(25,442)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 612.

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

ANDERSON COUNTY, CITY OF PALESTINE, GEORGE A. WRIGHT, ET AL.

IN ERROR TO THE COURT OF CIVIL APPEALS, SIXTH SUPREME JUDICIAL DISTRICT, STATE OF TEXAS.

INDEX.

	Original.	Print
Caption	*a*	a
Præcipe for record	*b*	a
Transcript of record from the district of Anderson county	*e*	*b*
Plaintiffs' original petition	1	1
Order of Judge Perkins granting an injunction on exhibit of the original petition, 7th of February, 1912	26	26
Agreement that bond for injunction was duly filed	27	27
Writ of injunction on the above order	27	27
Agreement for continuing the case without prejudice to plea to the jurisdiction	31	31
Plea to the jurisdiction	33	33
Charter of August, 1911, of the International & Great Northern Railway, the defendant	33	33
Order of the court overruling the plea to the jurisdiction	43	43

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 8, 1916.

	Original.	Print
Bill of exceptions No. 1 to the order of the court overruling the plea to the jurisdiction	44	44
Order granting change of venue	45	45
First amended petition, being the petition on which trial was had	46	46
First amended answer, being answer on which the trial was had	69	69
Exhibits to the first amended answer	145	145
Exhibit A—Bill in U. S. circuit court of Mercantile Trust Co. *vs.* I. & G. N. R. R.	145	145
Exhibit A to the last mentioned bill, being the third mortgage of the I. & G. N. R. R., dated March 1, 1892	162	162
Exhibit B—Order appointing Thos. J. Freeman receiver, and his qualification thereon, of February 27, 1908	188	188
Exhibit C—Bill of Farmers Loan & Trust Co., trustee, *vs.* I. & G. N. R. R. *et al.*	191	191
Exhibit A to the last mentioned bill, being second mortgage of 1881 of the I. & G. N. Ry.	209	209
Exhibit D—Decree in equity of U. S. court of April 20, 1908, appointing Thos. J. Freeman receiver in cause 2501 upon the last-mentioned bill	223	223
E—Decree of U. S. court of June 2, 1908, appointing Thos. J. Freeman receiver in cause 2525 on the bill of Geo. J. Gould *et al.*	226	226
F—Decree of U. S. court of June 2, 1908, consolidating causes 2501, 2514, 2525 *vs.* I. & G. N. R. R.	230	230
G—Supplemental bill of Farmers Loan & Trust Co. in the consolidated cause	233	233
H—Decree of U. S. court, May 10, 1910, foreclosing the second mortgage of the I. & G. N. R. R. of June, 1881, on the suit of the Farmers Loan & Trust Co.	239	239
I—Adjournment of sale of properties of the I. & G. N. R. R. under last decree	260	260
Exhibits J and J'—Final report of Flippen, master commissioner, making sale, to the Federal court, filed September 22, 1911	262	262
Exhibit A to the last mentioned final report—Assignment by Nicodemus of his bid, being successful bidder at the sale of properties of I. & G. N. R. R. made to I. & G. N. Ry.	269	269
Decree of U. S. court of September 25, 1911, confirming sale of I. & G. N. R. R. properties made by master commissioner, and directing deed to the I. & G. N. Ry., assignee of Nicodemus's bid	274	274

	Original.	Print
Exhibit K—Articles of incorporation of the International & Great Northern Ry., same as pages 36-43, above	278	274
L—Deed of Flippen, master commissioner, and others to the I. & G. N. Ry. of 1911, conveying properties of sold-out I. & G. N. Railroad	279	279
Exhibits M and N—Resolution of board of directors of International & Great Northern Ry. providing for denunciation of certain leases and contracts as stated under the terms of the decree of United States circuit court for the northern district of Texas, of May 10, 1910	294	294
Exhibit N—Denunciation of certain leases and contracts made by the International & Great Northern Ry., or alleged leases and contracts, made as claimed under the provisions of the decree of May 10, 1910	296	296
O—Notice of the I. & G. N. Ry. of January 30, 1912, to the judge and commissioners of Anderson county, Texas, that the defendant would not observe any such contracts as are claimed herein	306	306
P—Notice of the I. & G. N. Ry. of January 30, 1912, to mayor and city council of Palestine, Texas, to the same effect as the last above	308	308
Q—Decree of U. S. circuit court, April 15, 1879, in foreclosure of mortgage, April 1, 1871, International R. R., in suit of Stewart and Osborn, trustees	309	309
R—Decree of U. S. court confirming report of sale by special master under last above.	321	321
S—Deed by special master to Kennedy & Sloan under the last above	325	325
T—Decree of the U. S. court, August 4, 1879, in suit of Barnes & Pearsall, trustees of the mortgage of International R. R. of 1874 and mortgage of H. & G. N. R. R. of 1874	329	329
U—Decree confirming master's report of sale under last above	339	339
V—Deed of master to Kennedy & Sloan under the last above	342	342
W—Decree of U. S. court of April 15, 1879, in suit of Taylor & Dodge, trustees, *vs.* H. & G. N. Ry. *et al.*, foreclosing mortgage of H. & G. N. R. R. of February, 1872	347	347
X—Decree confirming report of sale under last above	358	358

	Original.	Print
Exhibit Y—Deed by master to Kennedy & Sloan, trustees, under last above	362	362
Z—Map of the State of Texas, showing railroad lines of the defendant in red and railroads	366	366
Plaintiffs' first supplemental petition, filed January 7, 1914	368	368
Defendant's first supplemental answer, filed January 8, 1914	381	381
Bill of exceptions 2-A—To the court's overruling plea in abatement	383	383
Bill of exceptions 3—To the court's refusing to enforce the rule as to Wright, Ozment, Bowers, and Hughes	384	384
Bill of exceptions 4—To the admission in evidence of matters relating to the executive board of the Houston & Great Northern R. R.	385	385
Bill of exceptions 5—To the admission in evidence of by-laws of the Houston & Great Northern R. R.	387	387
Bill of exceptions 6—To the admission in evidence of resolutions of executive committee of H. & G. N. R. R.	388	388
Bill of exceptions 7—To admission in evidence of by-laws of railroad relating to executive committee	391	391
Bill of exceptions 8—To the admission in evidence of resolution of joint board of directors	392	392
Bill of exceptions 9—To the admission in evidence of resolution of railroad of 1881 relating to lease to M., K. & T. Ry.	393	393
Bill of exceptions 10—To the admission in evidence of testimony of Howard in regard to Eddy	395	395
Bill of exceptions 11—To the refusal to enforce the rule as against Ozment, Bowers, Hughes, and Wright, when any of them should be testifying	396	396
Bill of exceptions 12—To the admission in evidence of testimony of Wright to conversation between Grow and Judge Reagan, etc.	397	397
Bill of exceptions 13—To admission in evidence of Wright's testimony in regard to canvass of county by Judge Reagan	404	404
Bill of exceptions 14—To admission in evidence of testimony of Wright as to speech of Grow	405	405
Bill of exceptions 15—To admission of testimony of Wright in regard to statements, etc., of Grow (when obtaining Anderson county bonds) to the county court	412	412
Bill of exceptions 16—To admission of testimony of Wright giving descriptions of properties, etc., at Palestine	419	419
Bill of exceptions 17—To admission of testimony of Wright giving other descriptions of property at Palestine	420	420
Bill of exceptions 18—To admission of testimony of Wright in regard to conversations with Hoxie, etc.	421	421
Bill of exceptions 18-A—To admission of testimony of Wright in regard to statement of Hoxie relating to letter from Grow	428	428
Bill of exceptions 19—To the admission of testimony of		

	Original.	Print
Mrs. Reagan	430	430
Bill of exceptions 20—To the admission of testimony of Jacobs	437	437
Bill of exceptions 21—To admission of testimony of Hughes	443	443
Bill of exceptions 22—To the admission of testimony of Watts	449	449
Bill of exceptions 23—To the admission of testimony of McClure	456	456
Bill of exceptions 24—To the admission of testimony of Ozment in regard to speeches of Judge Reagan and Grow.	462	462
Bill of exceptions 25—To the admission of testimony of Ozment in regard to interview with Hoxie, etc.	469	469
Bill of exceptions 27—To admission of testimony of Judge Stedman	476	476
Bill of exceptions 28—To the admission of newspaper article by Judge Reagan of 1899	480	480
Bill of exceptions 29—To the admission of map, and showing railroad reservation	488	488
Bill of exceptions 30—To the admission of deed from Texas Land Company	489	489
Bill of exceptions 31—To the admission of map filed in the clerk's office December 12, 1872	490	490
Bill of exceptions 32—To the admission of map filed in the clerk's office June, 1875	491	491
Bill of exceptions 33—To admission of four deeds from I. & G. N. Ry.	492	492
Bill of exceptions 36—To the admission of testimony of Ozment as to whether houses would have been built if there had been no agreement with Hoxie	493	493
Bill of exceptions 38—To the admission of testimony of Word	494	494
Charge of the court No. 1	501	501
Objections to the court's charge last above	507	507
Special charge 1—Requested by defendant	511	511
Special charge 2—Requested by defendant	512	512
Special charge 3—Requested by defendant	513	513
Special charge 4—Requested by defendant	514	514
Special issues 1, 2, 3, and 4—Requested by defendant	515	515
Special issue 5—Requested by defendant	518	518
Special issue 6—Requested by defendant	519	519
Special issue 7—Requested by defendant	520	520
Special issue 8—Requested by defendant	521	521
Special issue 9—Requested by defendant	522	522
Special issue 10—Requested by defendant	523	523
Special charge 1—Requested by defendant in connection with question 1	525	525
Special charge 2—Requested by defendant in connection with question 1	526	526
Special charge 3—Requested by defendant in connection with question 1	527	527

	Original.	Print
Special charge 4—Requested by defendant in connection with question 1	528	528
Special charge 1—Requested by defendant in connection with question 2	529	529
Special charge 1—Requested by defendant in connection with question 3	530	530
Special charge 3—Requested by defendant in connection with question 3	532	532
Charge A—Requested by defendant	535	535
Charge B—Requested by defendant	536	536
Charge of the court No. 2	537	537
Charge of the court No. 3	538	538
Charge of the court No. 4	539	539
Charge of the court No. 5	539	539
Charge of the court No. 6	540	540
Charge of the court No. 7	541	541
Objections of defendant to court's charges 2, 3, 4, 5, and 7, Defendant's bill of exceptions 40—Relating to the last-mentioned objections	543	543
Defendant's bill of exceptions 41—Giving history of the charges and objections thereto	545	545
Judgment	551	551
Agreement in relating to omission of its motion for a new trial substituted by new motion the same day	560	560
Order allowing defendant to file an amended motion for a new trial	561	561
Amended motion for a new trial	561	561
Order overruling amended motion for new trial and granting supersedeas, and fixing time for filing bills and statement of facts	619	619
Motion to change venue	621	621
Supersedeas and appeal bond	623	623
Bill of costs	627	627
Clerk's certificates	629	629
Clerk's certificate	630	629
Statement of facts	631	631
Charter of Houston, Tap & Brazoria Railway	636	635
Charter of Houston & Great Northern Railroad	637	635
Charter of International Railroad Company	639	638
Act of April 24, 1874, relating to International & Great Northern Railroad	641	640
Act of March 10, 1874, relating to International Railroad	642	641
Decree of foreclosure of mortgage of 1881 by U. S. court, being the second mortgage of I. & G. N. R. R.; decree entered May 10, 1910	643	642
Postponement of sale under last above decree	663	662
Report of sale of master under decree of U. S. court of May 10, 1910, showing sale made June 13, 1911, and first confirmation thereof, made June 14, 1911	664	663

	Original.	Print
Final report of sale by master, made September 22, 1911, and assignment by successful bidder to I. & G. N. Railway Company, defendant herein	667	666
Final report of receiver of sold-out I. & G. N. Railroad to U. S. court, dated September 22, 1911	678	679
Decree of United States court, September, 1911, confirming final report of sale and final report of receiver and directing deed	680	681
Deed of Master *et al.* conveying property of sold-out I. & G. N. R. R. to I. & G. N. Railway, the defendant, dated September, 1911	685	686
Charter of International & Great Northern Railway Co., the defendant, dated August 8, 1911	700	701
By-laws of 1871 of H. & G. N. Railroad	707	708
By-laws of H. & G. N. Ry. Co. of December 2, 1872	718	719
Agreement of February 19, 1872, for consolidation of H. & G. N. and International Railroads into International & Great Northern R. R. Co., and final ratification, September 23, 1873	723	724
Grow elected president of H. & G. N. R. R. December, 1872	726	727
Noble elected chief engineer of H. & G. N. R. R. December, 1873	726	727
Hoxie elected superintendent of H. & G. N. R. R. December, 1872	726	727
Compensation of Grow and authority to get county bonds	728	729
By-laws of I. & G. N. R. R. Co. of September 18, 1873	730	731
Bonds of Anderson county held by H. & G. N. R. R. December 22, 1873	730	731
Grow elected director and president of International Railroad November, 1872	732	733
Hoxie elected superintendent of I. & G. N. R. R. July 21, 1874	733	734
Hays elected vice-president, general manager and chief engineer of I. & G. N. R. R., July 21, 1874, and vice-president April 5, 1875	733	734
Sloan elected president of I. & G. N. R. R., April 5, 1875	733	734
Resolution of directors, April 5, 1875, moving International & Great Northern R. R. Co. to Palestine	733	734
Grow resigned as president of I. & G. N. R. R. September 17, 1874	733	734
Lease of International & Great Northern R. R. Co. to M., K. & T. Railway in 1881 and its termination in 1888	734	735
Changes of stockholding on dates in 1879 of International & Great Northern R. R. Co.	734	735
Gould-Huntington agreement	737	738
Testimony of Howard as to term of Maxwell as assistant secretary and Kane as claim agent, etc	753	753
Testimony of Howard and minutes as to Eddy	754	754
Testimony of Howard as to directors of various railroads to 1889	755	756

	Original.	Print
Testimony of Howard on the history of the various roads and vice-presidents, and secretaries of various railroads, and list of these officers	760	761
Testimony of Howard on the history of the various roads and officers	762	763
Houston & Great Northern R. R. and Anderson county—bond record of Anderson county showing issue of bonds to H. & G. N. R. R., 1872-1873	765	766
Testimony of Smith	780	781
Testimony of Wright	782	783
Anderson county and H. & G. N. R. R.—order of county court, January, 1873, in relation to depot and bond of H. & G. N. R. R. therefor and authorization of same	822	823
Anderson County *vs.* H. & G. N. R. R., suit of 1874, history thereof	826	827
Testimony of Mrs. Reagan	840	841
Watts	842	843
Hughes	843	844
Jacobs	844	845
McClure	846	847
Deed from Kennedy & Sloan, trustees, executed in 1879 to I. & G. N. R. R. Co.	847	848
Deed of I. & G. N. R. R. to Hatfield, 1874	849	850
Deed of Texas Land Company to I. & G. N. Railroad, 1880.	850	851
Maps of 1872 and 1875	852	853
Deeds from I. & G. N. R. R., four in number	855	856
Excerpts from record of State of Texas *vs.* I. & G. N. R. R., suit of 1887-1888	855	856
Testimony of Bowers	856	857
Ozment	857	858
Word	870	871
Bill in equity of Mercantile Trust Company in U. S. court in 1908 and appointment of receiver thereunder	874	875
Bill in equity of Farmers Loan & Trust Co. in U. S. court in 1908 and amendment thereto, and mortgage of the I. & G. N. Railroad of 1881, on which bill was founded	875	876
Mortgage of 1881, being second mortgage, and mortgages of 1879 and 1892, being first and third mortgages of the I. & G. N. R. R.; regularity of issue proved and admission that all bonds authorized by the mortgage of 1881 were issued approximately at its date	907	908
Bill in equity of Gould and others in United States court, filed in 1908	908	909
Consolidation of causes in equity, U. S. court, 1908	908	909
Notices precedent of foreclosure decree of the second mortgage of 1881 of the I. & G. N. Railroad Co. proved	916	917
Decree of United States court and sale thereunder, foreclosing mortgage of 1881, and financial result of sale	918	919
Denunciation made by International & Great Northern Railway Co., defendant, of alleged contracts sued on, made under decree of U. S. court, and service of notices on Anderson county and Palestine in relation thereto	919	92

	Original.	Print
Decree of 1879, United States court, foreclosing mortgage of 1871 of International Railroad	931	932
Decree of United States court confirming sale under last above	932	933
Master's deed of 1879 under last above to Kennedy and Sloan, trustees	932	933
Decree of 1879, United States court, foreclosing mortgages of International and H. & G. N. Railroads	933	934
Decree of 1879, United States court, confirming sale under last above	933	934
Master's deed of 1879 to Kennedy & Sloan under last above	934	935
Decree of 1879, United States court, foreclosing mortgage of H. & G. N. R. R.	935	936
Decree of United States court confirming sale under last above	935	936
Master's deed of 1879 to Kennedy & Sloan, trustees, under last above	935	936
Map of lines of defendant and connections	936	937
Testimony of Evans	940	941
Testimony of Maury	944	945
Affidavits of Ozment	951	952
Charter of Victoria & Columbia Ry. of 1870	951	952
Charter of Huntsville Branch of 1871	951	952
Consolidation of H. & G. N., H. & T. B., V. & C., and Huntsville Branch Railways	952	953
Letters of Jno. H. Reagan of 1872-1874	952	953
Correspondence between executive officers of H. & G. N., International, and I. & G. N. Railroads	957	958
Excerpts from annual report of Grow as president of H. & G. N. R. R., December, 1872	961	962
H. & G. N. R. R. map showing project to pass east of Palestine	962	963
Testimony of Booth	963	964
Opinion given by Baker & Botts, general attorneys of I. & G. N. R. R. Co., April, 1875, in regard to removal to Palestine	963	964
Testimony of Stedman	980	981
Newspaper article by Jno. H. Reagan of May, 1899	987	988
Testimony of Campbell	990	991
Turner	991	992
Bowers (recalled)	994	995
Stipulation *in re* recital of trial of plea in abatement	997	999
Judge's certificate to statement of facts	998	999
Clerk's certificate to statement of facts	999	1000
Opinion, Levy, J.	1000	1001
Certificate to opinion	1032	1022
Judgment	1033	1023
Motion for rehearing, &c.	1034	1024
Certificate to motion, &c.	1084	1062
Opinion overruling motion for rehearing	1085	1062
Certificate to opinion	1091	1066

INDEX.

	Original.	Print
Order overruling motion for rehearing	1092	1067
Order of supreme court refusing writ of error	1093	1067
Bill for costs	1094	1069
Application for writ of error	1095	1071
Proceedings in State supreme court	1315	1288
Caption	1315	1288
Order refusing writ of error	1316	1288
Motion for rehearing	1317	1289
Order overruling motion for rehearing	1383	1333
Clerk's certificate	1383	1333
Petition for writ of error	1384	1334
Will of J. E. McAshan, &c.	1387	1336
Decree of probate judge, &c.	1387	1336
Clerk's certificate *in re* appointment and qualification of executrix	1389	1338
Bond on writ of error	1390	1338
Citations and service	1392	1340
Writ of error	1397	1342
Assignments of error	1399	1344
Prayer for reversal	1427	1360
Clerk's certificate to proceedings in supreme court	1428	1361
Clerk's certificate	1429	1361

a INTERNATIONAL & GREAT NORTHERN RY. CO., Plaintiff in Error,

vs.

ANDERSON COUNTY et al., Defendants in Error.

Transcript of the Record, Proceedings in Supreme Court, and Proceedings Taking Out Writ of Error to Supreme Court of the United States to the Court of Civil Appeals of the Sixth Supreme Judicial District of Texas, Certificate Thereto and General Certificate to the Whole Transcript.

b This transcript is made in compliance with a writ of error filed in this Court July 28, 1916, allowed by Chief Justice Willson of this Court, and returned herewith.

July 28th, 1916.

Præcipe.

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY, Plaintiff in Error,

vs.

ANDERSON COUNTY et al., Defendants in Error.

E. T. Rosborough, Esq., Clerk of the Court of Civil Appeals for the Sixth Supreme Judicial District, Texarkana, Texas.

DEAR SIR: In the above case, No. 1351 on your docket, we desire you to make the transcript of the record so as to include the following:

(1) Record on appeal from the trial court;
(2) Statement of Facts on appeal from the trial court;
(3) Opinion of the Court of Civil Appeals affirming the case;
(4) Judgment of affirmance of the Court of Civil Appeals;
(5) Appellant's motion for rehearing in the Court of Civil Appeals;
(6) Opinion of the Court of Civil Appeals overruling motion for rehearing;
(7) Order of the Court overruling motion for rehearing;
(8) Application for Writ of Error to the Supreme Court
c of the State of Texas to review the decree and opinion of the Court of Civil Appeals of the Sixth Supreme Judicial District;
(9) Decree of the Supreme Court of Texas overruling Application for Writ of Error;
(10) Motion for rehearing filed in the Supreme Court of Texas;
(11) Decree of the Supreme Court of Texas overruling motion for rehearing;
(12) Petition for Writ of Error from the Supreme Court of the United States, allowed by Chief Justice S. P. Willson of your Court;
(13) Will of McAshan, probate thereof and letters to his wife;
(14) Supersedeas bond approved by Chief Justice Willson;

(14*a*) Writ of Error;
(15) Citation signed by Chief Justice Willson;
(16) Copy of citation signed by attorneys for Defendants in Error and others, waiving service thereof and accepting notice of the lodging in this Court of copy of Writ of Error.
(17*0*) Assignments of Error with these last proceedings;
(18) Prayer for reversal.

Yours truly,

WILSON, DABNEY & KING.

D./1.

We, the undersigned Attorneys of Record for the Defendants in Error in this case, accept notice of this Præcipe and state that we do not desire to have anything included in the transcript of the Record in addition to what is stated above.

THOS. B. GREENWOOD,
CAMPBELL & SEWELL,
JNO. C. BOX,
Attorneys for Anderson County et al.,
Defendants in Error.

Filed E. T. Rosborough, Clerk Court Civil Appeals for the Sixth Supreme Judicial District of Texas.

d No. 1351.

RECORD.

INTERNATIONAL & GREAT NORTHERN RAILWAY CO., Appellant,
vs.
ANDERSON COUNTY et al., Appellees.

Appeal from Cherokee County, Texas.

International & Great Northern Railway Co., Appellant.

Filed Apr. 28, 1914. E. T. Rosborough, Clerk Court of Civil Appeals, Sixth Supreme Judicial Dist. of Texas, By —— ——, Deputy.

e STATE OF TEXAS,
County of Cherokee:

At a term of the District Court of Cherokee County, begun and holden at Rusk, within and for the County of Cherokee, before the Honorable A. E. Davis, Judge, commencing on the 8th day of December, 1913, and ending on the 7th day of February, 1914, the following case came on for trial, to wit: Anderson County et al. vs. International & Great Northern Railway Company, No. 6415.

PLAINTIFFS' ORIGINAL PETITION.

Filed February 7, 1912.

THE STATE OF TEXAS,
COUNTY OF ANDERSON.

In District Court. To April Term, 1912.

To the Honorable Judge of the District Court of Anderson County, Texas.

The original petition of Anderson County, and of the City of Palestine, and of Geo. A. Wright, J. W. Ozment, A. L. Bowers, Jno. R. Hearne, Z. L. Robinson, E. W. Link, R. C. Sewall, ~~A. B. Hodges,~~ Jno. M. Colley and P. H. Hughes, citizens of the City of Palestine, Texas, who sue herein in behalf of themselves and of all other citizens of said City of Palestine, styled herein plaintiffs, complaining of the International and Great Northern Railway Company, styled herein defendant, would respectfully show to the court:

First.

That Anderson County is, and has been since prior to the 1st day of March, 1872, a body corporate and politic, created and organized as a County by the Legislature of the State of Texas.

That the City of Palestine is a municipal corporation, duly incorporated and chartered as a city of over ten thousand inhabitants, by special Act of the Legislature of Texas, approved on the 19th day of March, 1909, and is the successor of the City of Palestine, duly incorporated under the laws of Texas as a municipal corporation, since prior to the 1st day of March, 1872.

That each of the plaintiffs, Geo. A. Wright, J. W. Ozment, A. L. Bowers, Jno. R. Hearne, Z. L. Robinson, E. W. Link, R. C. Sewell, ~~A. B. Hodges,~~ Jno. M. Colley and P. H. Hughes, resides in the City of Palestine, in the

County of Anderson, and State of Texas, and each of them is a citizen of said city and the owner of real and personal property in said city.

That each of the last named plaintiffs has resided in said City of Palestine, and has been the owner of real and personal property therein since long prior to the 1st day of September, 1911; and, the plaintiffs Geo. A. Wright, J. W. Ozment and E. W. Link have been such resident citizens and property owners since prior to the 1st day of March, 1872.

That the citizens of the City of Palestine are numerous, aggregating in number some twelve thousand, and they have a joint and common interest in having the general offices, machine shops and round houses of the International and Great Northern Railroad kept and maintained, by the defendant, at Palestine. That it is impracticable to make all of said citizens parties to this suit, in their own proper persons, and hence this suit is brought, by the individual named plaintiffs, in behalf of each and all other citizens of said city, as well as in behalf of themselves.

That the defendant, International and Great Northern Railway Company, is a corporation, organized under the laws of Texas, as hereinafter shown, and required by law to keep and maintain its general offices at the City of Palestine, in the County of Anderson, Texas.

That the treasurer of the defendant is A. R. Howard, who resides in the County of Anderson, Texas, but who is temporarily at Houston, in Harris County, Texas.

That the defendant has local agents representing it in the County of Anderson, Texas.

Second.

That, on the 22nd day of October, 1866, the Legislature of Texas, by an Act entitled "An Act to incorporate the Houston and Great Northern Railroad Company," created and chartered that Company, and authorized it to construct, own, maintain and operate a railroad, com-

mencing at the City of Houston and running northward to Red River. That said Act authorized said Company to form a junction and connection with any other road, in such manner as would best secure their construction.

That, on the 5th day of August, 1870, the Legislature of Texas, by an Act entitled "An Act to incorporate the International Railroad Company and provide for the aid of the State of Texas in construction of same," created and chartered that Company, and authorized it to construct, own, maintain and operate a railroad from such point on Red River as nearly opposite the town of Fulton, in the State of Arkansas, as might be found expedient in forming a junction with the railway known as the "Cairo and Fulton Railway," then being constructed, by the most practicable route across the State of Texas, by way of Austin and San Antonio, to the Rio Grande River, at such point at or near Laredo as might be selected by the Company; that said Act authorized the International Railroad Company to connect itself with any other railroad Company, within or without the State, and to operate and maintain its railroad in connection or in consolidation with any other railroad company, as it might deem best.

That, acting under said Act of August 5th, 1870, the International Railroad Company had, prior to the 15th day of March, 1872, constructed a portion of its line of railroad from at or near the town of Hearne, in Robertson County, Texas, to the City of Palestine, in Anderson County, Texas, and was regularly operating said line of railroad, as a common carrier of freight and passengers for hire, and was maintaining a depot at said City of Palestine.

That heretofore, to-wit: On or about the 15th day of March, 1872, the Houston and Great Northern Railroad Company had constructed under its charter its line of railroad from the City of Houston northward to the north boundary line of Houston County, Texas; and, on

or about said date, said Houston and Great Northern Railroad Company, acting by its duly authorized president, Galusha A. Grow, contracted and agreed, in Anderson County, Texas, with the citizens of the City of Palestine, Texas, acting by and through Judge John H. Reagan, to extend its said line of railroad from the north boundary line of Houston County, to intersect the line of the International Railroad Company at Palestine, and to establish a depot within one-half mile of the Court House at Palestine, and to commence running cars regularly thereto, by the 1st day of July, 1873, and to thereupon locate and establish, and forever thereafter keep and maintain the general offices, machine shops and round houses of the Houston and Great Northern Railroad at the City of Palestine, for and in consideration of the promise and agreement then made, upon the part of said Judge John H. Reagan, to make a thorough canvass of Anderson County, to induce the electors thereof to authorize, by their votes, the issuance of the interest-bearing bonds of said county, in the principal sum of $150,000, and, for and upon the further consideration that Anderson County, on authorization of its electors, in the manner prescribed by law, should issue and deliver to the Houston and Great Northern Railroad Company its interest bearing bonds in said principal sum of $150,000, upon the completion of said railroad to its intersection with the International Railroad at Palestine, and upon the establishment of a depot within a half mile of the Court House, and upon the commencement of the running of cars regularly to such depot.

That if said contract did not expressly name the citizens of Palestine as parties thereto (as plaintiffs expressly aver it did) yet the same was made for their benefit and in their behalf, and such citizens, at that time and throughout the future, including the plaintiffs, were the parties intended, by both Judge John H. Reagan and the Houston and Great Northern Railroad Company, as

the parties to be benefited by the performance of all the obligations of the Railroad Company under said contract, and especially of those obligations which related to the location and maintenance of general offices, machine shops and round houses at Palestine.

That in order to induce the electors of Anderson County to authorize the issuance and delivery to the Houston and Great Northern Railroad Company of the interest bearing bonds of Anderson County, in the principal sum of one hundred fifty thousand dollars, which bonds are hereinafter more fully described, the Houston and Great Northern Railroad Company, acting by its duly authorized President, Galusha A. Grow, and by other duly authorized agents, on or about the 15th day of March, 1872, and on or about the last days of April, 1872, and on or about the first days of May, 1872, and throughout the time from about the 15th day of March, 1872, to the 4th day of May, 1872, promised, agreed and represented, unto and with said Anderson County and the electors thereof, that the general offices, machine shops and round houses of the Houston and Great Northern Railroad, upon the completion of said railroad to Palestine, would be established and forever thereafter maintained at Palestine, in Anderson County, Texas.

That said promises, agreements and representations were deliberately authorized and made by the Houston and Great Northern Railroad Company, with the intention that the electors of Anderson County should act and rely upon same. That the electors of Anderson County were induced, by said promises, agreements and representations, to authorize and therefore did authorize, by their votes at an election held in said County on the first, second, third and fourth days of May, 1872, the issuance and delivery to the Houston and Great Northern Railroad Company of the interest bearing bonds of Anderson County, for the principal sum of One Hundred and Fifty Thousand Dollars ($150,000) in denominations of

five hundred dollars ($500.00), payable in twenty years from their date, with interest at the rate of 8 per cent per annum, as per coupons to be attached, the interest and two per cent of the principal to be paid on the first day of January of each year, said bonds to be issued and delivered upon the completion of said railroad to an intersection with the International Railroad at Palestine, and upon the establishment of a depot within a half mile of the Court House at Palestine, and upon the commencement of the regular running of cars by said Company to such depot. That said electors would not have authorized the issuance and delivery of said bonds, nor the offer of same to the Houston and Great Northern Railroad Company, but for the inducement of the above mentioned promises, agreements and representations, by the Company, that it would establish and forever maintain general offices, machine shops and round houses at Palestine, nor but for the fact that the electors relied and acted upon same.

That the said Judge John H. Reagan made a thorough canvass of Anderson County between about the 15th day of March, 1872, and the 4th day of May, 1872, to induce the electors of Anderson County to vote to authorize the issuance of said bonds, in strict conformity with his promise to, and agreement with, the Houston and Great Northern Railroad Company and its president, as hereinbefore alleged.

That said election was held under and by virtue of a proper order of the Commissioners' Court of Anderson County, Texas, and subsequently, on the 6th day of May, 1872, an order was entered in said court declaring that more than two-thirds of the qualified voters of Anderson County had voted in favor of the issuance of said bonds.

That prior to the 31st day of December, 1872, the Houston and Great Northern Railroad Company completed its railroad from the north boundary of Houston County to its intersection with the International Railroad at Pales-

tine, and built a depot within one-half mile of the Court House at Palestine, and commenced to run its cars regularly thereto, and thereafter, on or about the 29th day of January, 1873, said Company, with its President, Galusha A. Grow, applied to the Commissioners' Court of Anderson County for the interest bearing bonds of said County in the principal sum of $150,000, as hereinbefore described, and as authorized by the electors of said County; and, in order to induce the Commissioners' Court of Anderson County to issue and deliver said bonds, the said Houston and Great Northern Railroad Company, acting by its duly authorized President, Galusha A. Grow, again promised, agreed and represented unto said County and said Commissioners' Court that the Company had already begun to establish and would thereafter forever maintain its general offices, machine shops and round houses at Palestine; and, acting on said promise, agreement and representation, and relying on same, as well as on the previous promises, agreements and representations of said Company, as hereinbefore set out, the said Commissioners' Court was induced to issue and deliver, and on or about the 29th day of January, 1873, did issue and deliver, unto the Houston and Great Northern Railroad Company, the interest bearing bonds of Anderson County, as theretofore authorized by the electors, bearing date as of Dec. 31st, 1872, for the principal sum of $150,000, in denominations of $500 each, payable in twenty years from their date, with interest from their date at the rate of 8 per cent per annum, as per coupons attached, the interest and two per cent of the principal payable on the 1st day of January of each year, commencing January 1st, 1874.

That if the President of the Houston and Great Northern Railroad Company and the other agents of said Company were not expressly authorized by it to make the contracts, promises, agreements and representations hereinbefore alleged (as plaintiffs expressly aver they

were), yet the said Houston and Great Northern Railroad Company was nevertheless bound thereby; for plaintiffs aver that the said Houston and Great Northern Railroad Company, with full knowledge of the facts hereinbefore plead acquiesced in, approved and ratified each and all of the aforesaid contracts, promises, agreements and representations of its said President, and of its other agents, with the intention to adopt same and to be bound thereby, and, with such knowledge, obtained and accepted the services of Judge John H. Reagan, as above shown, and obtained, accepted and retained the above mentioned bonds of Anderson County, as well as the proceeds thereof, and this plaintiffs are ready to verify.

That in September, 1873, the Houston and Great Northern Railroad Company and the International Railroad Company, by unanimous vote of their respective stockholders, united, consolidated, and merged the railroads, properties, rights, franchises, powers and capital stock of the two companies, under the name of the International and Great Northern Railroad Company, and this consolidation was approved, ratified and confirmed by the Legislature of the State of Texas, by Acts approved respectively on the 24th day of April, 1874, and on the 10th day of March, 1875.

That by Section 2 of the Act of April 24th, 1874, it was expressly provided that all acts theretofore done in the name of either of said companies should have the same binding force and effect upon the International and Great Northern Railroad Company that they had upon the respective companies.

That the Houston and Great Northern Railroad Company, in part performance of the aforesaid contracts, promises and agreements, promptly established the machine shops and round houses of the Houston and Great Northern Railroad at Palestine, Texas, and maintained the same there until the consolidation of the Houston and Great Northern Railroad Company with the Interna-

tional Railroad Company; and thereafter, to the present time, the machine shops and round houses of the International and Great Northern Railroad, in further performance of said contracts, promises and agreements, have been continuously maintained, by the International and Great Northern Railroad Company, and by the International and Great Northern Railway Company at Palestine, Texas.

That heretofore, to-wit: On or about the first of the year 1875 (plaintiffs being unable after this lapse of time to more definitely fix the date), the International and Great Northern Railroad Company, acting by its duly authorized general manager, H. M. Hoxie, contracted and agreed with the citizens of the City of Palestine, Texas, among whom were the plaintiffs, Geo. A. Wright and J. W. Ozment, to fully and completely perform the promises, contracts and agreements of the Houston and Great Northern Railroad Company, with said citizens and with Anderson County and with the electors of said County, by at once locating the general offices of the International and Great Northern Railroad at Palestine, and by thereafter forever keeping and maintaining the general offices, machine shops and round houses of said International and Great Northern Railroad at Palestine, for and in consideration of the bonds theretofore issued by Anderson County to the Houston and Great Northern Railroad Company, and for the further and additional consideration that said citizens should at once construct and complete, at their own cost and expense, any and all houses, at Palestine, Texas, which might be demanded by the International and Great Northern Railroad Company, in accordance with such plans or specifications as might be furnished by the Company, through its officers, for occupancy, at reasonable rentals, by employees of said Company and their families, and especially by general officers of said Company, their families and clerks. That the citizens of Palestine,

as required by said contract and agreement, did at once, in the early part of the year 1875, construct and complete, at their own cost and expense, amounting to many thousands of dollars, each and all of the houses, at Palestine, Texas, which were demanded by the International and Great Northern Railroad Company, numbering more than twenty, in accordance with the plans and directions furnished by the Company and its officers, for occupancy, at reasonable rentals, by the employees of said Company and their families, and especially by general officers of said Company, their families and clerks, to the entire satisfaction of the International and Great Northern Railroad Company; and, thereupon the said International and Great Northern Railroad Company, became bound, by its aforesaid contract and agreement, (as well as by the previous contract and agreement of one of its constituents), to forever keep and maintain the general offices, machine shops, and round houses of the International and Great Northern Railroad at Palestine.

That if the general manager of the International and Great Northern Railroad Company, H. M. Hoxie, was not expressly authorized by said Company, to make the contract and agreement hereinbefore set out, which he did make, in behalf of said Company, with the citizens of Palestine, (as plaintiffs expressly aver he was), yet the International and Great Northern Railroad Company was nevertheless bound thereby; for plaintiffs aver that said Company, with full knowledge of said contract and agreement, acquiesced in, approved, and ratified same, with the intention to adopt it and be bound thereby, and with such knowledge, said Company accepted the benefits of the expenditures made by the citizens of Palestine in the construction of houses for its employees as above shown; and, in performance of its obligations under said contract and agreement, the International and Great Northern Railroad Company did immediately, and in the early part of the year 1875, locate and establish the gen-

eral offices of the International and Great Northern Railroad at Palestine, and did thereafter continuously maintain such general offices at Palestine, until the 1st day of September, 1911; and, in compliance with the aforesaid contract and agreement, the International and Great Northern Railroad Company and the International and Great Northern Railway Company have continuously maintained the machine shops and round houses of the International and Great Northern Railroad at Palestine, from the date of said contract and agreement to the present time.

That under the laws of Texas, the International and Great Northern Railroad Company, had, prior to the 9th day of May, 1911, become the owner of 1106 miles of railroad, extending from Palestine to Houston; from Longview, via Palestine, to Laredo; and from Spring to Fort Worth; with several branches, spurs and terminals; and had also become the owner of trackage rights over 53.5 miles of railroad, including the Galveston, Houston and Henderson Railroad, from Houston to Galveston, together with the franchise to operate said 1106 miles of railroad and said 53.5 miles of railroad, as a common carrier of freight and passengers for hire, and had become the owner of valuable equipment and other property, connected with said lines of railroad and the operation thereof. That said railroads, franchises, equipment and other property were owned and held by the International and Great Northern Railroad on said 9th day of May, 1911, subject to the lien of a mortgage, of date Nov. 1st, 1879, securing bonds in the principal sum of $11,291,000; and also subject to the lien of a mortgage, on specific property, securing certain bonds known as Colorado River Bridge bonds, in the principal sum of $198,000, and also subject to the lien of a mortgage, on specific property, securing a loan upon the Company's San Antonio Station in the principal sum of $42,000, and also subject to a lien on certain equipment for the principal sum

of $392,650, and also subject to the lien of a mortgage, of date March 1st, 1892, securing bonds and scrip in the principal sum of $2,966,052.50, besides interest; and also subject to a valid subsisting judgment and decree of foreclosure of the lien of a mortgage, dated June 15th, 1881, for the sum of $12,165,545.60, with six per cent per annum interest from May 10th, 1910, said judgment and decree for foreclosure providing that said railroads, franchises, equipment and the other property of said Railroad Company should be sold subject to the lien of the mortgage of date Nov. 1st, 1879, and also subject to the lien of the mortgage securing said Colorado River Bridge Bonds, and subject to the lien of the mortgage securing said loan on the San Antonio Station, and also subject to the lien on said equipment, but not providing that said railroads, franchises, equipment and other property should be sold subject to the lien of said mortgage of date March 1st, 1892, though the trustee under the mortgage of date March 1st, 1892, was a party to said judgment and decree of foreclosure, and though such trustee, and the holders of the bonds secured by said mortgage of date March 1st, 1892, were bound by said judgment and foreclosure.

That on the said 9th day of May, 1911, the owners of substantially all of said $2,966,052.50, of bonds and scrip, with accrued interest, had acquired, or had arranged to acquire, substantially all of said judgment of foreclosure of said mortgage, of date June 15th, 1881, for $12,165,-545.60, with 6 per cent per annum interest from May 10th, 1910, or had acquired, or had arranged to acquire, the bonds and mortgage on which said judgment was based; and, on said date, acting by and through certain agents theretofore appointed and authorized, called a "Committee of Third Mortgage Bondholders," the said owners, among whom were the owners of all outstanding stocks of said International & Great Northern Railroad Company, entered into a certain agreement, for the reorgani-

zation of the fiscal affairs of the Company, upon the following basis in substance, to-wit:

First: That the railroads and property of the International and Great Northern Railroad Company should be sold under the above mentioned judgment and decree of foreclosure, and should be purchased by a trustee, and that the purchase price, save an inconsiderable part of the whole, should be met and paid by the surrender for cancellation of foreclosed bonds (as the terms of the foreclosure decree expressly authorized), and that the remaining part of such purchase price should be paid in cash, fully offset by cash belonging to the Company and included in the foreclosure.

Second: That said trustee, with such nominal associates as might be deemed necessary, should then form a corporation, under the laws of Texas, for the purpose of acquiring, owning, maintaining and operating the International and Great Northern Railroad.

Third: That said new corporation should issue $13,750,000 par value of 5 per cent thirty-year bonds, secured by mortgage upon all railroads and property of the International and Great Northern Railroad Company, and that said bonds should be pledged to secure the three-year, 5 per cent notes, of the new corporation, in the principal sum of $11,000,000, to be sold to bankers.

Fourth: That said new corporation should issue $3,400,000 par value of 5 per cent non-cumulative, preferred stock, to be entitled to dividends up to 5 per cent, before any dividends should be payable on common stock, and to be preferred to the common stock, in liquidation of the assets and property of the new corporation. That said new corporation should reserve an additional $1,600,000 par value of such preferred stock for exchange with a like amount of bonds at par.

Fifth: That said new corporation should immediately issue $6,500,000, par value, of common stock, subject to such change as might be requisite to conform to any valu-

ation to be made by the Railroad Commission of the State of Texas.

Sixth: That the new corporation should sell to a syndicate (which is alleged to have been composed of the former stockholders of the Company) and to no one else, $3,400,000, par value, of its preferred stock, $2,500,000, par value, of its common stock, and $1,600,000, par value, of its $13,750,000 issue of bonds, such $1,600,000 of bonds to be finally convertible into a like amount of preferred stock and to be sold under the agreement that the Syndicate would deposit the same to secure the Company's $11,000,000 par value of three-year 5 per cent notes.

That the new corporation should exchange its common stock for said $2,966,052.50 of bonds and scrip, with accrued interest, almost all of which belonged to the stockholders of the International and Great Northern Railroad Company.

Seventh: That the cash receipts of the new corporation, from its bond, stock and note issues, as aforesaid, should be applied to the payment unto the parties to said reorganization agreement, of the amount of said judgment and decree of foreclosure for $12,165,545.60, with accrued interest, or to the payment unto said parties of the amount of the bonds secured by mortgage, on which said judgment and decree of foreclosure was based, and to the payment of the outstanding claims against the International and Great Northern Railroad Company, other than the liens subject to which the foreclosure sale was decreed, and to the payment of the expenses of reorganization.

That said agreement was made at the instance and request of the International and Great Northern Railroad Company, and was fully approved and assented to by said Company.

That in consummation of the foregoing reorganization agreement, the railroads and other property of the International and Great Northern Railroad Company

were sold, under said judgment and decree of foreclosure, on the 13th day of June 1911, when one Frank C. Nicodemus, Jr., of New York City, as trustee for the parties to said agreement, acting through said "Committee of Third Mortgage Bondholders," bid in said railroads and other property, for the sum and price of twelve million six hundred and forty-five thousand dollars ($12,645,000), and the bid of said trustee was thereafter, on June 14th, 1911, duly accepted and confirmed by the court.

That thereafter, on or about the 10th day of August, 1911, the said Frank C. Nicodemus, Jr., and certain nominal associates, filed in the office of the Secretary of State, of the State of Texas, a certain charter forming a corporation, under Art. 4550, of Chapter 11, of Title 94, of the Revised Civil Statutes of Texas, as amended by the Act of the Legislature of Texas, approved on September 1st, 1910, under the name of the "International and Great Northern Railway Company," for the purpose of acquiring, owning, maintaining and operating the railroads theretofore forming the International and Great Northern Railroad, with an authorized capital stock of $11,500,000, divided into 115,000 shares, of the par value of $100 each, of which 50,000 shares should be preferred stock and 65,000 shares should be common stock, and thereby was created the defendant International and Great Northern Railway Company.

That subsequent to the filing of said charter, and on or about the 13th day of September, 1911, the said trustee, Frank C. Nicodemus, Jr., complied with his bid of $12,645,000 for said railroads and other property, by surrendering for cancellation, by authority of the parties to said reorganization agreement, (who then owned the same), foreclosed bonds of the value of $12,400,746.55, in satisfaction to that extent of said judgment and decree of foreclosure, and by the payment, as agent for the parties to said reorganization agreement, of $244,253.45 in cash, of which cash $100,000 had been deposited

at the date of the bid, and thereupon, by direction of said trustee, and in accordance with an assignment of his bid, and in consummation of said reorganization agreement, and with the approval of the court, decreeing and confirming the same, the railroads forming the International and Great Northern Railroad, and all appurtenant property, franchises and equipment, including $556,987.55 in cash, were conveyed unto said new corporation, the defendant International and Great Northern Railway Company. That the International and Great Northern Railroad Company joined in said conveyance, in execution and ratification of said reorganization agreement.

That afterwards, on or about the 27th day of September, 1911, the defendant International and Great Northern Railway Company secured an order from the Railroad Commission of Texas, valuing the International and Great Northern Railroad and appurtenant property, rights and franchises at $30,365,047.97, and approving the issuance, by the International and Great Northern Railway Company, of its bonds, secured by mortgage on said railroad and appurtenant property, rights and franchises, in the sum of $13,750,000, to be dated August 1st, 1911, maturing August 1st, 1941, and bearing interest at the rate of 5 per cent per annum.

That the International and Great Northern Railway Company, on or about said September 27th, 1911, or prior thereto, issued and sold to bankers of New York its three-year 5 per cent notes, in the principal sum of $11,000,000, and to secure the payment of such notes pledged, and caused to be pledged, said entire issue of bonds, for $13,750,000, par value, said Company having executed a mortgage to secure said bonds upon the International and Great Northern Railroad, and all property and franchises owned or claimed by said Railway Company.

That the International and Great Northern Railway Company issued and sold to the Syndicate, which is alleged to have consisted of the stockholders of the Inter-

national and Great Northern Railroad Company, in further performance of said reorganization agreement, $3,400,000, par value, of its non-cumulative 5 per cent preferred stock, and $1,600,000, par value, of its bonds, said Syndicate obligating itself to pledge, and pledging, said bonds to secure the Company's three-year 5 per cent notes.

That under the valuation of the Railroad Commission of Texas, only $1,422,000, par value, of common stock could be lawfully issued by the International and Great Northern Railway Company, in addition to other outstanding obligations. Hence, in order to carry out said reorganization agreement, and in compliance therewith, said Railway Company issued $1,422,000, par value, of common stock, and conditional interim certificates, entitling the holders thereof to receive $5,078,000, par value, of common stock whenever it might be legally issued by said Company in the future; and said Company transferred and conveyed all said common stock and conditional interim certificates to a corporation, organized under the laws of the State of Virginia, known as "The International and Great Northern Corporation," in exchange for $6,500,000, par value, of the Corporation's common stock, divided into 65,000 shares, of the par value of $100 each, and being all of its issued capital stock. That the Railway Company has sold to said Syndicate (which purchased said $3,400,000 of preferred stock and said $1,600,000 of bonds, convertible into preferred stock), $2,500,000, par value, of the capital stock of "The International and Great Northern Corporation," and has exchanged, and offers to exchange, the remaining $4,000,000, par value, of the capital stock of "The International and Great Northern Corporation" for said $2,966,052.50 of bonds and scrip, with accrued interest, amounting to substantially $4,000,000.

That the International and Great Northern Railway Company has applied the cash received from the sale of

its $11,000,000, par value, of three-year 5 per cent notes (secured by its $13,750,000, par value, of mortgage bonds), and from the sale of its $1,600,000, par value, of mortgage bonds, and from the sale of its $3,400,000 of preferred stock, and from the sale of its $2,500,000, par value, of common stock, in compliance with said reorganization agreement, to the payment, unto the parties to said reorganization agreement, of the amount of said judgment and decree of foreclosure, for $12,165,545.60, with 6 per cent per annum interest from May 10th, 1910, or to the payment, unto said parties, of the amount of the bonds, on which said judgment and decree was based, and to the payment of outstanding claims against the International and Great Northern Railroad Company other than the liens, subject to which the foreclosure sale was decreed, and to the payment of reorganization expenses.

That the parties to said reorganization agreement and their purchasing agent and trustee, Frank C. Nicodemus, Jr., had full and actual knowledge and notice of the facts herein plead, and of every right herein asserted, prior to the time that said trustee bid in the International and Great Northern Railroad, with its appurtenant property, franchises and equipment, and the defendant has had such actual knowledge and notice from the time of its organization to the present time. That plaintiffs gave formal, written notice of the causes of action herein alleged unto said purchasing agent and trustee, in advance of his bidding for said railroad and appurtenant property, franchises and equipment, and in advance of the cancellation of the foreclosed bonds, and this plaintiffs are ready to verify.

That since the Houston and Great Northern Railroad Company contracted and agreed to locate, keep and maintain the general offices, machine shops and round houses of the Houston and Great Northern Railroad at the City of Palestine, for a valuable consideration received, and since the International and Great Northern Railroad

Company contracted and agreed to locate, keep and maintain the general offices, machine shops and round houses of the International and Great Northern Railroad at the City of Palestine, for a valuable consideration received, and since the general offices, machine shops and round houses of the Houston and Great Northern Railroad and of the International and Great Northern Railroad have been located at the City of Palestine, in Anderson County, Texas, which county has aided said Houston and Great Northern Railroad and said International and Great Northern Railroad, by an issue of bonds, in consideration of such location being made: the laws of Texas, on the 1st day of September, 1911, and continuously afterwards to the present time, imposed, and do now impose upon the International and Great Northern Railway Company the performance of the public and statutory duty, enuring to plaintiffs' special benefit, to keep and maintain the general offices, machine shops and round houses of the International and Great Northern Railroad at the City of Palestine, in Anderson County; and the State of Texas, by general law, expressly forbade and prohibited, and still forbids and prohibits, any change, from said City, in the location of said general offices, machine shops and round houses. That the International and Great Northern Railroad Company, prior to the sale of its railroad and other property under said reorganization agreement, was not only bound by contract, but was bound by general law, as a part of its duty to the public, coupled with the enjoyment of its corporate franchises, to keep and maintain the general offices, machine shops and round houses of said railroad at the City of Palestine, and such duty could not be and was not impaired nor discharged by the sale of said railroad, with its appurtenant property and franchises, in consummation of said reorganization agreement.

That the general offices, maintained at the City of Palestine, for the operation of the International and Great

Northern Railroad (whether by the Company or by Receiver) for years prior to the 1st day of September, 1911, included that of Vice-President, Secretary, Treasurer, Auditor, General Freight Agent, General Manager, General Superintendent, General Passenger and Ticket Agent, Chief Engineer, Superintendent of Motive Power and Machinery, Master Mechanic, Master of Transportation, Fuel Agent, and General Claim Agent.

That in wilful disregard of its contract obligations unto plaintiffs, and in open and flagrant violation of the laws of the State of Texas, the defendant, International and Great Northern Railway Company, on or about the 1st day of September, 1911, undertook to change the location of all its general offices, except that of Superintendent of Motive Power and Machinery, and that of Master Mechanic, from the City of Palestine to the City of Houston, Texas, and undertook to establish the most important general office of its Traffic Manager without the State of Texas, in the City of New Orleans, in the State of Louisiana; and, in seeking to accomplish such changes the defendant has caused the Vice-President and General Manager, Secretary, Treasurer, Auditor, General Freight Agent, General Superintendent, General Passenger and Ticket Agent, Chief Engineer, Master of Transportation, Fuel Agent, and General Claim Agent, with their respective subordinates, engaged in the operation of the International and Great Northern Railroad, to remove to the City of Houston, in Harris County, Texas, and to there establish so-called general offices, from which their respective duties are performed; and, the defendant has caused the Traffic Manager for the International and Great Northern Railroad, together with his subordinates, to establish an office at New Orleans, La., from which their duties are performed.

That defendant has declared the purpose to change from the City of Palestine the location of the general offices of said Superintendent of Motive Power and Ma-

chinery, and of said Master Mechanic, and to change the location of the machine shops and round houses of said Railroad, as actually operated, immediately upon the institution of this suit, or of any suit of a like nature; and, the defendant will make the aforesaid changes, in further violation of law, unless prevented by the immediate issuance and service of the writ of injunction.

That acting upon the faith and credit of the contracts and agreements hereinbefore plead, and in reliance thereon, the plaintiffs have acquired property rights in the City of Palestine worth many hundreds of thousands of dollars.

That plaintiffs have been irreparably damaged by the transfer from Palestine of the general officers, and their subordinates, numbering some two hundred and fifty men, with an estimated pay roll of two hundred and fifty thousand dollars annually, such removal having greatly reduced the volume of business in said city and having materially depreciated all property values therein, and such damage, already amounting to over one hundred thousand dollars, will continue and increase until the return of said officers and their subordinates to their rightful location.

That should the defendant cease to maintain and operate said machine shops and round houses and the general offices of said Superintendent of Motive Power and Machinery and Master Mechanic, at the City of Palestine, with their annual pay roll far in excess of that of the removed general offices, as threatened by defendant, such action would destroy or depreciate plaintiffs' property to an amount far in excess of half a million dollars, and would imperil and largely sacrifice the property and business interest of said city, and there would be no way to measure the resulting injury nor to make compensation therefor, and the damages thus sustained would be inestimable and irreparable, and this plaintiffs are ready to verify.

That while the damages which would be sustained by plaintiffs by the continued absence of defendant's general officers, and their subordinates, from Palestine, during the pendency of this suit, would be great and irreparable, the trouble and cost to defendant of restoring such officers, with their subordinates, books and records, to Palestine, would be so slight and inconsiderable as to be trivial, the transfer from Palestine to Houston having been effected within a few hours, over defendant's own railroad, and by means of defendant's own trains, and the return could be as easily and cheaply accomplished.

That said general officers were transferred to Houston, with actual knowledge and notice, upon the part of the defendant, that this suit would be promptly brought, and that application would be made for a peremptory injunction, to restore the status of said general offices, machine shops and round houses, as they existed when the controversy arose between plaintiffs and defendant as to their location, and as such status had existed for more than thirty years.

That this petition is presented to the court at the earliest possible moment after plaintiffs became possessed through exercising the utmost diligence, of actual knowledge as to the facts pertaining to the reorganization of the International and Great Northern Railroad.

That plaintiffs have no adequate remedy at law for the wrongs and injuries inflicted upon them by defendant, nor to prevent the grievous wrongs and injuries with which they are threatened by the defendant, and in no other way can plaintiffs have any complete or adequate remedy for the wrongs and injuries already suffered by them, nor to prevent those with which they are threatened, save through the intervention of your Honor and of the Court with the writ of injunction.

That the exercise by your Honor of the power to apply the equitable remedy of injunction, without notice, while

essential to prevent irretrievable loss and injury to plaintiffs, can not, under the facts herein plead, work damage or injury to the defendant.

That the Hon. B. H. Gardner, Judge of the Third Judicial District of Texas, and Judge of the District Court of Anderson County, Texas, is one of the citizens of the City of Palestine, in whose behalf this suit is brought, and is the owner of property in said city, and he is also the father of the wife of the plaintiff R. C. Sewell, and hence said Judge is disqualified to hear and to act upon plaintiffs' application for injunction, or to make any order herein.

Wherefore, plaintiffs pray the Honorable Judge of the District Court to whom this petition is presented, for a writ of injunction, commanding the defendant to desist and refrain from changing the location of the machine shops and round houses of the International and Great Northern Railroad, as operated by defendant, from the City of Palestine; and to desist and refrain from changing the location of the general offices of the Superintendent of Motive Power and Machinery and of the Master Mechanic, engaged in the operation of said railroad, from the City of Palestine; and to desist and refrain from keeping or maintaining any other general offices in connection with the operation of said railroad, at any other place than the City of Palestine; and commanding the defendant to keep and maintain all of the general offices, for the operation of said railroad, at the City of Palestine, allowing the defendant such time as your Honor may deem reasonable for the return to the City of Palestine of defendant's general officers, now in the cities of Houston, Texas, and New Orleans, La., with their subordinates, books and records.

And plaintiffs pray that the defendant may be cited, as required by law, to answer this petition, that the court will hear proof, and that plaintiffs may have judgment, establishing the contracts and agreements herein

plead, and decreeing that the defendant specifically perform such contracts and agreements by forever keeping and maintaining at the City of Palestine the general offices, machine shops and round houses of the International and Great Northern Railroad, and for judgment enforcing the public duty of defendant to forever keep and maintain its general offices, machine shops and round houses at the City of Palestine, and that plaintiffs may have judgment that the injunction above applied for be made perpetual; and for all other and further relief, special and general, in law and in equity, to which plaintiffs may be rightly and justly entitled.

A. G. GREENWOOD,
CAMPBELL, SEWELL & STRICKLAND,
THOS. B. GREENWOOD,
Attorneys for Plaintiffs.

THE STATE OF TEXAS,
COUNTY OF ANDERSON.

I, Geo. A. Wright, do solemnly swear that I am one of the plaintiffs in the foregoing petition, and that the matters of fact therein alleged are true, and that I make this affidavit in behalf of, and as agent for, my co-plaintiffs in said petition and myself.

GEO. A. WRIGHT.

Subscribed and sworn to before me by Geo. A. Wright, this the 6th day of February, 1912.

(L. S.) J. B. MCDONALD,
Notary Public for Anderson County, Texas.

THE STATE OF TEXAS,
COUNTY OF ANDERSON.

I, Mrs. Mollie Ford Reagan, do solemnly swear that I am the widow of Judge John H. Reagan, formerly of Anderson County, Texas; that I was present at the home of myself and Judge John H. Reagan, then my husband, on or about the 15th day of March, 1872, when Galusha A. Grow, acting in behalf of the Houston and Great Northern Railroad Company, offered to extend the line

of the Houston and Great Northern Railroad to Palestine, and I know, of my own personal knowledge, that, as a consideration for the bond issue desired from Anderson County, by said Company, in aid of the construction of said Railroad, the Company, through President Grow, offered unto the citizens of the City of Palestine, then represented by Judge Reagan, to locate and establish, and to thereafter forever maintain, the general offices, machine shops and round houses of the Houston and Great Northern Railroad, at the City of Palestine; that the plaintiff Geo. A. Wright was present when said offer was made; that I believe all of the averments of the foregoing petition to be true; and that this affidavit is made in behalf of the plaintiffs in said petition.

MRS. MOLLIE FORD REAGAN.

Subscribed and sworn to before me, by Mrs. Mollie Ford Reagan, on this the 6th day of February, 1912.

(L. S.) J. B. McDONALD,
Notary Public in and for Anderson County, Texas.

THE STATE OF TEXAS,
COUNTY OF ANDERSON.

I, J. W. Ozment, do swear that I am one of the plaintiffs in the foregoing petition; that I was a party to the contract and agreement between the citizens of Palestine and the International and Great Northern Railroad Company, on or about the first of the year 1875, and that the averments of said petition, relative to said contract and agreement, and relative to compliance therewith by the citizens of Palestine, to the satisfaction of said Company, are true; and I make this affidavit in behalf of, and as agent for my co-plaintiffs, in said petition and for myself.

J. W. OZMENT.

Subscribed and sworn to before me, by J. W. Ozment, on this the 6th day of February, 1912.

(L. S.) J. B. McDONALD,
Notary Public for Anderson County, Texas.

THE STATE OF TEXAS,
COUNTY OF CHEROKEE.

In Chambers, at Rusk, Texas.

The foregoing petition for injunction having been presented to me, on this the 7th day of February, 1912, and having been carefully considered, it is ordered that the Clerk of the District Court of Anderson County, Texas, do issue a writ of injunction commanding the defendant International and Great Northern Railway Company to desist and refrain from changing the location of the machine shops and round houses of the International and Great Northern Railroad, as operated by the defendant, from the City of Palestine; and to desist and refrain from changing the location of the general offices of the Superintendent of Motive Power and Machinery, and of the Master Mechanic, engaged in the operation of said Railroad, from the City of Palestine; and to desist and refrain from keeping and maintaining the general offices of the vice-president and general manager, secretary, treasurer, auditor, general freight agent, traffic manager, general superintendent, general passenger and ticket agent, chief engineer, master of transportation, fuel agent, and general claim agent, engaged in the operation of the International and Great Northern Railroad, at any other place than the City of Palestine; and commanding the defendant to keep and maintain the general offices above named, for the operation of said Railroad, with their general officers, subordinates and records, at the City of Palestine, provided that the defendant shall be allowed sixty days from this date within which to return to said City of Palestine such of its general officers as are now in the cities of Houston, Texas, and New Orleans, La., with their subordinates, books and records, said writ of injunction to issue upon the petitioners executing to the defendant a bond with two or more good and sufficient sureties, in the sum of Five Thousand Dollars, conditioned as required by law.

Witness my official signature in the town of Rusk, Texas, on this the 7th day of February, 1912.

JAMES I. PERKINS,
Judge of the Second Judicial District of Texas.

WRIT OF INJUNCTION.

Anderson County et al.
No. 8589. vs.
International and Great Northern Railway Company.

In the District Court of Anderson County, Texas.

The State of Texas: To the International and Great Northern Railway Company, Greeting:

Whereas, Anderson County, the City of Palestine, Geo. A. Wright, J. W. Ozment, A. L. Bowers, Jno. R. Hearne, Z. L. Robinson, E. W. Link, R. C. Sewell, A. B. Hodges, Jno. M. Colley, and P. H. Hughes, plaintiffs in the above entitled and numbered cause, in the District Court of Anderson County, have filed a petition for injunction, alleging that you have undertaken to change the location from Palestine, Texas, in violation of law, of the general offices of the vice-president and general manager, secretary, treasurer, auditor, general freight agent, traffic manager, general superintendent, general passenger and ticket agent, chief engineer, master of transportation, fuel agent, and general claim agent, engaged in the operation of the International and Great Northern Railroad; and alleging that you will change, from the City of Palestine, in violation of law, unless restrained, the general offices of the Superintendent of Motive Power and Machinery and of the Master Mechanic, engaged in the operation of said Railroad, and alleging that you will change, from the City of Palestine, in violation of law,

unless restrained, the machine shops and round houses of the International and Great Northern Railroad; and alleging that the Houston and Great Northern Railroad Company contracted and agreed to locate, keep and maintain the general offices, machine shops, and round houses of the Houston and Great Northern Railroad at the City of Palestine, for a valuable consideration received, and was thereafter consolidated with the International Railroad Company, under the name of the International and Great Northern Railroad Company, by virtue of an act of the Legislature of Texas, which made all contracts and agreements of the Houston and Great Northern Railroad Company binding on the International and Great Northern Railroad Company, and alleging that the International and Great Northern Railroad Company contracted and agreed to locate, keep and maintain the general offices, machine shops and round houses of the International and Great Northern Railroad at the City of Palestine, for a valuable consideration received, and alleging that the general offices, machine shops and round houses of the Houston and Great Northern Railroad and of the International and Great Northern Railroad were located at the City of Palestine, in Anderson County, which county has aided the Houston and Great Northern Railroad and the International and Great Northern Railroad by an issue of bonds, in consideration of said locations being made at the City of Palestine; and alleging that the defendant International and Great Northern Railway Company has acquired the International and Great Northern Railroad, under a reorganization agreement, of date May 9th, 1911, with the public duty imposed upon said Railway Company, by general law, as it was imposed by general law on its predecessor companies, to keep and maintain said general offices, machine shops and round houses at the City of Palestine; and alleging that the general laws of the State forbid and prohibit any change in the location of said general offices, machine shops and

round houses; and praying for an injunction to restrain you from changing the location of said machine shops and round houses, and of the general offices of said Superintendent of Motive Power and Machinery, and of said Master Mechanic, from the City of Palestine, and to compel you to restore to the City of Palestine the said general offices above named, which you have undertaken to establish elsewhere; and whereas, the Honorable Jas. I. Perkins, Judge of the Second Judicial District of Texas, has issued his fiat on said petition, as follows, to-wit:

"THE STATE OF TEXAS,
COUNTY OF CHEROKEE.

In Chambers, at Rusk, Texas.

The foregoing petition for injunction having been presented to me, on this the 7th day of February, 1912, and having been carefully considered, it is ordered that the Clerk of the District Court of Anderson County, Texas, do issue a writ of injunction commanding the defendant International and Great Northern Railway Company to desist and refrain from changing the location of the machine shops and round houses of the International and Great Northern Railroad, as operated by the defendant, from the City of Palestine; and to desist and refrain from changing the location of the general offices of the Superintendent of Motive Power and Machinery, and of the Master Mechanic, engaged in the operation of said Railroad, from the City of Palestine; and to desist and refrain from keeping and maintaining the general offices of the vice-president and general manager, secretary, treasurer, auditor, general freight agent, traffic manager, general superintendent, general passenger and ticket agent, chief engineer, master of transportation, fuel agent, and general claim agent, engaged in the operation of the International and Great Northern Railroad, at any other place than the City of Palestine, and commanding the defendant to keep and maintain the general

offices above named, for the operation of said Railroad, with their general officers, subordinates and records, at the City of Palestine, provided that the defendant shall be allowed sixty days from this date within which to return to said City of Palestine such of its general officers as are now in the cities of Houston, Texas, and New Orleans, La., with their subordinates, books and records, said writ of injunction to issue upon the petitioners executing to the defendant a bond with two or more good and sufficient sureties, in the sum of Five Thousand Dollars, conditioned as required by law.

Witness my official signature in the town of Rusk, Texas, on this the 7th day of February, 1912.

JAMES I. PERKINS,
Judge of the Second Judicial District of Texas."

And, whereas the said plaintiffs have executed and filed with the Clerk of the District Court of Anderson County, Texas, a bond in the sum of Five Thousand Dollars, payable and conditioned as required by law and the order of said Judge:

These are therefore to command you that you desist and refrain from changing the location of the machine shops and round houses of the International and Great Northern Railroad, as operated by you, from the City of Palestine; and that you desist and refrain from changing the location of the general offices of the Superintendent of Motive Power and Machinery and of the Master Mechanic, engaged in the operation of said Railroad, from the City of Palestine; and that you desist and refrain from keeping or maintaining the general offices of the vice-president and general manager, secretary, treasurer, auditor, general freight agent, traffic manager, general superintendent, general passenger and ticket agent, chief engineer, master of transportation, fuel agent, and general claim agent, engaged in the operation of the International and Great Northern Railroad, at any other place than the City of Palestine; and that you do keep

and maintain the general offices above named, for the operation of said railroad, at the City of Palestine, provided that you are allowed sixty days from the 7th day of February, 1912, within which to return to said City of Palestine such of your general officers as are now in the cities of Houston and New Orleans, with their subordinates, books and records, until the further orders of the District Court in and for the County of Anderson, Texas, to be holden at the Court House thereof, in Palestine, on the 28th day of April, 1912, when and where this writ is returnable.

Witness, F. R. Morris, Clerk of the District Court of Anderson County, Texas.

Given under my hand and the seal of said Court at office in Palestine, Texas, this the 7th day of February, 1912.

(L. S.) F. R. MORRIS,
Clerk of the District Court of Anderson County, Texas.

Bond for injunction was duly filed and approved and is omitted by agreement of counsel

AGREEMENT.

Anderson County, et al.,
No. 8589. vs.
International & Great Northern Railway Company.

In the District Court of Anderson County, Texas, April Term, 1912.

We, the undersigned attorneys for the plaintiffs, and undersigned attorneys for the defendant, in the above numbered and styled cause, do hereby agree that said cause shall be continued at the April Term, 1912, of the District Court of Anderson County, Texas, the order of continuance to show the cause is continued by consent and without prejudice to the defendant's exceptions and

plea to the venue and jurisdiction of the District Court of Anderson County, Texas.

And we further agree that, if the appeal which has been taken by the defendant to the Court of Civil Appeals of the First Supreme Judicial District of the State of Texas at Galveston from the order of the Honorable James I. Perkins, Judge of the Second Judicial District of the State of Texas, granting an injunction in said cause, shall not be finally disposed of in said Court of Civil Appeals and in the Supreme Court of the State of Texas before any term of said District Court succeeding said April Term, 1912, said cause shall be continued at each term of said District Court commencing prior to said final disposition of said appeal in the Court of Civil Appeals and Supreme Court, each order of continuance to be by consent and without prejudice to said exceptions and plea of the defendant to the venue and jurisdiction of the District Court of Anderson County.

It is understood and agreed between the parties hereto that when said exceptions and plea to the jurisdiction are reached at any term of the District Court of Anderson County for hearing, and are heard, the same shall have the same standing as if they had been heard and disposed of at the first term of the court after the filing of the same, namely, said April Term, 1912.

Signed in triplicate this the —— day of April, 1912, one copy being retained by the attorneys for the plaintiffs, one by the attorneys for the defendant, and the other to be filed in the District Court of Anderson County.

This agreement was recognized by the Court and the case continued from time to time in accordance with it.

Anderson County, et al.,
No. 8589. vs.
International & Great Northern Railway Company.

In the District Court of Anderson County, Texas.

To the Honorable, the Judge of said Court:

Now comes the International & Great Northern Railway Company, the defendant herein, and a resident citizen of Harris County, Texas, and appears for the sole purpose of objecting to the jurisdiction of this Court, and in that regard only answers as follows:

I.

It excepts to this Court taking jurisdiction of this case, because it does not appear from plaintiffs' petition that the defendant, the International & Great Northern Railway Company, has its domicile and place of residence in Anderson County, Texas, it being upon the plaintiffs as a prerequisite to the jurisdiction of this Court, in this suit, to show that the defendant was domiciled and had its principal offices, headquarters and residence in Anderson County, Texas.

II.

The defendant, the International & Great Northern Railway Company, excepts to this Court taking jurisdiction of this case, and to all proceedings by this Court in this case, except to the transfer of this case to the proper forum in Harris County, Texas, because it appears on the face of plaintiffs' petition not only that an effort is made to avoid stating the domicile, legal headquarters, but also because it appears from the petition that the defendant is legally incorporated under the laws of the State of Texas, and that it is a new corporation, and that it has placed its offices and headquarters in the City of Houston, in Harris County, Texas, and because it inferentially appears from the petition that its charter provided that its

headquarters, domicile and principal offices should be in Harris County, Texas.

Wherefore, this defendant prays that its exceptions to the jurisdiction of this Court be sustained, and that this Court take no action herein except to order the venue to be changed to the proper court of the County having jurisdiction of this cause, to-wit, to the proper forum in Harris County, Texas, and that the Clerk make up a transcript of all orders herein and certify them and transmit them as provided by law.

III.

And further, subject to the above, and in the event that its above exceptions be overruled, the International & Great Northern Railway Company now presents this its plea of privilege to be sued in Harris County, Texas, which is the county of its residence, and in support of such plea represents as follows:

In support of this its plea, the International & Great Northern Railway Company attaches hereto and makes a part of this plea a true and correct copy of the articles of its incorporation, dated August 8th, 1911, and certified to by the Acting Secretary of State of the State of Texas, wherein it is provided that "the place at which shall be established and maintained the principal business office, the public offices and general offices of this corporation, is the City of Houston, in Harris County, State of Texas," and the copy of the charter of the defendant so attached is identified and marked Exhibit "A." In accordance with the provisions of this charter, the International & Great Northern Railway Company, the defendant, has maintained, since it commenced to act and since it has had any office whatever, its principal business office, its public office and its general offices in the City of Houston, in Harris County, Texas, and has always so maintained them, and still so maintains them, at which place is its domicile and residence, and it has no domicile or residence in the County of Anderson, Texas.

Further, this defendant represents that its foregoing stated place of residence is fixed and established; further, the defendant represents that neither at the time of the institution of this suit nor at the time of service of process herein upon this defendant, nor at the time of the filing of this plea, nor at any time whatsoever, was the International & Great Northern Railway Company, the defendant, a resident of Anderson County, Texas; and further, that neither at the time of the institution of this suit, nor at the time of the service of the process therein upon said defendant, nor at any time whatsoever, did it have its principal business office, its public offices, or its general offices, in Anderson County, Texas, but, on the contrary, at all such times and before and ever since the institution of this suit, the International & Great Northern Railway Company was a resident of Harris County, Texas, where said offices always have been and now are.

Further, the International & Great Northern Railway Company says that none of the exceptions to exclusive venue in the county of its residence mentioned in Article 1194 or Article 1585 of the Revised Statutes of the State of Texas exist in this case; except that it is true that the railroad of the defendant extends through and into Anderson County, Texas, and is operated through and into that county; and that the defendant has agencies and representatives in that county, to-wit, stations, freight and passenger agents therein, and persons in its services, but that there is a statute which prescribes that writs of injunction not granted to stay proceedings in a suit or execution on a judgment but granted against an inhabitant of this State in other cases, shall be returnable to and tried in the District or County Court of the county in which such defendant has his domicile, according to the amount of the matter in controversy.

Wherefore, upon its foregoing plea, the International & Great Northern Railway Company prays that its plea be in all things sustained, and that no other proceedings

be had in this Court, except to sustain its plea and to order the venue to be changed to the proper forum in Harris County, Texas, and that the Clerk of this Court make up a transcript of all the orders in this case and certify thereto as required by law, and transmit the same with the original papers to the Clerk of the Court to which the venue may be changed. The defendant prays for all other relief which may be its due under this plea.

THE STATE OF TEXAS,
COUNTY OF HARRIS.

I, A. R. Howard, being duly sworn, do on my oath say that I am the secretary of the defendant, the International & Great Northern Railway Company, and that I have read the foregoing plea numbered three, and that the facts and allegations therein stated are true.

(Signed) A. R. HOWARD.

Sworn to and subscribed before me by A. R. Howard, secretary of the International & Great Northern Railway Company, this 20th day of April, 1912.

(L. S.) L. TEMME,
Notary Public in and for Harris County, Texas.

(Signed) WILSON & DABNEY,
ANDREWS, BALL & STREETMAN,
WILLIAMS & STEDMAN,
Attorneys for International & Great Northern Railway Company.

EXHIBIT A.

Articles of Incorporation of International and Great Northern Railway Company, Dated August 8th, 1911.

Know All Men by These Presents:

That we, the undersigned, whose names are hereunto subscribed, being the purchaser at the sale hereinafter mentioned, and the associates of such purchaser, do hereby certify that we have, under and in pursuance of Article 4550 of Chapter 11 of Title 94 of the Revised Statutes of Texas, as amended by an act of the Legislature of the

State of Texas, approved September 1, 1910, associated ourselves together to form a corporation for the purpose of acquiring, owning, maintaining and operating the railroad, property and franchises sold at said sale and hereinafter described; and we do further certify, pursuant to the provisions of Chapter 1 of Title 94 of the Revised Statutes of Texas, as follows:

FIRST. The name of this corporation shall be International and Great Northern Railway Company.

SECOND. This corporation is organized for the purpose of acquiring, owning, maintaining and operating the railroads heretofore forming the International and Great Northern Railroad and purchased by Frank C. Nicodemus, Jr., one of the undersigned, at a sale thereof, held on June 13, 1911, pursuant to a decree of foreclosure and sale entered on or about May 10, 1910, in certain judicial proceedings brought for the foreclosure of a mortgage of the International and Great Northern Railroad Company known as its second mortgage, said decree having been made and entered by the United States Circuit Court for the Northern District of Texas, in a certain cause therein pending, wherein The Farmers' Loan and Trust Company, Trustee, was complainant and International and Great Northern Railroad Company and others were defendants, which said decree was subsequently adopted and entered, in certain ancillary causes between the same parties, by the Circuit Courts of the United States for the Southern District of Texas, the Eastern District of Texas and the Western District of Texas; said railroads being described as follows, to-wit:

> All and singular the lines of railroad in the State of Texas formerly belonging to the International and Great Northern Railroad Company, extending from the town of Longview, in the County of Gregg in said State, through said county and through the Counties of Rusk, Smith, Cherokee, Anderson, Leon, Robertson, Milam, Williamson, Travis, Hays, Comal, Bexar, Medina, Frio, La Salle, Encinal and Webb, to La-

redo in said last mentioned county; and from the town of Mineola, in Wood County, to Troupe, in Smith County; and from the City of Palestine, in Anderson County, through the Counties of Houston, Trinity, Walker and Montgomery to Houston, in Harris County; and from the town of Spring, in Harris County, through the Counties of Montgomery, Waller, Grimes, Brazos, Robertson, Falls, McLennan, Limestone, Hill, Navarro, Ellis and Johnson to the City of Fort Worth, Tarrant County; with branches and branch lines from the town of Overton to the town of Henderson, in Rusk County, from the town of Round Rock to Georgetown, in Williamson County, from the town of Phelps to the town of Huntsville, in Walker County, from the City of Houston, in Harris County, to the town of Columbia, in Brazoria County, from Navasota, in Grimes County, to Madisonville, in Madison County, from Calvert Junction to Calvert, in Robertson County, and from Waco Junction to East Waco, in McLennan County; including also the railway and railway tracks and property appurtenant thereto, and certain tracts of land in and adjacent to the City of Houston, in Harris County, known as the Houston Belt Terminals; a total distance of about eleven hundred and six (1106) miles; and including also the trackage rights formerly belonging to said International and Great Northern Railroad Company from Houston, in Harris County, to Galveston, in Galveston County, Texas, over the railroad of the Galveston, Houston and Henderson Railroad Company of 1882, under an agreement between said railroad companies dated November 19, 1895.

This corporation shall have all of the powers and privileges conferred by the laws of the State of Texas upon chartered railroads, including the power to construct and extend.

THIRD. The place at which shall be established and

maintained the principal business office, the public office and general offices of this corporation is the City of Houston, in Harris County, State of Texas.

FOURTH. The time of the commencement of this corporation shall be the date of the filing of these articles in the office of the Secretary of State of the State of Texas, and the period of the continuation of this corporation shall be fifty (50) years from the time of its commencement.

FIFTH. The amount of the capital stock of this corporation shall be Eleven Million Five Hundred Thousand Dollars ($11,500,000).

SIXTH. The names and places of residence of the several persons forming the association for incorporation are as follows:

Name.	Residence.
Frank C. Nicodemus, Jr	New York City, N. Y.
Horace Booth	Palestine, Texas.
Willis H. Cope	Houston, Texas.
Samuel B. Dabney	Houston, Texas.
Thomas J. Freeman	Houston, Texas.
Alfred R. Howard	Palestine, Texas.
Frank T. Richardson	Houston, Texas.
William L. Maury	Palestine, Texas.
Milton L. Morris	Houston, Texas.
Dougald J. Price	Palestine, Texas.

SEVENTH. The names of the members of the first Board of Directors of this corporation are as follows:

Horace Booth.
Willis H. Cope.
Samuel B. Dabney.
Thomas J. Freeman.
Alfred R. Howard.
Frank T. Richardson.
William L. Maury.
Milton L. Morris.
Dougald J. Price.

The government of this corporation and the management of its affairs shall be vested in a board of directors composed of nine persons: a president, one or more vice-presidents and such other officers and agents as this corporation by its by-laws may prescribe.

EIGHTH. The number and amount of the shares of the capital stock of this corporation shall be one hundred and fifteen thousand shares, of the par value of $100 each.

Of such capital stock fifty thousand shares shall be issued as preferred stock, and sixty-five thousand shares shall be issued as common stock, but the amount of preferred or common stock, or both, may be increased from time to time in the manner provided by the laws of the State of Texas.

No dividends shall be paid in any fiscal year upon the common stock of this corporation until and unless dividends to the amount of five per cent. for the same fiscal year shall have been set apart for or paid upon the preferred stock of this corporation; but such dividends on the preferred stock shall be non-cumulative. After the payment or the setting apart in any one fiscal year of dividends upon the preferred stock to the amount of five per cent., no further dividends in the same fiscal year shall be set apart for or paid upon the preferred stock until and unless dividends to the amount of five per cent. for the same fiscal year shall be set apart for or paid upon the common stock; but after dividends to the amount of five per cent. in any one fiscal year shall have been set apart for or paid upon both preferred stock and common stock, all stock, without priority or distinction as between the different classes thereof, shall share *pro rata* in any further dividends for that year.

In the event of any liquidation, dissolution or winding up (whether voluntary or involuntary) of this corporation, the holders of the preferred stock shall be entitled to be paid in full, out of the assets of this corporation, the par amount of their shares and all dividends thereon declared and unpaid, before any amount shall be paid out of said assets to the holders of the common stock; but, after payment in full to the holders of the common stock of the par amount of their common stock and all dividends thereon declared and unpaid, holders of both classes of stock, without priority or distinction as be-

tween the different classes thereof, shall be entitled to participate, *pro rata*, in the assets of this corporation.

WITNESS our hands this 8th day of August, A. D. 1911.

FRANK C. NICODEMUS, JR.,
HORACE BOOTH,
WILLIS H. COPE,
SAMUEL B. DABNEY,
THOMAS J. FREEMAN,
ALFRED R. HOWARD,
FRANK T. RICHARDSON,
WILLIAM L. MAURY,
MILTON L. MORRIS,
DOUGALD J. PRICE.

STATE OF TEXAS,
COUNTY OF HARRIS.—SS.:

Before me, H. B. Mansfield, a notary public in and for the aforesaid State and County duly qualified, personally appeared Frank C. Nicodemus, Jr., Horace Booth, Willis H. Cope, Samuel B. Dabney, Thomas J. Freeman, Alfred R. Howard, Frank T. Richardson, William L. Maury, Milton L. Morris and Dougald J. Price, known to me to be all of the persons whose names are subscribed to the foregoing instrument, and each acknowledged to me that he executed the same for the purposes and considerations therein contained and expressed.

Given under my hand and seal of office this 8th day of August, A. D. 1911. My commission expires May 31st, 1913.

H. B. MANSFIELD,
Notary Public.

(SEAL)

STATE OF TEXAS,
COUNTY OF HARRIS.—SS.:

Before the undersigned authority, within and for said County and State, on this day came and personally appeared Thomas J. Freeman, Alfred R. Howard and William L. Maury, three of the directors named in the foregoing and attached Articles of Incorporation of International and Great Northern Railway Company, all of

whom are personally known to me, and who being by me severally sworn, as the law provides, on their oaths, severally depose and say that the amount of One Thousand Dollars ($1,000) per mile for every mile of road of said Company has been in good faith subscribed, that five per cent. (5%) of the amount subscribed has been actually paid to the directors named in said Articles of Incorporation, and that the corporators named in said Articles are all subscribers to said capital stock.

THOMAS J. FREEMAN,
ALFRED R. HOWARD,
WILLIAM L. MAURY.

Subscribed and sworn to before me, at my office in the City of Houston, Harris County, Texas, this 8th day of August, A. D. 1911. My commission expires May 31st, 1913.

H. B. MANSFIELD,
(SEAL) *Notary Public.*

ATTORNEY GENERAL'S OFFICE,
Austin, Texas, August 10th, 1911.

CERTIFICATE.

This is to certify that the original Articles of Incorporation of International and Great Northern Railway Company were submitted to me on the 10th day of August, 1911, and having carefully examined the same I find them in accordance with the provisions of Chapter 1 of Title 94 of the Revised Statutes of Texas and any and all amendments thereto, and not in conflict with the laws of the United States or of the State of Texas.

J. P. LIGHTFOOT,
Attorney General.

Filed in the office of the Secretary of State this 10th day of August, 1911.

C. C. MCDONALD,
Secretary of State.

DEPARTMENT OF STATE.

I, John L. Wortham, Secretary of State of the State of Texas, do hereby certify that the foregoing is a true copy of the charter of International & Great Northern Rail-

way Company, with the endorsements thereon, as now appears of record in this Department, in Book G, pages 265-6-7 and 8, Record of Railroad Charters.

In testimony whereof I have hereunto signed my name officially and caused to be impressed hereon the Seal of State at my office in the City of Austin, Texas, this the 20th day of January, A. D. 1913.

JOHN L. WORTHAM,
Secretary of State.

(SEAL)

ORDER.

Anderson County, et al.,
No. 8589. vs.
International and Great Northern Railway Company.

In the District Court of Anderson County, Texas.

On this the 7th day of July, 1913, coming on to be heard before the District Court of Anderson County, Texas, the plea of personal privilege of the defendant International and Great Northern Railway Company, which is contained in its original answer filed in this cause on April 24th, 1912; and evidence being introduced in support of said plea of personal privilege, and said plea and evidence being duly considered by the Court, it is ordered and adjudged by the Court that said plea of personal privilege be and the same is hereby overruled, to which ruling of the Court the defendant in open court excepts.

BILL No. 1.

Anderson County, et al.,
No. 8589 vs.
International & Great Northern Railway Company.

In the District Court of Anderson County, Texas, July Term, A. D. 1913.

Be it remembered that on this the 7th day of July, A. D. 1913, the defendant's plea of personal privilege filed in this Court heretofore in due order of pleading, and which has not been waived, came on to be heard in its regular order, and after being duly presented to the Court and being duly certified by affidavit as required by law, and being in due form, the defendant, in support thereof, introduced the following evidence:

FIRST.

A duly certified copy of the Charter of the International & Great Northern Railway Company, filed in the office of the Secretary of State on the —— day of August, A. D. 1911. The said charter, among other things, designated the general offices and headquarters of said Railway Company at Houston, Harris County, Texas.

SECOND.

It is admitted by both parties as a fact that on the 1st day of September, A. D. 1911, the general manager, general freight agent, general auditor, general claim agent and all other general officers of the defendant company, except those specially excepted in plaintiff's petition, removed to the City of Houston, in Harris County, Texas, taking with them all the books of their respective offices, as well as their subordinates and employes, and that from and since said date they have continuously transacted the business of their respective offices in the City of Houston, Harris County, Texas, and have not since said date transacted their business in the City of Palestine, Anderson County, Texas.

And be it further remembered that no ~~contest~~ other evidence was presented against said plea and that the Court after duly considering said plea of personal privilege and all the evidence introduced as aforesaid, overruled said plea to which ruling of the Court the defendant then and there in open Court excepted and here and now tenders this its bill of exceptions.

WILLIAMS & STEDMAN,
WILSON, DABNEY & KING,
ANDREWS, BALL & STREETMAN,
N. B. MORRIS,
Attorneys for Defendant.

Approved:
PRINCE, *District Judge Presiding.*
July 7, 1913.

Motion to change venue see pp. 621-623 herein below.

ORDER GRANTING CHANGE OF VENUE.

Anderson County, et al.,
No. 8589. vs.
International & Great Northern Railway Company.

In the District Court of Anderson County, Texas.

On this the 7th day of July, 1913, coming on to be heard before the District Court of Anderson County, Texas, the application, filed herein on this day, of the defendant the International and Great Northern Railway Company for a change of venue in this cause; and it appearing to the Court that said application is in conformity to the requirements of the statute regulating the change of venue in civil causes, and is properly supported by the affidavit of the defendant and also by the affidavit of three credible persons, residents of the County of Anderson; and there being no contest of said application and there

being no attack upon the credibility of the persons making the application for a change of venue, or their means of knowledge or the truth of the facts set out in said application, it is therefore ordered and adjudged by the Court that said application for a change of venue be and the same is hereby granted. And it appearing to the Court that the court house of Cherokee County, at Rusk, the county seat of that county, is nearest to the court house of Anderson County, at Palestine, in that county; and no objections appearing to the change of venue to Cherokee County, it is ordered and adjudged by the Court that by virtue of the change of venue as aforesaid this cause shall be removed to Cherokee County for trial. It is further ordered and adjudged by the Court that the Clerk of this Court shall immediately make out a correct transcript of all the orders in this cause, certifying thereto officially under the seal of this Court, and transmit the same, with the original papers in the cause, to the Clerk of the District Court of Cherokee County, to which the venue of this cause is changed by this order.

By agreement of counsel in this cause it is ordered that this cause shall stand for trial in the District Court of Cherokee County at the term beginning on the 1st day of December, 1913.

FIRST AMENDED PETITION, FILED JANUARY 7, 1914.

THE STATE OF TEXAS,
COUNTY OF CHEROKEE.

In District Court, November Term, 1913.

To the Honorable Judge of the District Court of Cherokee County, Texas:

The first amended original petition of Anderson County, and of the City of Palestine, and of Geo. A. Wright,

J. W. Ozment, A. L. Bowers, Jno. R. Hearne, Z. L. Robinson, E. W. Link, R. C. Sewell, Jno. M. Colley and P. H. Hughes, citizens of the City of Palestine, Texas, who sue herein in behalf of themselves and of all other citizens of said City of Palestine, styled herein plaintiffs, amending their original petition filed on the 7th day of February, 1912, leave of the court first being had, complaining of the International & Great Northern Railway Company, styled herein defendant, would respectfully show to the court:

(1) That Anderson County is, and has been since prior to the 1st day of March, 1872, a body corporate and politic, created and organized as a county by the Legislature of the State of Texas.

(2) That the City of Palestine is a municipal corporation, duly incorporated and chartered as a city of over ten thousand inhabitants by special act of the Legislature of Texas, approved on the 19th day of March, 1909, and is the successor of the City of Palestine, duly incorporated under the laws of Texas as a municipal corporation, since prior to the 1st day of March, 1872.

(3) That each of the plaintiffs, Geo. A. Wright, J. W. Ozment, A. L. Bowers, Jno. R. Hearne, Z. L. Robinson, E. W. Link, R. C. Sewell, Jno. M. Colley and P. H. Hughes, resides in the City of Palestine, in the County of Anderson, and State of Texas, and each of them is a citizen of said city and the owner of real and personal property in said city. That each of the last named plaintiffs has resided in said City of Palestine, and has been the owner of real and personal property therein since long prior to the 1st day of September, 1911; and the plaintiffs Geo. A. Wright, J. W. Ozment and E. W. Link have been such resident citizens and property owners since prior to the 1st day of March, 1872.

(4) That the citizens of the City of Palestine are numerous, aggregating in number some twelve thousand, and they have a joint and common interest in having the general offices, machine shops and round houses of the

International & Great Northern Railroad kept and maintained, by the defendant, at Palestine. That it is impracticable to make all of said citizens parties to this suit, in their own proper persons, and hence this suit is brought by the individually named plaintiffs, in behalf of each and all other citizens of said city, as well as in behalf of themselves.

(5) That the defendant International & Great Northern Railway Company is a corporation, organized under the laws of Texas as hereinafter shown, and required by law to keep and maintain its general offices at the City of Palestine, in the County of Anderson, Texas.

(6) That on the 22nd day of October, 1866, the Legislature of Texas, by an act entitled "An Act to incorporate the Houston & Great Northern Railroad Company" created and chartered that company, and authorized it to construct, own, maintain and operate a railroad, commencing at the City of Houston and running northward to Red River. That said act authorized said company to form a junction and connection with any other road in such manner as would best secure their construction.

(7) That on the 5th day of August, 1870, the Legislature of Texas, by an act entitled "An Act to incorporate the International Railroad Company and provide for the aid of the State of Texas in construction of same" created and chartered that company, and authorized it to construct, own, maintain and operate a railroad from such point on Red River as nearly opposite to the town of Fulton, in the State of Arkansas, as might be found expedient in forming a junction with the railway known as the "Cairo & Fulton Railway," then being constructed, by the most practicable route across the State of Texas, by way of Austin and San Antonio, to the Rio Grande River, at such point at or near Laredo as might be selected by the company. That said act authorized the International Railroad Company to connect itself with any other railroad company, within or without the State, and to operate and maintain its railroad in connection or in

consolidation with any other railroad company, as it might deem best; and said act provided that the principal office of said company should be established at such point on the line of said railroad as might be deemed most convenient for the transaction of its business, and might be moved from time to time to such places on the line as the progress of the work of construction might render expedient or necessary.

(8) That, acting under said act of August 5th, 1870, the International Railroad Company had, prior to the 15th day of March, 1872, constructed a portion of its line of railroad from, at or near the town of Hearne, in Robertson County, Texas, to the City of Palestine, in Anderson County, Texas, and was regularly operating said line of railroad, as a common carrier of freight and passengers for hire, and was maintaining a depot at said City of Palestine.

(9) That heretofore, to-wit, on or about the 15th day of March, 1872, the Houston & Great Northern Railroad Company had constructed, or had determined to construct, under its charter, its line of railroad from the City of Houston northward to the north boundary line of Houston County, Texas; and, on or about said date, said Houston & Great Northern Railroad Company, acting by its duly authorized president, Galusha A. Grow, contracted and agreed, in Anderson County, Texas, with the citizens of the City of Palestine, Texas, acting by and through Judge John H. Reagan, to extend its said line of railroad from the north boundary line of Houston County, to intersect the line of the International Railroad Company at Palestine, and to establish a depot within one-half of the court house at Palestine, and to commence running cars regularly thereto by the 1st day of July, 1873, and to thereupon locate and establish, and forever thereafter keep and maintain the general offices, machine shops and round houses of the Houston & Great Northern Railroad at the City of Palestine, for and in consideration of the promise and agreement then made,

upon the part of the said Judge John H. Reagan, to make a thorough canvass of Anderson County, to induce the electors thereof to authorize, by their votes, the issuance of the interest bearing bonds of said county in the principal sum of $150,000, and, for and upon the further consideration that Anderson County, on authorization of its electors, in the manner prescribed by law, should issue and deliver to the Houston & Great Northern Railroad Company its interest bearing bonds in said principal sum of $150,000, upon the completion of said railroad to its intersection with the International Railroad at Palestine, and upon the establishment of a depot within a half mile of the court house, and upon the commencement of the running of cars regularly to such depot.

(10) That if said contract did not expressly name the citizens of Palestine as parties thereto (as plaintiff expressly aver it did), yet the same was made for their benefit and in their behalf, and such citizens, at that time and throughout the future, including the plaintiffs, were the parties intended, by both Judge John H. Reagan and the Houston & Great Northern Railroad Company, as the parties to be benefited by the performance of all the obligations of the Railroad Company under said contract, and especially of those obligations which related to the location and maintenance of general offices, machine shops and round houses at Palestine.

(11) That the above mentioned contract, and especially the promise to establish and forever maintain said general offices, machine shops and round houses at Palestine, was made and entered into by the Houston and Great Northern Railroad Company as an inducement to Anderson County and the electors thereof to donate to said Houston & Great Northern Railroad Company the bonds of said county in the principal sum of $150,000, and it was in reliance upon, and in consideration of, such inducement, contract and promise that said bonds were subsequently authorized and delivered to said Railroad Company.

(12) That in order to induce the electors of Anderson County to authorize the issuance and delivery to the Houston & Great Northern Railroad Company of the interest bearing bonds of Anderson County, in the principal sum of one hundred fifty thousand dollars, which bonds are hereinafter more fully described, the Houston & Great Northern Railroad Company, acting by its duly authorized president, Galusha A. Grow, and by other duly authorized agents, on or about the 15th day of March, 1872, and on or about the last days of April, 1872, and on or about the first days of May, 1872, and throughout the time from about the 15th day of March, 1872, to the 4th day of May, 1872, promised, agreed, and represented, unto and with Anderson County, and the electors thereof, that the general offices, machine shops and round houses of the Houston & Great Northern Railroad, upon the completion of said railroad to Palestine, would be established and forever thereafter maintained at Palestine, in Anderson County, Texas, and further, that said company was firmly bound by valid contract, with the citizens of Palestine to so establish and maintain said general offices, machine shops and round houses.

(13) That said contract, promises, agreements and representations were deliberately authorized and made by the Houston & Great Northern Railroad Company, with the intention that the electors of Anderson County should act and rely upon same. That the electors of Anderson County were induced, by said contract, promises, agreements and representations, to authorize, and therefore did authorize, by their votes, at an election held in said county on the first, second, third and fourth days of May, 1872, the issuance and delivery to the Houston & Great Northern Railroad Company of the interest bearing bonds of Anderson County, for the principal sum of One Hundred and Fifty Thousand Dollars ($150,000), payable in twenty years from their date, with interest at the rate of eight per cent per annum from their date, as per coupons to be attached, the interest and two per cent

of the principal to be paid on the first day of January of each year, said bonds to be issued and delivered upon the completion of said railroad to an intersection with the International Railroad at Palestine, and upon the establishment of a depot within a half mile of the court house at Palestine, and upon the commencement of the regular running of cars by said company to such depot. That said electors would not have authorized the issuance and delivery of said bonds, nor the offer of same to the Houston & Great Northern Railroad Company, but for the inducement of the above mentioned contract, promises, agreements and representations, by the company, that it would establish and forever maintain general offices, machine shops and round houses at Palestine, and that it was under a binding contract with the citizens of Palestine so to do, nor but for the fact that the electors relied and acted upon such contract, promises, agreements and representations.

(14) That the said Judge John H. Reagan made a thorough canvass of Anderson County between about the 15th day of March, 1872, and the 4th day of May, 1872, to induce the electors of Anderson County to vote to authorize the issuance of said bonds, in strict conformity with his promise to, and agreement with, the Houston & Great Northern Railroad Company and its president, as hereinbefore alleged.

(15) That said election was held under and by virtue of a proper order of the Commissioners' Court of Anderson County, Texas, and subsequently on the 6th day of May, 1872, an order was entered in said court declaring that more than two-thirds of the qualified voters of Anderson County had voted in favor of the issuance of said bonds.

(16) That prior to the 31st day of December, 1872, the Houston & Great Northern Railroad Company completed its railroad from the north boundary of Houston County to its intersection with the International Railroad at Palestine, and built a depot within one-half mile

of the court house at Palestine, and commenced to run its cars regularly thereto, and thereafter, on or about the 29th day of January, 1873, said company, by its president, Galusha A. Grow, applied to the Commissioners' Court of Anderson County for the interest bearing bonds of said county in the principal sum of $150,000, as hereinbefore described and as authorized by the electors of said county; and in order to induce the Commissioners' Court of Anderson County to issue and deliver said bonds, the said Houston & Great Northern Railroad Company, acting by its duly authorized president, Galusha A. Grow, again promised, agreed and represented unto said county and said Commissioners' Court that the company had already begun to establish and would thereafter forever maintain its general offices, machine shops and round houses at Palestine, as required by its contract with the citizens of Palestine; and, acting on said promise, agreement and representation, and relying on same, as well as on the previous contract, promises, agreements and representations of said company, as hereinbefore set out, and in part performance of said contract between the Houston & Great Northern Railroad Company and the citizens of Palestine, the said Commissioners' Court was induced to issue and deliver, and on or about the 29th day of January, 1873, did issue and deliver unto the Houston & Great Northern Railroad Company the interest bearing bonds of Anderson County, as theretofore authorized by the electors, bearing date as of Dec. 31st, 1872, for the principal sum of $150,000, in denominations of $500 each, payable in twenty years from their date, with interest from their date at the rate of eight per cent per annum, as per coupons attached, the interest and two per cent of the principal payable on the 1st day of January of each year, commencing Jan. 1st, 1874.

(17) That if the president of the Houston & Great Northern Railroad Company and the other agents of said company were not expressly authorized by it to make the contracts, promises, agreements and representations

hereinbefore alleged (as plaintiffs expressly aver they were), yet the said Houston & Great Northern Railroad Company was nevertheless bound thereby; for plaintiffs aver that the said Houston & Great Northern Railroad Company, with full knowledge of the facts hereinbefore plead, acquiesced in, approved and ratified each and all of the aforesaid contracts, promises, agreements and representations of its said president, and of its other agents, with the intention to adopt same and to be bound thereby, and, with such knowledge, obtained and accepted the services of Judge John H. Reagan, as above shown, and obtained, accepted and retained the above mentioned bonds of Anderson County, as well as the proceeds thereof, and this plaintiffs are ready to verify.

(18) That on or about the 19th day of February, 1872, the International Railroad Company and the Houston & Great Northern Railroad Company, acting by their respective presidents, entered into certain written "Articles of Agreement," whereby it was provided that the railroads, properties, rights, franchises, powers and capital stock of the two companies should be united, consolidated and merged, under the name of the International and Great Northern Railroad Company, on authorization of the holders of three-fourths of the outstanding stock of the respective companies, and, in the meantime the railroads, properties, rights, franchises and powers of the two companies were to be managed, operated and exercised by their respective boards of directors or by the joint action of the two boards, all earnings to belong, however, to the united company. That in September, 1873, said union, consolidation and merger was duly approved by the stockholders of the respective companies, and the same were also approved, ratified and confirmed by the Legislature of the State of Texas, by acts approved, respectively, on the 24th day of April, 1874, and on the 10th day of March, 1875.

(19) That by Section 2, of the Act of April 24th, 1874, it was expressly provided that all acts theretofore

done in the name of either of said companies should have the same binding force and effect upon the International & Great Northern Railroad Company that they had upon the respective companies.

(20) That the Houston & Great Northern Railroad Company, and the International and Great Northern Railroad Company (as formed by the consolidation agreement aforesaid), in part performance of the aforesaid contracts, promises and agreements, and in compliance therewith, promptly established the machine shops and round houses of the Houston and Great Northern Railroad and of the International and Great Northern Railroad, at Palestine, Texas, and thereafter, until the 13th day of September, 1911, and for a period of nearly forty years, the machine shops and round houses of the Houston and Great Northern Railroad, and of the International and Great Northern Railroad, in further performance of said contracts, promises and agreements, were continuously maintained, by the Houston and Great Northern Railroad Company and by the International and Great Northern Railroad Company, at Palestine, Texas, where the same have also been, and now are, maintained by the International and Great Northern Railway Company.

(21) That heretofore, to-wit: On or about the first of the year 1875 (plaintiffs being unable after this lapse of time to more definitely fix the date), the International & Great Northern Railroad Company, acting by its duly authorized general manager, or general superintendent, H. M. Hoxie, contracted and agreed with the citizens of the City of Palestine, Texas, among whom were the plaintiffs Geo. A. Wright and J. W. Ozment, to fully and completely perform the promises, contracts and agreements of the Houston & Great Northern Railroad Company, or the promises, contracts and agreements which the said Galusha A. Grow had undertaken to make in behalf of said company with said citizens and with Anderson County and with the electors of said county, by at

once locating the general offices of the International & Great Northern Railroad at Palestine, and by thereafter forever keeping and maintaining the general offices, machine shops and round houses of said International & Great Northern Railroad at Palestine, for and in consideration of the bonds theretofore issued by Anderson County to the Houston & Great Northern Railroad Company, and for the further additional consideration that said citizens should at once construct and complete, or cause to be constructed and completed, at their own cost and expense, any and all houses, at Palestine, Texas, which might be demanded by the International & Great Northern Railroad Company, in accordance with such plans or specifications or directions as might be furnished by the company, through its officers, for occupancy, at reasonable rentals, by employees of said company and their families, and especially by general officers of said company, their families and clerks.

(22) That the citizens of Palestine, as required by said contract and agreement, did at once, in the early part of the year 1875, construct and complete, and cause to be constructed and completed, at their own cost and expense, amounting to many thousands of dollars, each and all of the houses, at Palestine, Texas, which were demanded by the International & Great Northern Railroad Company, and by its officers, numbering more than twenty, in accordance with the plans and directions furnished by the company and its officers, for occupancy, at reasonable rentals, by the employees of said company and their families and clerks, to the entire satisfaction of the International & Great Northern Railroad Company; and, that among the houses so constructed and completed or caused to be so constructed and completed by said citizens, were the following, to-wit: a residence constructed and completed on Lot 15, of Larkin & Campbell's Addition to the City of Palestine, Texas, by the Palestine Land and Building Company, a corporation organized under the laws of Texas, with its place of business at Pal-

estine, Texas, with its capital stock owned by many citizens of Palestine; a residence constructed and completed by remodeling and reconstructing the former Reeves home, on Lot 14, of Larkin & Campbell's Addition to the City of Palestine, Texas, by said Palestine Land and Building Company; a residence on the west half of Lot 13 of Larkin & Campbell's Addition to the City of Palestine, Texas, by said Palestine Land and Building Company; three residences on Lot 4 of Larkin & Campbell's Addition to Palestine, Texas, by said Palestine Land and Building Company; a residence on Lot 2, in Block 11, of the City of Palestine, by said J. W. Ozment; a residence on part of Block 89 of the City of Palestine, Texas, by said J. W. Ozment; and two residences on Lot 5 of Larkin & Campbell's Addition to the City of Palestine, by Geo. A. Wright and J. E. Whiteselle, who were both citizens of said city; that owing to the lapse of nearly thirty-nine years these plaintiffs are unable to state with any greater particularity the location of other houses and by whom constructed, under the terms of said contract, but they aver that said Railroad Company accepted the buildings which were constructed, and the work which was done and caused to be done by said citizens as in full and complete and perfect performance of said contract, as in truth and in fact such buildings and work did fully and completely comply with every obligation of said citizens under said contract; and thereupon the said International & Great Northern Railroad Company became bound, by its aforesaid contract and agreement (as well as by the previous contract and agreement of one of its constituents), to forever keep and maintain the general offices, machine shops and round houses of the International & Great Northern Railroad at Palestine.

(23) That if the general manager or general superintendent of the International & Great Northern Railroad Company, H. M. Hoxie, was not expressly authorized by said company, to make the contract and agreement hereinbefore set out, which he did make, in behalf

of said company with the citizens of Palestine (as plaintiffs expressly aver he was), yet the International & Great Northern Railroad Company was nevertheless bound thereby; for plaintiffs aver that said company, with full knowledge of said contract and agreement, acquiesced in, approved and ratified same, with the intention to adopt it and be bound thereby, and, with full knowledge, said company accepted the benefits of the expenditures made by the citizens of Palestine in the construction of houses for its employees as above shown; and, in performance of its obligations under said contract and agreement, the International & Great Northern Railroad Company did immediately, and in the early part of the year 1875, locate and establish the general offices of the International & Great Northern Railroad at Palestine, and did thereafter continuously maintain such general offices, at Palestine, until the 1st day of September, 1911; and, in compliance with the aforesaid contract and agreement, the International & Great Northern Railroad Company and the International & Great Northern Railway Company have continuously maintained the machine shops and round houses of the International & Great Northern Railroad at Palestine from the date of said contract and agreement to the present time.

(24) That under the laws of Texas, the International & Great Northern Railroad Company had, prior to the 9th day of May, 1911, become the owner of 1106 miles of railroad, extending from Palestine to Houston; from Longview, via Palestine, to Laredo; and from Spring to Fort Worth; with several branches, spurs and terminals and had also become the owner of trackage rights over 53.5 miles of railroad, including the Galveston, Houston & Henderson Railroad, from Houston to Galveston, together with the franchise to operate said 1106 miles of railroad and said 53.5 miles of railroad, as a common carrier of freight and passengers for hire, and had become the owner of valuable equipment and other property, connected with said lines of railroad and the oper-

ation thereof. That said railroads, franchises, equipment and other property were owned and held by the International & Great Northern Railroad Company, on said 9th day of May, 1911, subject to the lien of a mortgage, of date Nov. 1st, 1879, securing bonds in the principal sum of $11,291,000; and also subject to the lien of a mortgage, on specific property, securing certain bonds known as Colorado River bridge bonds, in the principal sum of $198,000, and also subject to the lien of a mortgage, on specific property, securing a loan upon the company's San Antonio station in the principal sum of $42,000, and also subject to a lien on certain equipment for the principal sum of $392,650, and also subject to the lien of a mortgage, of date March 1st, 1892, securing bonds in the principal sum of $2,966,052.50, besides interest, and also subject to a valid subsisting judgment and decree of foreclosure, against the International and Great Northern Railroad Company, of the lien of a mortgage, dated June 15th, 1881, for the sum of $12,165,545.60, with six per cent per annum interest from May 10th, 1910, said judgment and decree of foreclosure providing that said railroads, franchises, equipment and the other property of said Railroad Company should be sold subject to the lien of the mortgage of date Nov. 1st, 1879, and also subject to the lien of the mortgage securing said Colorado River bridge bonds, and subject to the lien of the mortgage securing said loan on the San Antonio station, and also subject to the lien on said equipment, but not providing that said railroads, franchises, equipment and other property should be sold subject to the lien of said mortgage of date March 1st, 1892, though the trustee under the mortgage of date March 1st, 1892, was a party to said judgment and decree of foreclosure, and though such trustee, and the holders of the bonds secured by said mortgage of date March 1st, 1892, were bound by said judgment and foreclosure.

(25) That said railroads, franchises, equipment and other property of the International & Great Northern

Railroad Company were sold by a master commissioner appointed by said court, under the aforesaid judgment and decree of foreclosure, on the 13th day of June, 1911, when one Frank C. Nicodemus, Jr., of New York, bid in and purchased said railroads, franchises and equipment and other property for the sum and price of twelve million six hundred and forty-five thousand dollars ($12,645,000), and the bid of said Frank C. Nicodemus, Jr., was thereafter, on June 14, 1911, duly accepted and confirmed by the court rendering said judgment and decree of foreclosure.

(26) That thereafter, on or about the 10th day of August, 1911, the said Frank C. Nicodemus, Jr., and certain nominal associates, filed in the office of the Secretary of State of the State of Texas a certain charter forming a corporation, under Art. 4550, of Chapter 11, of Title 94, of the Revised Civil Statutes of Texas, as amended by the Act of the Legislature of Texas, approved September 1st, 1910, under the name of the "International & Great Northern Railway Company," for the purpose of acquiring, owning, maintaining and operating the railroads theretofore forming the International & Great Northern Railroad, with an authorized capital stock of $11,500,000, divided into 115,000 shares, of the par value of $100 each, of which 50,000 shares should be preferred stock and 65,000 shares should be common stock, and thereby was created the defendant International & Great Northern Railway Company.

(27) That subsequent to the filing of said charter, and on or about the 13th day of September, 1911, the said purchaser, Frank C. Nicodemus, Jr., complied with his bid of $12,645,000 for said railroads and other property, and thereupon, by direction of said purchaser, and in accordance with an assignment of his bid, and with the approval of the court, decreeing and confirming the sale, the railroads forming the International & Great Northern Railroad, and all appurtenant property, franchises and equipment, by said master commissioner, were con-

veyed unto said new corporation, the defendant International & Great Northern Railway Company. That the International & Great Northern Railroad Company joined in said conveyance, in confirmation of said sale.

(28) That thereafter, on the 25th day of September, 1911, the court ordering and decreeing the sale of said Railroad and appurtenant property, franchises and equipment made and entered a final order and decree approving the Final Report of the master commissioner making said sale, and confirming his deed of conveyance to the International and Great Northern Railway Company, and forever and finally discharging all the railroads, franchises and properties of the International and Great Northern Railroad Company from the possession, custody and control of said court.

(29) That the said Frank C. Nicodemus, Jr., had full and actual knowledge and notice of the facts herein plead, and of every right herein asserted, prior to the time that he bid in the International & Great Northern Railroad, with its appurtenant property, franchises and equipment, and the defendant has had such actual knowledge and notice, from the time of its organization to the present time. That plaintiffs gave formal, written notice of the causes of action herein alleged unto said purchaser in advance of his bidding for said railroad and appurtenant property, franchises and equipment, and in advance of compliance with his bid, and this plaintiffs are ready to verify.

(30) That since the Houston & Great Northern Railroad Company contracted and agreed to locate, keep and maintain the general offices, machine shops and round houses of the Houston & Great Northern Railroad at the City of Palestine, for a valuable consideration received, and since the International & Great Northern Railroad Company contracted and agreed to locate, keep and maintain the general offices, machine shops and round houses of the International & Great Northern Railroad at the City of Palestine, for a valuable consideration received,

and since the general offices, machine shops and round houses of the Houston & Great Northern Railroad and of the International & Great Northern Railroad have been located at the City of Palestine, in Anderson County, Texas, which county has aided said Houston & Great Northern Railroad and said International & Great Northern Railroad, by an issue of bonds, in consideration of such location being made; and since no certain place was named in the charter of the International & Great Northern Railroad Company where its general offices should be located and maintained, the laws of Texas, on the 1st day of September, 1911, and continuously afterwards to the present time, imposed, and do now impose, upon the International & Great Northern Railway Company the performance of the public and statutory duty, enuring to plaintiffs' special benefit, to keep and maintain the general offices, machine shops and round houses of the International & Great Northern Railroad at the City of Palestine, in Anderson County; and, the State of Texas, by general law, expressly forbade and prohibited, and still forbids and prohibits, any change, from the said city, in the location of said general offices, machine ships and round houses. That the International & Great Northern Railroad Company, prior to the sale of its railroad and other property, was not only bound by contract, but was bound by general law, as a part of its duty to the public, coupled with the enjoyment of its corporate franchises, to keep and maintain the general offices, machine shops and round houses of said railroad, at the City of Palestine, and such duty and regulation of its franchises could not be, and was not, impaired nor discharged by the sale of said Railroad, with its appurtenant property and franchises, and the organization of defendant to operate said Railroad under said franchises.

(31) That the general offices, maintained at the City of Palestine, for the operation of the International & Great Northern Railroad (whether by the Company, or by Receivers), for years prior to the 1st day of Septem-

ber, 1911, included that of Vice President, Secretary, Treasurer, Auditor, General Freight Agent, General Manager, General Superintendent, General Passenger and Ticket Agent, Chief Engineer, Superintendent of Motive Power and Machinery, Master Mechanic, Master of Transportation, Fuel Agent, and General Claim Agent.

(32) That in wilful disregard of its contract obligations unto plaintiffs, and in open and flagrant violation of the laws of the State of Texas, the defendant, International & Great Northern Railway Company, on or about the 1st day of September, 1911, undertook to change the location of all its general offices, except that of Superintendent of Motive Power and Machinery, and that of Master Mechanic, from the City of Palestine to the City of Houston, Texas, and undertook to establish the most important general office of its Traffic Manager without the State of Texas, in the City of New Orleans, in the State of Louisiana; and, in seeking to accomplish such changes, the defendant has caused the Vice President and General Manager, Secretary, Treasurer, Auditor, General Freight Agent, General Superintendent, General Passenger and Ticket Agent, Chief Engineer, Master of Transportation, Fuel Agent, and General Claim Agent, with their respective subordinates, engaged in the operation of the International & Great Northern Railroad, to remove to the City of Houston, in Harris County, Texas, and to there establish so-called general offices, from which their respective duties are performed; and the defendant has caused the Traffic Manager, for the International & Great Northern Railroad, together with his subordinates, to establish an office at New Orleans, La., from which their duties are performed.

(33) That plaintiffs were advised that the defendant had declared the purpose to change from the City of Palestine the location of the general offices of said Superintendent of Motive Power and Machinery, and of said Master Mechanic, and to change the location of the machine shops and round houses of said railroad, as actually

operated, immediately upon the institution of this suit, or of any suit of a like nature; and, the defendant will make the aforesaid changes, in further violation of law, unless prevented by the restraint of the writ of injunction.

(34) That acting upon the faith and credit of the contracts and agreements hereinbefore plead, and in reliance thereon, the plaintiffs have acquired property rights in the City of Palestine worth many hundreds of thousands of dollars.

(35) That plaintiffs have been irreparably damaged by the transfer from Palestine of the general officers, and their subordinates, numbering some two hundred and fifty men, with an estimated pay roll of two hundred and fifty thousand dollars annually, such removal having greatly reduced the volume of business in said City and having materially depreciated all property values therein, and such damage, already amounting to over one hundred thousand dollars when this suit was brought has continued and increased and will continue and increase, until the return of said officers and their subordinates to their rightful location.

(36) That should the defendant cease to maintain and operate said machine shops and round houses and the general offices of said Superintendent of Motive Power and Machinery and Master Mechanic, at the City of Palestine, with their annual pay roll far in excess of that of the removed general offices, as threatened by defendant, such action would destroy or depreciate plaintiffs' property to an amount far in excess of half a million dollars, and would imperil and largely sacrifice the property and business interests of said city, and there would be no way to measure the resulting injury nor to make compensation therefor, and the damages thus sustained would be inestimable and irreparable, and this plaintiffs are ready to verify.

(37) That while the damages which would be sustained by plaintiffs by the continued absence of defendant's gen-

eral officers and their subordinates, from Palestine, during the pendency of this suit would be great and irreparable, the trouble and cost to defendant of restoring such officers, with their subordinates, books and records, to Palestine, would be so slight and inconsiderable as to be trivial—the transfer from Palestine to Houston having been effected within a few hours, over defendant's own railroad, and by means of defendant's own trains—and the return could be as easily and cheaply accomplished.

(38) That said general officers were transferred to Houston, with actual knowledge and notice, upon the part of the defendant, that this suit would be promptly brought, and that application would be made for a peremptory injunction, to restore the status of said general offices, machine shops and round houses, as they existed when the controversy arose between plaintiffs and defendant as to their location, and as such status had existed for more than thirty years.

(39) That plaintiffs' original petition was presented to the court at the earliest possible moment after plaintiffs became possessed, through exercising the utmost diligence, of actual knowledge as to the material facts alleged in said petition.

(40) That plaintiffs have no adequate remedy at law for the wrongs and injuries inflicted upon them by defendants, nor to prevent the grievous wrongs and injuries with which they are threatened by the defendant, and, in no other way, can plaintiffs have any complete or adequate remedy for the wrongs and injuries already suffered by them, nor to prevent those with which they are threatened, save by means of the writ of injunction.

(41) That the Hon. B. H. Gardner, Judge of the Third Judicial District of Texas, and Judge of the District Court of Anderson County, Texas, when this suit was filed in said court, was one of the citizens of the City of Palestine, in whose behalf this suit was brought, and was the owner of property in said city, and he was also

the father of the wife of the plaintiff R. C. Sewell, and hence said Judge was disqualified to hear and to act upon plaintiffs' application for temporary injunction, or to make any orders herein.

(42) Wherefore, plaintiffs applied to the Honorable Judge of the District Court of Cherokee County, Texas, who, on the 7th day of February, 1912, ordered a writ of injunction to issue, commanding the defendant International & Great Northern Railway Company to desist and refrain from changing the location of the machine shops and round houses of the International & Great Northern Railroad, as operated by the defendant, from the City of Palestine; and to desist and refrain from changing the location of the general offices of the Superintendent of Motive Power and Machinery, and the Master Mechanic, engaged in the operation of said Railroad, from the City of Palestine, which writ of injunction was duly issued and served on defendant, and which injunction, in so far as it commands the foregoing acts, is still in full force and effect.

(43) And, plaintiffs pray, the defendant having answered, that the court will hear proof, and that plaintiffs may have judgment, establishing the contracts and agreements herein plead, and for judgment enforcing the public duty of defendant to forever keep and maintain its general offices, machine shops and round houses at the City of Palestine, and that plaintiffs may have judgment that the temporary injunction granted as aforesaid, be made perpetual; and for a mandatory injunction commanding defendant to at once desist and refrain from keeping or maintaining any other general offices, in connection with the operation of said Railroad at any other place than the City of Palestine, and commanding and requiring the defendant to keep and maintain all of the general offices for the operation of said Railroad at the City of Palestine, and for all other and further relief,

special and general, in law and in equity, to which plaintiffs may be rightly and justly entitled.

A. G. Greenwood,
Campbell, Sewell & Strickland,
Thos. B. Greenwood,
Jno. C. Box,
R. O. Watkins,
John B. Guinn,
Perkins & Perkins,
Attorneys for Plaintiffs.

The State of Texas,
County of Anderson.

I, Geo. A. Wright, do solemnly swear that I am one of the plaintiffs in the foreging petition, and that the facts and statements contained in said petition are true to my knowledge and belief, and that I make this affidavit in behalf of, and as agent for, my co-plaintiffs in said petition and myself.

Geo. A. Wright.

Subscribed and sworn to before me by Geo. A. Wright, this the 19th day of December, 1913.

E. T. McCain,
Clerk of the District Court of Anderson County, Texas.

The State of Texas,
County of Anderson.

I, Mrs. Mollie Ford Reagan, do solemnly swear that I am the widow of Judge John H. Reagan, formerly of Anderson County, Texas; that I was present at the home of myself and Judge John H. Reagan, then my husband, on or about the 15th day of March, 1872, when Galusha A. Grow, acting in behalf of the Houston & Great Northern Railroad Company offered to extend the line of the Houston & Great Northern Railroad to Palestine, and I know, of my own personal knowledge, that, as a consideration for the bond issue desired from Anderson County by said Company, in aid of the construction of said Rail-

road, the Company, through President Grow, offered unto the citizens of the City of Palestine, then represented by Judge Reagan, to locate and establish, and to thereafter forever maintain, the general offices, machine shops and round houses of the Houston & Great Northern Railroad, at the City of Palestine; that the plaintiff Geo. A. Wright was present when said offer was made; that I believe all of the averments of the foregoing petition to be true; and that this affidavit is made in behalf of the plaintiffs in said petition.

MRS. MOLLIE FORD REAGAN.

Subscribed and sworn to before me, by Mrs. Mollie Ford Reagan, on this the 19th day of December, 1913.

(L. S.) E. T. McCAIN,

Clerk of the District Court of Anderson County, Texas.

THE STATE OF TEXAS,
COUNTY OF ANDERSON.

I, J. W. Ozment, do swear that I am one of the plaintiffs in the foregoing petition; that I was a party to the contract and agreement between the citizens of Palestine and the International & Great Northern Railroad Company, on or about the first of the year 1875, and that the averments of said petition relative to said contract and agreement and relative to compliance therewith by the citizens of Palestine, to the satisfaction of said Company, are true; and I make this affidavit in behalf of, and as agent for, my co-plaintiffs in said petition and for myself.

J. W. OZMENT.

Subscribed and sworn to before me, by J. W. Ozment, on the 19th day of December, 1913.

(L. S.) E. T. McCAIN,

Clerk of the District Court of Anderson County, Texas.

FIRST AMENDED ANSWER.

Filed January 7, 1914.

Anderson County, et al.,
vs.
International & Great Northern
Railway Company.

In the District Court of Cherokee County, Texas.

To the Honorable the Judge of Said Court:

With leave of the court and subject to the plea to the venue herein filed and heretofore ruled on by the Judge of the District Court of Anderson County, Texas, and insisting upon the same and upon its Bill of Exceptions reserved to the action of that court in overruling such plea, the International & Great Northern Railway Company, the defendant, now with leave of the court amends its Original Answer, filed herein, and in lieu thereof files this, its First Amended Original Answer, as follows, to the plaintiffs' First Amended Original Petition:

1.

The International & Great Northern Railway Company pleads in abatement of this suit and shows that this court has no jurisdiction to hear and determine the matters herein proposed by the plaintiffs for litigation, because of the facts now stated:

1. On the 25th of February, 1908, the Mercantile Trust Company filed its bill against the International & Great Northern Railroad Company, in the Circuit Court of the United States for the Northern District of Texas, Fifth Circuit, wherein it was set out that on March 1st, 1892, that railroad company had executed its mortgage to the Mercantile Trust Company, Trustee, for the purpose of securing an issue of bonds for the aggregate principal amount of $3,000,000, bearing interest at the rate of 4 per cent per annum, payable until and including September 1st, 1897. only, out of the net earnings, and thereafter

absolutely. It was alleged that default had been made in payment of interest; that the railroad was insolvent, and prayer was made for a decree and foreclosure and sale, and also for the appointment of a receiver. This suit was styled The Mercantile Trust Company, Trustee, Complainant, vs. The International & Great Northern Railroad Company, Defendant, and was numbered 2501 on the Equity Docket of the court. The defendant appeared and on February 25th, 1908, the court appointed Thomas J. Freeman Receiver of all of the railroads, lands, franchises and properties of the railroad, covered by the mortgage sued on, and the Receiver proceeded at once to qualify under the terms of this decree and to take charge of, control and operate the properties. This mortgage created a lien upon all the lands, tenements and hereditaments owned by the railroad company, and thereafter to be acquired by it, including tolls, fares, freights, rents, income, issues and profits thereof, and all the reversions, remainder and remainders thereof. No foreclosure has been had of this mortgage, and the suit so brought is still pending, undisposed of, in the United States District Court for the Northern District of Texas, at Dallas, such court being the successor of the United States Circuit Court. Thomas J. Freeman qualified as Receiver on the 28th of February, 1908. A copy of the Bill of Complaint is hereto attached, marked Exhibit "A" and made a part hereof.

2. The suit mentioned in paragraph 1 was docketed at the Fort Worth division of the Northern District of Texas, but on March 7th, 1908, by agreement of all parties, was transferred by the order of the court from the Fort Worth division to the Dallas division, where it is still pending in the United States District Court. A copy of the appointment of the Receiver is hereto attached and is marked Exhibit "B" and made a part hereof.

3. Thereafter, in the same court, The Farmers Loan & Trust Company, as Trustee, applied for permission to file in that court its Bill of Complaint, which was granted

by the Judge, April 20th, 1908. Whereupon, on the same day, the Farmers Loan & Trust Company filed its bill versus the International & Great Northern Railroad Company, The Mercantile Trust Company, and Thomas J. Freeman, Receiver, as defendants, the case being docketed and numbered 2514 Equity.

In this bill the complainant set out that, on or about the 15th of June, 1881, the Railroad Company had executed its bonds for the aggregate principal amount of $10,391,000, payable in gold at the agency of the company in New York City on the first of September, 1909, bearing interest, evidenced by coupons, at the rate of 6 per cent per annum from March 1st, 1881, payable in gold; and that to secure these bonds duly delivered and which had passed to various persons, it executed its mortgage and deed of trust of the same day, whereby it conveyed to The Farmers Loan & Trust Company, as Trustee, of the City of New York, all the lands, except as therein specified, tenements and hereditaments of the railroad company, owned or hereafter to be acquired, including all of its tracks and railroad equipment, with all of its corporate rights, privileges, immunities and franchises, owned or to be acquired, including the franchise to be a corporation, and all the tolls, fares, freights, rents, income, issues and profits thereof, and otherwise as more particularly in the deed of trust and mortgage set out. It was further alleged in this bill that the authorized bonds had been issued and negotiated for value, and were valid outstanding obligations of the railroad company. Further, it was alleged that the railroad company had defaulted upon its interest to a large amount and the proceedings by the Mercantile Trust Company mentioned in sub-section 1, above, were described. It was alleged that there was a prior first mortgage made to Kennedy and Sloan, Trustees, dated November 1st, 1879, that the railroad was embarrassed and insolvent, and prayer was made for the appointment of a receiver and for foreclosure and sale of the properties and a full settlement of all matters. A

copy of this bill and mortgage is attached hereto, marked Exhibit "C." It is now alleged that all allegations and statements of said bill and mortgage are true, and they are made part hereof.

4. Upon consideration of this bill and having jurisdiction in cause No. 2514, on the 20th of April, 1908, the Judge of the United States Circuit Court appointed Thomas J. Freeman Receiver as prayed for, and in this cause, all as appears by the decree attached hereto and marked Exhibit "D," and made a part hereof.

5th. On the 14th of May, 1908, George J. Gould, Frank J. Gould, Edwin Gould, Helen M. Gould, Pacific Express Company, Missouri Pacific Railway Company, and George J. Gould, Edwin Gould, Howard Gould and Helen M. Gould as Executors of the will of Jay Gould, applied to said Circuit Court for permission to file their bill of complaint against the International & Great Northern Railroad Company, which application was granted the same day.

6. Under the permission given above on the 2nd of June, 1908, in Equity Cause No. 2525, in the Circuit Court of the United States, for the Northern District of Texas, at Dallas, the last mentioned applicants filed their bill in equity against the International & Great Northern Railroad Company, wherein they set out, among other things, that, in addition to the second and third mortgages executed by this railroad, there was a first mortgage executed by it of date the 1st of November, 1879, to Kennedy and Sloan, as Trustees, who had been substituted by the Bowling Green Trust Company of New York as Trustee, and that this first mortgage was for the principal sum of $11,290,000 and was a valid lien upon all of the properties, rights and franchises of the International & Great Northern Railroad Company. The suits and receiverships above mentioned, as pending and taken out were mentioned, and it was alleged that the complainants in their various capacities had recovered judgments in the aggregate amounts of $4,929,108.46 against the Inter-

national & Great Northern Railroad Company in the Fourteenth District Court of Dallas County, Texas, which judgments were exhibited with the bill, and it was alleged that none of them had been paid. It was further alleged that the International & Great Northern Railroad Company was wholly unable to pay and discharge said judgments by reason of admitted insolvency and on other grounds; but that the railroad had certain property and assets not embraced in the three mortgages, either intangible or so bound up with properties covered by the mortgages as now to be in the possession of the receiver, and the value thereof inhering in the use of the same in connection with the operation of the railroads; that there was a danger of multiplicity of suits and a necessity for the compact conservation, by the order of the court, of such property and its being brought under the receivership now existing, for which there was prayer and for marshalling the unmortgaged properties and ascertainment of the debts and liens and priorities.

7. On the second day of June, 1908, the prayer in the above suit, No. 2525 Equity, for the appointment of the Receiver was considered by the Honorable A. P. McCormick, United States Circuit Judge, Fifth Circuit, and thereon a decree entered appointing Thomas J. Freeman Receiver upon the terms and conditions set out in the decree of the court, hereto attached and marked Exhibit "E," and on this appointment, and all others, Thomas J. Freeman accepted and acted as Receiver.

8. And on or about the same day in Equity 2514, Thomas J. Freeman, Receiver, in all three cases, filed his respective applications that these causes should be consolidated. Thereupon the court made his order of June 2nd, 1908, directing their consolidation and applying previous decrees of the Court and orders as in the order of consolidation set out, hereto attached, marked Exhibit "F," hereto attached and made a part hereof, and consolidated cause being No. 2501.

9. On the 7th of June, 1909, The Farmers Loan and

Trust Company, as Trustee, in Equity 2501, the consolidated cause, having previously obtained the leave of the court, filed a supplemental bill, affirming the allegations of their original bill, and setting out additional defaults as alleged and praying for the benefit of the proceedings taken under the original bill, for relief already prayed and otherwise as in the supplemental bill set out, a copy whereof is attached hereto and marked Exhibit "G," and made a part hereof. The allegations in this supplemental bill contained are now alleged to be true and that the said mortgage, as well as the first and second mortgages, were all duly issued and authorized regularly by the directors and stockholders of said road.

10. The above proceedings being had and commencing with the institution of the first suit, and thereafter said Circuit Court entered various administrative orders providing for the maintenance, control and management of the properties and its protection, the issue of receiver's certificates to raise necessary funds, the payment of interest on the first mortgage bonds, all as sufficiently appears in the decree next exhibited herewith; and proceeding on the demand of the trustee of the second mortgage bonds, on May 10th, 1910, the court entered the decree of foreclosure of the second mortgage, ascertaining and settling various indebtednesses and matters at issue and directing the properties of the railroad to be sold upon the terms and conditions and all as in the decree set out. This decree foreclosed the lien upon all of the properties, tangible and intangible, together with all the corporate rights, privileges, immunities and franchises of the defendant and all other properties as in the decree stated, and declaring that all of the right, title, estate and equity of redemption of the defendant and all parties to Equity Cause 2514, and of all persons claiming or to claim under them, or either of them, or, in or to the premises, property and franchises, and every part and parcel thereof, should be forever barred and foreclosed, and also that the lien of the second mortgage upon the properties

was prior and superior to every lien in favor of any party to this cause, and was subordinate only to the lien of the first mortgage, except as in the decree stated, and also that the Master Commissioner making the sale should receive no bid from any person on the property until said person should have deposited with him the sum of $100,000, to be returned in case his bid was not accepted, but to be held in case his bid was accepted on account of the purchase price; and that a further payment for the property might be made in bonds and coupons secured by the second mortgage, taken at a valuation equal to the amount said bonds and coupons would be entitled to receive in cash out of the amount bid for said property, on the terms and conditions as in the decree stated; and further, that the property should be offered for sale subject to the first mortgage and to any unpaid indebtedness or liability contracted or incurred by the defendant in the operation of its railroad, which the court may hereafter order or decree to be prior or superior to the lien of the second mortgage, except such as should be paid or satisfied out of the income of the property in the hands of the receiver under the orders of the court, entered or to be entered; and subject also to such debts, claims, liens and demands of whatsoever nature theretofore incurred or created or which might thereafter be incurred or created by the receiver under orders of the court theretofore or thereafter entered, and not paid or to be paid out of the proceeds of the sale. Also, it was decreed that the Master Commissioner by public notice should require holders of any claim for unpaid debts or liabilities to present the same for allowance; and that, if they should not be presented within three months after the first publication of such notice, they should not be enforceable against the receiver or the property sold or the purchaser or his successors or assigns. It was furthermore decreed that the form of the conveyance to the purchaser should be settled upon by the Master Commissioner or the court, or a judge thereof, should there be any question thereon;

and that, in default of such conveyance, the decree should operate as a conveyance, and that the purchaser or purchasers, his or their successors and assigns, should have the right, within six months after the completion of the sale, or delivery of the deed of the Master Commissioner, to elect whether or not to assume or adopt any lease or contract made by the defendant railroad company, and that such purchaser or purchasers, his or their successors and assigns, should not be held to have assumed any of such leases or contracts which he or they should so elect not to assume, such election to be shown by filing with the clerk of this court, from time to time, within said period, a description of such leases or contracts which he or they should so elect not to assume; and it was further provided in this decree that all questions not thereby disposed of, including the discharge of the receiver and the settlement of his accounts, and including the disposition of all claims theretofore filed or thereafter to be so filed, in accordance with the provisions of the decree, were reserved by the court for future adjudication, and it was declared: "The court reserves jurisdiction of this cause and the property affected by this decree for the purpose of final disposition of all such questions and matters; and any party to this proceeding and any claimant whose claims have been or shall be so filed herein, may apply to the court for further orders and directions at the foot of the decree"; and otherwise and generally in said decree the court reserved jurisdiction, directly and implied, of the properties and for the purpose of enforcing the decree in all of its terms. A copy of this decree is attached hereto and marked Exhibit "H," and made a part hereof.

11. On September 7th, 1910, the court entered an order deferring the sale provided for in the decree last above set out to October 6th, 1910, or to some later date to which the same might be again adjourned.

12. On November 28th, 1910, the court made an order directing that the case of the Marshall Car Wheel &

Foundry Company, Complainants, vs. The International & Great Northern Railroad Company et al., Defendants, No. 2623, in Equity, should be consolidated with the previously consolidated cause, and that all orders and decrees in said last cause be extended and applied to the newly consolidated cause.

13. The sale was again adjourned by the order of the court, and under its order, or in accordance therewith, to May 16th, 1911; but on the 12th of May, 1911, the court filed another order, decreeing that the sale should be adjourned to June 13, 1911, a copy of which last order is hereto attached, marked Exhibit "I."

14. The sale was made as provided in the decrees by the Master Commissioner, at public outcry, on June 13th, 1911, at Palestine, Texas, to Frank C. Nicodemus, Jr., and duly reported to the court and by the court in all things approved, as appears by the order of court dated September 25th, 1911, a copy of which is attached hereto and marked Exhibit "J," and made a part hereof, and also a copy of the report of sale marked Exhibit "J-1," and made a part hereof.

15. By charter dated the 8th of August, 1911, the International & Great Northern Railway Company, the defendant herein, as an independent and new railway company, was incorporated under the laws of the State of Texas, and a copy of the charter of that railway is attached hereto and marked Exhibit "K," and made a part hereof. This charter authorized the defendant to acquire, own, maintain and operate the railroads heretofore forming the International & Great Northern Railroad Company and which had been purchased by Frank C. Nicodemus, Jr., at the sale of the properties mentioned above, and all as stated in said charter.

16. On the 31st day of August, 1911, a deed was executed, whereby the Master Commissioner, the International & Great Northern Railroad Company, Thomas J. Freeman, Receiver, Frank C. Nicodemus, Jr., the above purchaser, and The Farmers Loan & Trust Company,

Trustee of the second mortgage, conveyed to the International & Great Northern Railway Company the properties purchased at the sale, all as appears by a copy of the deed hereto attached, marked Exhibit "L" and made a part hereof. Having acquired those properties the International & Great Northern Railway Company has since its acquisition operated the same under said charter and the laws of Texas.

17. The amount bid at said sale by Nicodemus was $12,645,000 of which as prescribed by the decree he deposited at the time of his bid $100,000, and thereafter, on or about September 13th, 1911, he paid the additional amount of $144,253.45, making the total cash payment $244,253.45, and he made the remaining payments under the terms of the decree as follows, and through the Farmers Loan & Trust Company in second mortgage bonds of the face value; that is, for the principal amount as next stated to which was to be added the amount of accrued interest, to-wit:

On or about September 13, 1911....	$ 164,500
On or about September 13, 1911....	9,182,000
On or about September 13, 1911....	990,000

Total in bonds, principal, not including interest, $10,336,500. To these bonds were attached the coupons maturing March 1, 1908, and subsequently, and interest was to be added.

Whereby by such payments the total amount of the bid under the terms of the decree of $12,645,000 was paid.

The apportionate amount applicable out of the bid to the second mortgage bonds not used as means of payments was, to-wit, of the principal amount of $54,500 was paid to apply thereto in the sum of $65,383.89, as appears by the report of the Master Commissioner set out above.

It thus appears that the purchase was made with the decree with the exception of $244,253.45; which decree and the bonds carried thereinto and representing the same it thus appears was owned by Frank C. Nicodemus,

Jr., or the persons whom he represented at the time of the purchase, and also that there was a deficit and the amount of the decree was not realized.

18. The above causes and consolidated cause are still pending upon the docket of the United States District Court for the Northern District of Texas, at Dallas, Texas, successor to the United States Circuit Court for the Northern District of Texas.

19. The International & Great Northern Railway Company, the defendant, here now states and represents that it purchased the above described properties upon the faith, guarantees and statements of the proceedings held in the United States Court and the reservations of the decree therein.

20. All the notices provided for in the decree of foreclosure and the supplements thereto were duly given as conditions for the making of the sale, they being given and published exactly as provided for by the decrees of the court.

21. The International & Great Northern Railway Company and Nicodemus, the purchaser at the sale, exercising the privilege and right provided for by the decree, the International & Great Northern Railway Company being authorized and directed so to do, by resolution of its Board of Directors, a copy of which is attached hereto, marked Exhibit "M", did within six months after the completion of the sale and the delivery of the deed of the Master Commissioner, elect that they would not assume or adopt, and that it, the International & Great Northern Railway Company electing for itself, would not assume or adopt any contract whatsoever made either by the International & Great Northern Railroad Company or the Houston & Great Northern Railroad Company with the plaintiffs herein or any of them, and which they now sue on; such election being shown by filing with the Clerk of the United States Circuit Court at Dallas, Texas, within said six months, a description of such contracts which were elected not to be assumed; a copy of

which election and statement is attached hereto and marked Exhibit "N"; and further, within said time exercising due precaution, though not required as it is advised by the decree of the court, this defendant caused notice of its intention and election not to perform or assume or adopt said alleged contracts sued on, to be served upon the Commissioners Court of Anderson County, and the City Council of the Town of Palestine, by reading and delivering the same to said bodies at regular meetings, and copies of such notices are hereto attached, marked Exhibits "O" and "P" respectively. In making such election this defendant did not acknowledge the existence of the alleged contracts sued on, which it had always denied did exist, but declared and elected not to adopt and assume them, if they existed.

22. Wherefore, upon all of the above, this its plea of abatement, the International & Great Northern Railway Company, the defendant, says:

(a) That it appears from the above that this court has no jurisdiction to try and hear this cause or the issues of law and the fact herein tendered, and that the sole jurisdiction to try, hear and determine the same is in the United States District Court for the Northern District of Texas, if not already disposed of.

(b) That the United States Circuit Court for the Northern District of Texas, directly and by implication, reserved jurisdiction to hear and determine any such cause of action and issues as the plaintiffs now tender and sue on, and that all such questions, if they be open, as may be involved in this case are questions not disposed of in said cause and causes, formerly pending and now pending in the United States Circuit Court of the Northern District of Texas, and the United States District Court there.

(c) That the United States District Court of the Northern District of Texas is open to entertain the cause of action of the plaintiffs, if any they have, which is not admitted, and that the above cases are still pending upon

the docket of that court, but that it is immaterial whether they be so still pending, as that court alone has jurisdiction to hear and determine the matters herein propounded for litigation.

(d) And furthermore, the International & Great Northern Railway Company represents that it appears upon the face of the proceedings and matters set out above that to further litigate this cause in this court would invade the jurisdiction and the decrees of the United States Court, and that a Federal question is now presented upon this matter; that this Federal question being that the matters herein tendered for litigation have already been barred by the decree of the United States Court, the plaintiffs herein refusing to intervene or come before that court, and the proceedings now attempted in this case being in violent collision with the decrees of that court, set out above, and ignoring and conflicting with the same; and in this connection it is alleged that the plaintiffs, each and all of them, and those whom they represent, had full notice of all of the proceedings in the United States Court and were invited to participate therein and refused to intervene or come before that court; whereby, it is represented that it appears upon the face of the decree that they are thereby forever barred and precluded; and furthermore, that whether or not they were barred or precluded is only for the adjudication of that court and not for the adjudication of this court, and that it is only for that court and not this court to adjudicate the plaintiffs' rights, if any they have, and this defendant invokes the constitution and statutes of the United States, and the powers, jurisdiction and decision of said United States Court; and also, not limiting the above, Section 709 of the Revised Statutes of the United States carried into Section 237 of the Act of Congress of March 3, 1911 (36 Stat., 1087) in protection of the title, right, privileges and immunities established by and acquired under the authority of the decree and proceedings of said court.

(e) Wherefore, upon all of the above, the International & Great Northern Railway Company represents that this court has no jurisdiction of this cause; and furthermore, that this cause should abate in this court. Wherefore, it prays that this cause should abate and that the defendant go hence without day.

THE STATE OF TEXAS,
COUNTY OF HARRIS.

I, Samuel B. Dabney, do on my oath say, that I am an attorney of the International & Great Northern Railway Company and that all of the statements of fact contained in the above plea in abatement, being under the head I., sub-sections 1 to 21, inclusive, are true.

SAM'L B. DABNEY.

Sworn and subscribed to before me this 8th Jan., 1914.

J. J. BOLTON,
Clerk District Court Cherokee Co. Tex.
(SEAL) By E. S. JONES, *Deputy.*

WILSON, DABNEY & KING,
F. A. WILLIAMS,
N. A. STEDMAN,
ANDREWS, BALL & STREETMAN,
MORRIS & SIMS,
NORMAN, SHOOK & GIBSON,
W. E. DONLEY,
F. B. GUINN.

II.

And further, the International & Great Northern Railway Company, the defendant, protesting that there is no venue in this court or jurisdiction on that ground, and preserving its contention in that regard, and its Bill of Exception already taken, and also protesting that the plaintiffs are barred and estopped by the decree and proceedings in the Federal Court, above set out in Section I., and that if there be any cause of action in them, it is

only subject to litigation in the Federal Court, if anywhere, and preserving all its contests against the plaintiffs in these particulars, further answers as follows, subject to the above and subject to its positions, as above, not being maintained:

1. That International & Great Northern Railway Company demurs to plaintiffs' petition and says that it is insufficient in law.

2. This defendant demurs specially to all that part of the petition stating and alleging a contract between the Houston & Great Northern Railroad Company, acting through Grow, and the citizens of Palestine, acting through John H. Reagan, and with said Reagan, as in the petition set out, in consideration of the promise and alleged services of Reagan in canvassing the County to induce a bond issue, because no contract is there stated, and because the allegations are insufficient to show a contract; and because any such agreement, if ever made, would be illegal, void and contrary to public policy, and incapable of enforcement.

3. This defendant specially demurs to the allegations in the petition, setting out promises, agreements and representations of Grow and other agents of the railroad to locate offices and shops, and render considerations as stated, in promotion of the canvass for the county bond issue, and otherwise; because such allegations are wholly irrelevant and immaterial; and because any contract with the county was required by law to be in writing, and such canvassing promises, if made, are not provable; and because evidence thereof will not be accepted.

4. This defendant demurs to the allegations in the petition that the electors of the County were induced by promises and considerations offered them to vote for the issue of the bonds, because the same are irrelevant and immaterial; and because it is not now a subject of proof to determine what motives, if any, outside of the written contract of the county, caused the voters to vote for the bond issue, the law requiring the contract with the county

and proposition submitted to the voters to be in writing, which writing necessarily stated all of the considerations.

5. The defendant demurs to the allegations concerning the election for the issue of bonds and the actual issue thereof, upon the alleged inducements and considerations stated, because they are insufficient and irrelevant, because the only legal evidence of the election and the considerations for the issuance of the bonds were required by law to be in writing, and of record; and because such records are not set forth and their contents in no way stated.

6. The defendant specially demurs to the allegations of the petition in regard to the considerations and inducements for the election and in promotion thereof, and to induce the voters of Anderson County in 1872 to vote for a bond issue, and the authorities of Anderson County thereafter to issue these bonds, because the law required all such matters to be in writing; and because these written documents are suppressed and left out of the pleadings.

7. The defendant specially demurs to the allegations concerning the promises, agreements and representations stated to have been made by Grow to the County Court to induce the delivery of the bonds; because neither Grow nor the County Court, nor both together, could form any such contract or could alter or change any existing contract between the railroad and the county in this matter; and because such contract could only be formed by an election and was not subject to variation or condition by any understandings or conditions between Grow and the County Court.

8. This defendant specially demurs to the allegations setting out transactions between Hoxie and the citizens of Palestine, including Wright and Ozment, in regard to the renting of houses and the erection of houses and the other matters in that connection therein stated; because

the same are insufficient to show the formation of a contract.

9. The defendant specially demurs to all of the allegations concerning the alleged transaction between Hoxie and the citizens of Palestine, including Wright and Ozment; because it is not alleged that the agreement was in writing and signed by any of the parties to be bound, so as to be valid under the statute of frauds, nor does it appear from these allegations whether or not the agreement was in writing.

10. The defendant specially demurs to the allegations concerning the transactions between Hoxie and the citizens of Palestine, including Wright and Ozment; because it is not therein alleged how long and for what period the houses were to be rented; nor what houses were constructed, on what specifications, who were the owners, the descriptions and locations of the houses; their number, how long they were rented, and what has become of these houses; and because in these particulars the pleader carefully avoids any precise statement.

11. The defendant specially demurs to the allegations of the ratification of the actions of the several officers of the railroad or railroads in making the alleged agreements relied on; because the particulars of such ratifications are not given, when, how and where made, and how acquiesced in; this defendant now insisting upon full particulars in regard to these matters.

12. The defendant specially demurs to all of the allegations contained in the petition concerning the plan for the re-organization, as alleged, of the International & Great Northern Railroad Company, the foreclosure of the mortgages upon its properties, the sale and purchase thereof, the organization of this defendant and the acquisition of such property by it; because the same are insufficient and irrelevant to charge it with any obligation arising out of the alleged contracts of the sold out company; and because such allegations are too general and indefinite to require any answer.

13. The defendant specially demurs to the petition wherein it is alleged that it was incorporated and obligated to keep its offices at Palestine, because the provisions of its charter and domicile therein named are not stated.

14. This defendant specially demurs to the allegations in the petition, relating to the re-organization as alleged of the sold out railroad, the foreclosure of mortgages upon its property and the sale and purchase thereof, and the creation of this defendant and the acquisition by it of such property:

(a) Because the terms of the decree of foreclosure are not set out; nor the decree; nor the sale; nor the reservations and restrictions therein, and conditions, under which the sale was made; and because it is not stated in what court such proceedings were had.

(b) Because the statement of the mortgages proceeding and foreclosure are incomplete to show their character.

(c) Because the allegations in regard to the alleged re-organization are insufficient, in that it does not appear whether or not the same were in writing.

(d) Because it is not illegal for bond holders to use their foreclosure decree as a means of purchase of the property or to form an organization for their own protection and the purchase of the property with their foreclosure decree.

15. The defendant specially demurs to said petition, because it is confused and contains careful suppression of documents, to-wit, the alleged decree of foreclosure and proceedings thereon, the alleged contract with the County of Anderson for the bond issue, which the law required to be in writing; and because the same is redundant and tautological.

16. This defendant specially demurs to said petition, because the various allegations of fact and each fact, if any there be, going to make up any cause of action, are not plead in separate paragraphs and each paragraph

numbered consecutively, so that this defendant can admit or deny the same intelligently and without confusion.

17. The defendant specially demurs to the 29th section of the First Amended Petition,

(a) Because as a whole it is insufficient in law.

(b) Because it is incomplete and vague in its allegations.

(c) Because the rights of plaintiffs, if any they had, were eliminated by and were inferior to the foreclosed mortgage.

(d) Because neither in said section nor elsewhere is the history of such foreclosed mortgage set out.

18. Defendant excepts to the plaintiffs' petition and particularly to the allegations of an alleged agreement made with the Houston and Great Northern Railroad Company, for the location and maintenance of the General Offices at Palestine, that it is not alleged either that the charter of the Houston and Great Northern Railroad Company did not name a certain place where its General Offices shall be located and maintained, or that the charter of the Houston and Great Northern Railroad named Palestine, Texas, as the place for the locating of its general offices.

19. Defendant excepts to the plaintiffs' petition and particularly to the allegations of an alleged agreement made with the International and Great Northern Railroad Company, for the location and maintenance of the general offices at Palestine, that it is not alleged either that the charter of the International & Great Northern Railroad Company did not name a certain place where its general offices shall be located and maintained or that the charter of the International & Great Northern Railroad Company named Palestine, Texas, as the place for the locating of its general offices.

And of these its demurrers, general and special, International & Great Northern Railway Company, prays the judgment of the court and that each and all be sustained.

III.

The International & Great Northern Railway Company answers the plaintiffs' first amended original petition upon their allegations of fact, if answer thereon be required, as below. In traversing the issues of fact, the defendant does not waive its plea to the venue, its plea in abatement, its demurrers and other positions taken above, but preserves the same and answers further subject to the same and subject only to their being overruled. Subject to the above it answers on the facts as follows: This answer is applied to the first amended petition and all references below are to it and the sections thereof.

1. The defendant admits the allegations contained in Section 1.

2. The defendant admits the allegations contained in Section 2.

3. The defendant admits the allegations contained in Section 3.

4. As to Section 4 the defendant says that it has no knowledge or information thereof sufficient to form a belief except that it admits that the City of Palestine has a population of at least 10,000, and also, it is admitted that it is impracticable to make all of the citizens parties to this suit in their proper persons. Wherefore, with the exception of such admissions, the defendant denies Section 4.

5. The defendant admits as alleged in Section 5 that it is a corporation authorized under the laws of Texas, but denies that it is required by law to keep and maintain its general offices in the City of Palestine in the County of Anderson, Texas.

6. The defendant admits the allegations contained in Section 6.

7. The defendant admits the allegations contained in Section 7.

8. The defendant admits the allegations contained in Section 8.

9. As to Section 9 the defendant says that in regard to the allegation that on the 15th of March, 1872, the Houston & Great Northern Railroad Company had constructed or had determined to construct under its charter its line of railroad from the City of Houston, northward to the north boundary line of Houston County, Texas, it, that is, this defendant, denies that it has any knowledge or information thereof sufficient to form a belief, therefore it denies such allegation.

As to the remainder of the allegations and of statements contained in Section 9, the defendant denies the same.

10. As to Section 10 the defendant denies all the allegations and statements therein contained.

11. As to the allegations in Section 11, the defendant denies the same.

12. As to the allegations in Section 12 of plaintiffs' petition, defendant denies the same.

13. As to Section 13 the defendant denies each and all of the allegations therein contained except that it admits that the electors of Anderson County did authorize the issue and delivery to the Houston & Great Northern Railroad Company of the bonds of the County in the principal sum of $150,000 with interest and to run for the time stated upon the completion of the railroad to an intersection with the International Railroad at Palestine and upon the establishment of a depot within a half mile of the court house at Palestine and upon the commencement of the regular running of the cars to such depot.

14. The defendant denies Section 14 and all of the allegations therein contained.

15. The defendant admits Section 15 and the matters therein stated, except that it denies that anything was passed on at said election except the issue of the bonds, on consideration of the road building into and operating into Palestine within the year 1872, and erecting said depot.

16. As to Section 16 the defendant admits that prior

to the 31st of December, 1872, the Houston & Great Northern Railroad Company had completed its railroad to an intersection with the International Railroad at Palestine and commenced to run its cars regularly thereto and that on or about the 29th of January, 1873, the bonds as stated in Section 16 were issued or authorized to be issued to the Houston & Great Northern Railroad Company, but each and every other allegation in said Section 16 the defendant denies. In admitting the issue of these bonds and their authorization, it is intended to admit these bare facts and to deny every other allegation not expressly admitted above.

17. The defendant denies all the allegations in Section 17 contained.

18. As to Section 18 the defendant admits the allegations therein contained except as follows:

a. It does not admit that before September, 1873, the union of the roads was consummated or that they were managed jointly, but denies the allegations in that regard.

b. It does not admit that the terms of consolidation were approved, ratified and confirmed by the legislature, but denies this allegation, but admits that the legislature by the acts approved respectively April 24, 1874, and the 10th of March, 1875, did recognize the consolidation into the International & Great Northern Railroad Company.

19. The defendant admits the allegations contained in Section 19.

20. The defendant denies all of the allegations contained in Section 20, but in making this denial it is not denied that the machine shops and round houses were at Palestine where they still are and are still being operated. It is denied that they were placed there and kept there upon any of the considerations stated or in part performance of any alleged contracts, promises and agreements.

21. The defendant denies all the allegations in Section 21 contained.

22. The defendant denies all of the allegations in Section 22 contained.

23. The defendant denies all the allegations in Section 23 contained.

24. The defendant admits all the allegations contained in Section 24 with the following exceptions:

a. It denies that the property was sold subject to the lien of a mortgage of date December 1, 1890, and admits that it was sold subject to the lien of a mortgage of date December 1, 1879, and admits that the allegations in that regard would be correct if the date 1890 were changed to 1879.

b. It denies that the foreclosure of the mortgage of June 15, 1881, was of and upon all the property of the International & Great Northern Railroad Company, but admits that it was upon all of the property as alleged in this Section 24 with the exception of the following, as stated in the decree of foreclosure:

"Excepting, however, all land grants, lands, land certificates, town lots, and townsites, owned or controlled by the said International & Great Northern Railroad Company, at the date of the execution of said second mortgage, namely, on June 15th, 1881, or any time prior to said date, which were not, on the first day of November, 1879, or thereafter up to the said 15th day of June, 1881, actually occupied and in use by the said Railroad Company and necessary to the occupation and maintenance of its lines of railroad; and excepting further any portions of said premises and property which may have been released from the lien and operation of said mortgage dated June 15th, 1881, and the releases for which have been duly filed for record in the proper county."

25. The defendant admits the allegations contained in Section 25 with the following exception on the implication of such allegations. It denies that the payment of the bid was made in cash except to the extent of $244,253.45, the balance being with second mortgage bonds.

26. The defendant admits the allegations contained

in Section 26 except that it denies that the associates of Frank C. Nicodemus, Jr., were nominal associates.

27. The defendant admits the allegations in Section 27 contained.

28. The defendant admits the allegations contained in Section 28, except that it denies the same wherein it is stated that the court forever discharged the railroads, franchises and properties of the sold out railroad company from the possession, custody and control of said court.

29. As to the allegations in Section 29 set out the defendant says,

a. It has not knowledge or information sufficient to form a belief whether or not Frank C. Nicodemus, Jr., had the knowledge imputed to him and of the notice in Section 29 stated, and therefore denies that he had such knowledge and notice.

b. As to the allegations that the defendant had actual knowledge and notice from the time of its organization to the present time of the claims asserted by the plaintiffs it says that it denies that it has such knowledge and notice from the time of its organization to the present time; except that it was informed that someone or persons at Palestine or the County of Anderson or the City of Palestine or someone, it cannot state more definitely, might make some claim such as is now pursued in this suit but on bases and grounds unknown to this defendant.

c. As to the allegation that the plaintiffs gave formal written notice of the causes of action herein alleged in advance of Nicodemus' bidding the defendant says that it concedes that some notice was given but denies that it has any knowledge or information thereof sufficient to form a belief as to whether or not the notice was given of the causes of action by plaintiffs alleged and therefore denies the same.

30. The defendant denies all of the allegations in Section 30 contained except that it admits the fact that the general offices, machine shops and round houses of the

sold out International & Great Northern Railroad have been located at the City of Palestine thereby not admitting that the general offices were located at such city continuously until in 1911, but denying that they were so continuously located and not admitting that the general offices of the Houston & Great Northern Railroad have ever been located at the City of Palestine, but denying that they have ever been so located; and except that as to the allegation that the machine shops and round houses of the Houston & Great Northern Railroad this defendant says that it has no knowledge or information thereof sufficient to form a belief thereon, and therefore denies that the machine shops and round houses of the Houston & Great Northern Railroad were ever located at Palestine; and except that it denies that a General Superintendent was ever maintained at Palestine, and except that it denies that such officers as are mentioned were at the time maintained at Palestine, and except that it denies that any of them were ever at Palestine for any considerable period of years.

31. The allegations in Section 31 the defendant admits except that it states that it has no knowledge or information thereof sufficient to form a belief as to whether or not the master of transportation and fuel agent were included in the general offices maintained at Palestine, and therefore denies the same.

32. The defendant denies all of the allegations in Section 32 contained.

33. As to the allegations in Section 33 the defendant has no knowledge and information thereof sufficient to form a belief as to what advice or information has been given to the plaintiffs and therefore denies the allegations in Section 33 contained. And defendant denies that it proposes to make any changes in violation of law.

34. The defendant denies the allegations in Section 34 contained.

35. As to the allegations in Section 35 contained the defendant denies that it has any knowledge or informa-

tion thereof sufficient to form a belief and that therefore it denies all of such allegations.

36. As to Section 36 the defendant denies that it has any knowledge or information of the matters therein alleged sufficient to form a belief and therefore denies such allegations.

37. The defendant denies all the allegations in Section 37 contained.

38. The defendant denies that it ever transferred its general officers to Houston. It admits that when it was organized and thereafter it had information that some sort of suit was threatened but denies all other state ments in Section 38 contained.

39. As to the allegations of Section 39 this defendant denies it has any knowledge or information thereof sufficient to form a belief and therefore denies the same.

40. As to Section 40 the defendant denies that the wrongs and injuries claimed by the plaintiffs exist.

41. The defendant admits the allegations in Section 41 contained.

42. The defendant admits the allegations in Section 42, not, however, admitting any legal consequences or proposition of law therein alleged or that any writ of injunction was duly or legally issued.

IV.

Further pleading, subject to all of the positions taken above, and preserving the same, the International & Great Northern Railway Company represents: It does not admit that any such alleged contracts as are set out in plaintiffs' petition were ever made, and denies that they were made; but further represents that if any such agreements or contracts were ever made, either with Reagan or with Hoxie, and were ever ratified, as alleged in the plaintiffs' petition, then that for more than two years after the making and the ratification of the same (they being verbal and not in writing) they were breached

and broken by the International & Great Northern Railroad Company, its agents and employees, by which breach and break of these alleged contracts, if they ever existed (which is not admitted but denied), and then by and upon such breach and break they became actionable, and that all of this happened and said cause of action arose more than two years and more than four years before the institution of this suit and more than two years and more than four years before the International & Great Northern Railroad Company was sold out. Wherefore, this defendant pleads the statute of two years and the statute of four years in bar of the plaintiffs' demands.

IV-a.

Further pleading, subject to all the positions taken above, and preserving the same, the International & Great Northern Railway Company represents: It does not admit that any such alleged contracts as are set out in plaintiffs' petition were ever made, and denies that they were made; but further represents that if any such agreement or contract as is alleged to have been made with Judge Reagan, representing the citizens of Palestine, was ever made, then such contract was breached and broken by the Houston & Great Northern Railroad Company, its agents and employees and officers in this: The Houston & Great Northern Railroad Company did not move its general offices and headquarters to Palestine and maintain and place its shops there, and round houses there, but more than two years elapsed after the making of said alleged contract and after the time had arrived for the performance thereof, before the International & Great Northern Railroad Company moved to Palestine and established there its headquarters and general offices and shops and round houses, and during such two years and more than two years, the general offices were maintained at Houston, Texas, in defiance of and in breach of said contract, if it ever existed, whereby such contract was breached and broken if ever made, for

more than two years before the institution of this suit. Wherefore the International & Great Northern Railroad Company pleads the Statute of Limitations of two years in bar of plaintiffs' demand and suit.

V.

Subject to all of its positions taken and referred to above, and insisting upon the same, this defendant specially pleads all of the allegations made by it in the last two subdivisions hereof, and says that plaintiffs' alleged contracts, if they ever existed, either in writing or in parol, were breached by the International & Great Northern Railroad Company, its agents, servants and employees, whereby, if there were ever an action for such breach it is barred, which breach and cause of action, if any there was, arose more than four years before the institution of this suit and more than four years before said railroad was sold out, and more than four years before the receivership thereof commencing in February, 1908. Wherefore, this defendant pleads the statute and statutes of four years' limitation in bar of the plaintiffs' action, if any they have.

VI.

And further pleading specially, subject to all of its positions taken above, and preserving the same and each of its contentions, the International & Great Northern Railway Company represents:

In the year 1881 all of the officers and employees of the International & Great Northern Railroad Company were moved by it from Palestine, Texas, except its station and local offices there, and all of the employees and general officers and all of the officers and employees belonging to the general offices mentioned in the plaintiffs' petition as far as existing were moved by the International & Great Northern Railroad Company, now sold out, to the City of St. Louis, in the State of Missouri, in breach of the alleged contracts plead by the plaintiffs; and that all

of such general officers and their offices, and the officers and employees mentioned in the plaintiffs' petition as far as existing continued to reside and remain in the City of St. Louis, State of Missouri, in contradiction of the alleged contracts and agreements, from in the year 1881 into the year 1888, whereby such contracts and agreements, if they existed, and if there was any action thereon, were breached and broken; and whereby, if any cause of action existed, a cause of action arose upon such breach and break, which took place in the year 1881, and that there has never been any waiver of the Statute of Limitation by said railroad, or by anyone, in writing or otherwise, or waiver thereof, either of the two years' statute or of any four years' statute. Wherefore the International & Great Northern Railway Company pleads the statute of limitation of two years and the statute and statutes of limitation of four years in bar of the plaintiffs' action.

VII.

Further, preserving all of its positions taken above, and insisting upon the same and subject to the same, the International & Great Northern Railway Company specially pleads as follows: The alleged contracts sued on were neither of them and none of them in writing, and the performance was incapable of being completed within the time prescribed by law, upon both sides or upon either side; nor was there any contingency upon such contracts by which there was a possibility of the performance being released or completed by either side within a year. Wherefore, the defendant pleads the statute of frauds in bar of plaintiffs' action, and because such alleged contracts were not reduced to writing.

VIII.

Reserving all of its positions taken above and subject to the same, the International & Great Northern Railway Company specially pleads as follows:

1. On the 25th of February, 1908, the Mercantile

Trust Company filed its bill against the International & Great Northern Railroad Company, in the Circuit Court of the United States for the Northern District of Texas, Fifth Circuit, wherein it was set out that on March 1st, 1892, that railroad company had executed its mortgage to the Mercantile Trust Company, Trustee, for the purpose of securing an issue of bonds for the aggregate principal amount of $3,000,000, bearing interest at the rate of four per cent per annum, payable until and including September 1st, 1897, only, out of the net earnings, and thereafter absolutely. It was alleged that default had been made in payment of interest; that the railroad was insolvent and prayer was made for a decree and foreclosure and sale, and also for the appointment of a receiver. This suit was styled The Mercantile Trust Company, Trustee, Complainant, vs. The International & Great Northern Railroad Company, Defendant, and was numbered 2501 on the Equity Docket of the court. The defendant appeared and on February 25th, 1908, the Court appointed Thomas J. Freeman, Receiver of all of the railroads, lands, franchises and properties of the railroad, covered by the mortgage sued on, and the Receiver proceeded at once to qualify under the terms of this decree and to take charge of, control and operate the properties. This mortgage created a lien upon all the lands, tenements and hereditaments owned by the railroad company, and thereafter to be acquired by it, including tolls, fares, freights, rents, income, issues and profits thereof, and all the reversions, remainder and remainders thereof. No foreclosure has been had of this mortgage, and the suit so brought is still pending, undisposed of, in the United States District Court for the Northern District of Texas, at Dallas, such court being the successor of the United States Circuit Court. Thomas J. Freeman qualified as Receiver on the 28th of February, 1908. A copy of the Bill of Complaint is hereto attached, marked Exhibit "A" and made a part hereof.

2. The suit mentioned in paragraph 1 was docketed

at the Fort Worth division of the Northern District of Texas, but on March 7th, 1908, by agreement of all parties, was transferred by the order of the court from the Fort Worth Division to the Dallas Division, where it is still pending in the United States District Court. A copy of the appointment of the Receiver is hereto attached and is marked Exhibit "B" and made a part hereof.

3. Thereafter, in the same court, The Farmers Loan & Trust Company, as Trustee, applied for permission to file in that court its Bill of Complaint, which was granted by the Judge, April 20th, 1908. Whereupon, on the same day, The Farmers Loan & Trust Company filed its bill versus the International & Great Northern Railroad Company, The Mercantile Trust Company, and Thomas J. Freeman, Receiver, as Defendants, the case being docketed and numbered 2514 Equity.

In this Bill the Complainant set out that, on or about the 15th of June, 1881, the Railroad Company had executed its bonds for the aggregate principal amount of $10,391,000, payable in gold at the agency of the company in New York City on the first of September, 1909, bearing interest, evidenced by coupons, at the rate of six per cent per annum from March 1st, 1881, payable in gold; that to secure these bonds duly delivered and which had passed to various persons, it executed its mortgage and deed of trust of the same day, whereby it conveyed to The Farmers Loan & Trust Company, as Trustee, of the City of New York, all the lands, except as therein specified, tenements and hereditaments of the railroad company, owned or hereafter to be acquired, including all of its tracks and railroad equipment, with all of its corporate rights, privileges, immunities and franchises, owned or to be acquired, including the franchise to be a corporation, and all the tolls, fares, freights, rents, income, issues and profits thereof, and otherwise as more particularly in the deed of trust and mortgage set out. It was further alleged in this Bill that the authorized bonds had been

issued and negotiated for value, and were valid outstanding obligations of the railroad company. Further, it was alleged that the railroad company had defaulted upon its interest to a large amount and the proceedings by the Mercantile Trust Company, mentioned in sub-section 1, above, were described. It was alleged that there was a prior first mortgage made to Kennedy and Sloan, Trustees, dated November 1st, 1879, that the railroad was embarrassed and insolvent, and prayer was made for the appointment of a receiver and for foreclosure and sale of the properties and a full settlement of all matters. A copy of this Bill and mortgage is attached hereto, marked Exhibit "C". It is now alleged that all allegations and statements of said bill and mortgage are true, and they are made part hereof; and further, all allegations recited above as made in said bill are now alleged to be true; and that the bonds secured by said mortgage were duly issued.

4. Upon consideration of this Bill and having jurisdiction in cause No. 2514, on the 20th day of April, 1908, the Judge of the United States Circuit Court appointed Thomas J. Freeman Receiver as prayed for, and in this cause, all as appears by the decree attached hereto and marked Exhibit "D", and made a part hereof.

5. On the 14th day of May, 1908, George J. Gould, Frank J. Gould, Edwin Gould, Helen M. Gould, Pacific Express Company, Missouri Pacific Railway Company, and George J. Gould, Edwin Gould, Howard Gould, and Helen M. Gould, as Executors of the will of Jay Gould, applied to said Circuit Court for permission to file their bill of complaint against the International & Great Northern Railroad Company, which application was granted the same day.

6. Under the permission given above on the second of June, 1908, in Equity Cause No. 2525, in the Circuit Court of the United States for the Northern District of Texas, at Dallas, the last mentioned applicants filed their Bill in Equity against the International & Great Northern Railroad Company, wherein they set out among other

things, that, in addition to the second and third mortgages executed by this railroad, there was a first mortgage executed by it of date the first of November, 1879, to Kennedy and Sloan, as Trustees, who had been substituted by the Bowling Green Trust Company of New York as Trustee, and that this first mortgage was for the principal sum of $11,290,000 and was a valid lien upon all of the properties, rights and franchises, of the International & Great Northern Railroad Company. The suits and receiverships above mentioned, as pending and taken out were mentioned, and it was alleged that the Complainants in their various capacities had recovered judgments in the aggregate amounts of $4,929,108.46 against the International & Great Northern Railroad Company in the 14th District Court of Dallas County, Texas, which judgments were exhibited with the Bill, and it was alleged that none of them had been paid. It was further alleged that the International & Great Northern Railroad Company was wholly unable to pay and discharge said judgments by reason of admitted insolvency and on other grounds; but that the railroad had certain property and assets not embraced in the three mortgages, either intangible or so bound up with properties covered by the mortgage as now to be in the possession of the receiver, and the value thereof inhering in the use of the same in connection with the operation of the railroads; that there was a danger of multiplicity of suits and a necessity for the compact conservation, by the order of the court, of such property and its being brought under the receivership now existing, for which there was prayer and for marshalling the unmortgaged properties and ascertainment of the debts and liens and priorities.

7. On the second of June, 1908, the prayer in the above suit #2525 Equity for the appointment of the Receiver was considered by the Honorable A. P. McCormick, United States Circuit Judge, Fifth Circuit, and thereon a decree entered appointing Thomas J. Freeman upon the terms and conditions set out in the decree of the

court, hereto attached and marked Exhibit "E"; and on this appointment, and all others, Thomas J. Freeman accepted and acted as Receiver.

8. And on or about the same day in Equity 2514 Thomas J. Freeman Receiver, in all three cases, filed his respective applications that these causes should be consolidated. Thereupon, the court made his order of June 2nd, 1908, directing their consolidation and applying previous decrees of the Court and orders as in the order of consolidation set out, hereto attached, marked Exhibit "F", hereto attached and made a part hereof, and consolidated cause being No. 2501.

9. On the 7th of June, 1909, The Farmers Loan & Trust Company, as Trustee, in Equity 2501, the consolidated cause, having previously obtained the leave of the court, filed a Supplemental Bill, affirming the allegations of their original Bill, and setting out additional defaults as alleged and praying for the benefit of the proceedings taken under the original bill for relief already prayed and otherwise as in the Supplemental Bill set out, a copy whereof is attached hereto and marked Exhibit "G" and made a part hereof. The allegations in this supplemental bill contained are now alleged to be true and that the said mortgage, as well as the first and second mortgages, were all duly issued and authorized regularly by the directors and stockholders of said road.

10. The above proceedings being had and commencing with the institution of the first suit, and thereafter, said Circuit Court entered various administrative orders providing for the maintenance, control and management of the properties and their protection, the issue of receiver's certificates to raise necessary funds, the payment of interest on the first mortgage bonds, all as sufficiently appears in the decree next exhibited herewith; and proceeding on the demand of the trustee of the second mortgage bonds, on May 10th, 1910, the court entered the decree of foreclosure of the second mortgage ascertaining and settling various indebtednesses and matters at issue

and directing the properties of the railroad to be sold upon the terms and conditions and all as in the decree set out. This decree foreclosed the lien upon all of the properties, tangible and intangible, together with all the corporate rights, privileges, immunities and franchises of the defendant and all other properties as in the decree stated, and declaring that all of the right, title, estate and equity of redemption of the defendant and all parties to Equity Cause 2514, and of all persons claiming or to claim under them, or either of them, of, in or to the premises, property and franchises, and every part and parcel thereof, should be forever barred and foreclosed, and also that the lien of the second mortgage upon the properties was prior and superior to every other lien in favor of any party to this cause, and was subordinate only to the lien of the first mortgage, except as in the decree stated, and also that the Master Commissioner making the sale should receive no bid from any person on the property until said person should have deposited with him the sum of $100,000, to be returned in case his bid was not accepted, but to be held in case his bid was accepted on account of the purchase price; and that a further payment for the property might be made in bonds and coupons secured by the second mortgage, taken at a valuation equal to the amount said bonds and coupons would be entitled to receive in cash out of the amount bid for said property, on the terms and conditions as in the decree stated; and further, that the property should be offered for sale subject to the first mortgage and to any unpaid indebtedness or liability contracted or incurred by the defendant in the operation of its railroad, which the court might thereafter order or decree to be prior or superior to the lien of the second mortgage, except such as should be paid or satisfied out of the income of the property in the hands of the receiver under the orders of the court, entered or to be entered; and subject also to such debts, claims, liens and demands of whatsoever nature theretofore incurred or created or which

might thereafter be incurred or created by the receiver under orders of the court theretofore or thereafter entered, and not paid or to be paid out of the proceeds of the sale. Also, it was decreed that the Master Commissioner by public notice should require holders of any claim for unpaid debts or liabilities to present the same for allowance; and that, if they should not be presented within three months after the first publication of such notice, they should not be enforceable against the receiver or the property sold or the purchaser or his successors or assigns. It was furthermore decreed that the form of the conveyance to the purchaser should be settled upon by the Master Commissioner or the court, or a judge thereof, should there be any question thereon; and that, in default of such conveyance, the decree should operate as a conveyance, and that the purchaser or purchasers, his or their successors and assigns, should have the right, within six months after the completion of the sale, or delivery of the deed of the Master Commissioner, to elect whether or not to assume or adopt any lease or contract made by the defendant railroad company, and that such purchaser or purchasers, his or their successors and assigns, should not be held to have assumed any of such leases or contracts which he or they should so elect not to assume, such election to be shown by filing with the Clerk of this Court, from time to time, within said period, a description of such leases or contracts which he or they should so elect not to assume; and it was further provided in this decree that all questions not thereby disposed of, including the discharge of the receiver and the settlement of his accounts, and including the disposition of all claims theretofore filed or thereafter to be so filed, in accordance with the provisions of the decree, were reserved by the court for future adjudication, and it was declared: "The court reserves jurisdiction of this cause and the property affected by this decree for the purpose of final disposition of all such questions and matters; and any party to this proceeding and any claimant whose

claims have been or shall be so filed herein, may apply to the court for further orders and directions at the foot of the decree"; and otherwise and generally in said decree, the court reserved jurisdiction directly and impliedly of the properties and for the purpose of enforcing the decree in all of its terms. A copy of this decree is attached hereto and marked Exhibit "H" and made a part hereof.

11. On Sept. 7th, 1910, the court entered an order deferring the sale provided for in the decree last above set out to October 6th, 1910, or to some later date to which the same might be again adjourned.

12. On November 28th, 1910, the court made an order directing that the case of the Marshall Car Wheel & Foundry Company, Complainants, vs. The International & Great Northern Railroad Company, et al, Defendants, No. 2623, in Equity, should be consolidated with the previously consolidated cause, and that all orders and decrees in said last cause be extended and applied to the newly consolidated cause.

13. The sale was again adjourned by the order of the court, and under its order, or in accordance therewith, to May 16th, 1911; but on the 12th of May, 1911, the court filed another order, decreeing that the sale should be adjourned to June 13th, 1911, a copy of which last order is hereto attached, marked Exhibit "I".

14. The sale was made as provided in the decree by the Master Commissioner at public outcry, on June 13th, 1911, at Palestine, Texas, to Frank C. Nicodemus, Jr., and duly reported to the court and by the court in all things approved, as appears by the order of court dated September 25th, 1911, a copy of which is attached hereto and marked Exhibit "J" and made a part hereof, and also a copy of the report of sale marked Exhibit "J-1" and made a part hereof.

15. By charter dated the 8th of August, 1911, the International & Great Northern Railway Company, the defendant herein, as an independent and new railway company, was incorporated under the laws of the State of

Texas, and a copy of the charter of that railway is attached hereto and marked Exhibit "K" and made a part hereof. This charter authorized the defendant to acquire, own, maintain and operate the railroads heretofore forming the International & Great Northern Railroad Company and which had been purchased by Frank C. Nicodemus, Jr., at the sale of the properties mentioned above, and all as stated in said charter.

16. On the 31st day of August, 1911, a deed was executed, whereby the Master Commissioner, the International & Great Northern Railroad Company, Thomas J. Freeman, Receiver, Frank C. Nicodemus, Jr., the above purchaser, and The Farmers Loan & Trust Company, Trustee of the second mortgage, conveyed to the International & Great Northern Railway Company the properties purchased at the sale, all as appears by a copy of the deed hereto attached, marked Exhibit "L" and made a part hereof. Having acquired those properties the International & Great Northern Railway Company has since such acquisition operated the same under said charter and the laws of Texas.

17. The amount bid at said sale by Nicodemus was $12,645,000 of which as prescribed by the decree he deposited at the time of his bid $100,000 and thereafter on or about September 13, 1911, he paid the additional amount of $144,253.45, making the total cash payment $244,253.45, and he made the remaining payments under the terms of the decree as follows, and through the Farmers Loan & Trust Company in second mortgage bonds of the face value, that is, for the principal amount as next stated to which was to be added the amount of accrued interest, to-wit:

On or about September 13, 1911	$ 164,500
On or about September 13, 1911	9,182,000
On or about September 13, 1911	990,000

Total in bonds, principal, not including interest, $10,336,500. To these bonds were attached the coupons ma-

turing March 1, 1908, and subsequently, and interest was to be added.

Whereby by such payments the total amount of the bid under the terms of the decree of $12,645,000 was paid.

The apportionate amount applicable out of the bid to the second mortgage bonds not used as means of payments was to-wit, of the principal amount of $54,500 was paid to apply thereto in the sum of $65,383.89, as appears by the report of the Master Commissioner set out above.

It thus appears that the purchase was made with the decree with the exception of $244,253.45; which decree and the bonds carried thereinto and representing the same it thus appears was owned by Frank C. Nicodemus, Jr., or the persons whom he represented at the time of the purchase, and also that there was a deficit and the amount of the decree was not realized.

18. The above causes and consolidated cause are still pending upon the docket of the United States District Court for the Northern District of Texas, at Dallas, Texas, successor to the United States Circuit Court for the Northern District of Texas.

19. The International & Great Northern Railway Company, the defendant, here now states and represents that it purchased the above described properties upon the faith, guarantees, and statements of the proceedings held in the United States Court and the reservations of the decree therein.

20. All the notices provided for in the decree of foreclosure and the supplements thereto were duly given both of the making of the sale and of the invitation to all claimants to intervene and present their claims; they being given and published exactly as provided for by the decree of the court.

21. The International & Great Northern Railway Company, exercising the privilege and right provided for by the decree, the International & Great Northern Railway Company being authorized and directed so to do, by resolution of its Board of Directors, a copy of which is

attached hereto, marked Exhibit "M", did within six months after the completion of the sale and the delivery of the deed of the Master Commissioner, elect that they would not assume or adopt, and that it, the International & Great Northern Railway Company electing for itself, would not assume or adopt any contract whatsoever made either by the International & Great Northern Railroad Company or the Houston & Great Northern Railroad Company with the plaintiffs herein or any of them, and which they now sue on; such election being shown by filing with the Clerk of the United States Circuit Court at Dallas, Texas, within said six months, a description of such contracts which were elected not to be assumed; a copy of which election and statement is attached hereto and marked Exhibit "N"; and further, within said time exercising due precaution, though not required as it is advised by the decree of the court, this defendant caused notice of its intention and election not to perform or assume or adopt said alleged contracts sued on, to be served upon the Commissioners' Court of Anderson County, and the City Council of the Town of Palestine, by reading and delivering the same to said bodies at regular meetings, and copies of such notices are hereto attached, marked Exhibits "O" and "P" respectively. In making such election this defendant did not acknowledge the existence of the alleged contracts sued on, which it had always denied did exist, but declared and elected not to adopt and assume them, if they existed.

22. So pleading and alleging, this defendant represents that this litigation now pending in this court is in defiance of and in contradiction to the decree of foreclosure entered by the United States Circuit Court for the Northern District of Texas in consolidated Equity No. 2501, and which is set out above, and to the proceedings consequent and in pursuit thereof, and the sale made thereunder and confirmed by the court.

23. That all possible matters for litigation, involved in this case, if they now can be litigated, were reserved in

such decree and proceedings in the United States Court and are only subject to be litigated in that court.

Wherefore, upon the above, the International & Great Northern Railway Company represents:

(a) The decrees and proceedings in the United States Court disposed of and barred this action.

(b) If such decrees and proceedings did not dispose of and bar this action, then the litigation of all and every question involved in this suit was reserved by that court for its sole adjudication, and for the adjudication of its successor, the United States District Court for the Northern District of Texas.

(c) That the effect of such decrees and proceedings in the United States Court was to assure to any purchaser or person holding under such purchaser the right that any such claim or causes of action, as is asserted herein, as a liability of the sold out railroad or its constituent should be asserted and litigated only in the United States Circuit Court, now succeeded by the United States District Court, for the Northern District of Texas, upon which assurances the defendant purchased the properties and upon which it relied and has relied from the beginning, and that it should not be sued in any other forum on account of any contract or liability of the International & Great Northern Railroad Company or any of its constituents.

(d) Wherefore, relying upon the decree of foreclosure of the United States Circuit Court and the other proceedings therein, the International & Great Northern Railway Company respectfully submits to this court that each and every of the questions raised herein involves the jurisdiction of the United States District Court for the Northern District of Texas, and infringes upon such jurisdiction and the express and implied terms and reservations of its decree of foreclosure and other decrees and proceedings set out above; all of which involve a Federal question, now seasonably thus presented to this court in bar of this suit and in defense thereof in this forum; and

it is respectfully represented to this court that it has no power or right to place itself in conflict with the United States Court, first acquiring jurisdiction upon the grounds set out, and this defendant invokes the Constitution and statutes of the United States, and the powers, jurisdiction and decision of said United States Court; and also, not limiting the above, Section 709 of the Revised Statutes of the United States carried into Section 237 of the Act of Congress of March 3, 1911 (36 Stat., 1087) in protection of the title, right, privileges and immunities, established by and acquired under the authority of the decree and proceedings of said court.

IX.

Further, specially pleading, subject to its various positions taken above, and insisting upon and preserving each of them, the International & Great Northern Railway Company represents as follows:

1. It repeats and re-avers all of the allegations contained in Section VIII. of this answer, being sub-sections 1 to 21 inclusive, and refers to the same and repeats the same as a part of this plea.

2. By the act of September 1st, 1856, the legislature of the State of Texas, constituted a corporation, designated the Houston Tap and Brazoria Railway Company, with the right of locating, building, etc., a railroad from the City of Houston to the Brazos River and to the Colorado River, and constituting such railroad a public carrier.

3. In Section 8 of the act it was provided that there should be an election held in the City of Houston of not less than five directors after giving public notice of the election; and furthermore, that "a majority of the Board of Directors shall have the power of a full Board, and all conveyances and contracts executed in writing signed by the President and countersigned by the Treasurer or any other officer duly authorized by the directors under the seal of the company and in pursuance of the vote of the directors", shall be valid and binding.

4. The Houston Tap and Brazoria Railway Company was constructed to the Brazos River in Brazoria County under this charter, and falling in debt to the State of Texas on account of money lent from the school fund, it was provided by the act of the legislature of August 15th, 1870, that the road should be sold. This was entitled "An Act to provide for the sale of the Houston Tap & Brazoria Railway" and under this act the road was duly sold and afterwards purchased by the Houston & Great Northern Railway Company with all its properties and franchises.

5. The act incorporating the Houston Tap and Brazoria Railway Company was entitled "An Act to incorporate the Houston Tap and Brazoria Railway Company."

6. The Houston & Great Northern Railroad Company was incorporated by an act entitled "An Act to incorporate the Houston & Great Northern Railroad Company", by the Legislature of the State of Texas October 22nd, 1866, by which T. M. Bagby and others were authorized to open books and receive subscriptions and proceed to the incorporation of the road.

In pleading special portions of the acts plead anywhere in this answer, it is not intended not to plead or refer to the whole of it, nor is the position waived that it is necessary to plead the same, but they are all plead by their respective titles, and so of all acts incorporating railroads or consolidating them, herein.

7. In Section 2 of said act, it was provided "A majority of the directors shall constitute a quorum to do business and shall have the power of a full board and all conveyances and contracts in writing signed by the President and countersigned by the secretary or any other officer duly authorized by the Board of Directors under the seal of the company, when the same is in execution of an order of the Board, shall be binding and valid."

8. By Section 6 of the act the company was author-

ized to construct a railroad from the City of Houston northward to Red River.

9. By Section 11 of said act it was provided "that said company shall have the right to form a junction with any other railroad at any point between Houston and Clarksville or at either of its termini."

10. By Section 13 of the act it was provided "The annual meeting of the stockholders of this company shall be held at the principal office in the City of Houston on the first Monday of December of each year, which shall be a day for the transaction of business by the stockholders, at which time the annual election of directors shall take place."

11. By Section 15 of the act it was provided: "This charter shall remain in force for the period of 50 years from the date of completing said Railway; provided the conditions set forth are fully complied with."

12. The principal office of the Houston & Great Northern Railroad Company was established, in accordance with the provisions of its legislative charter, in the City of Houston in Harris County, Texas, where was the domicile of the corporation.

13. The control and execution of contracts, under the provision of the charter and the provisions of the by-laws of this railroad, and of the International & Great Northern Railroad, were and continued to be lodged with the Board of Directors, which alone had the power to make contracts.

14. The Victoria & Columbia Railway was incorporated November 13th, 1866, by the act of the Legislature of Texas of that date, entitled "An Act to incorporate the Victoria & Columbia Railway Company" but no railroad was ever constructed under this act.

15. The Huntsville Branch Railway Company was incorporated by the act of the legislature of Texas, dated April 4th, 1871, by an act entitled "An Act to incorporate the Huntsville Branch Railway Company" for the purpose of constructing a railroad from a convenient point

on the Houston & Great Northern Railroad to the town of Huntsville in Walker County, Texas.

16. On May 8th, 1873, the Legislature of the State of Texas passed an act entitled "An Act to consolidate the Houston Tap and Brazoria Railway, the Huntsville Branch Railway, and the Victoria & Columbia Railroad with the Houston & Great Northern Railroad" whereby it was declared that all of said railroads, except the Houston & Great Northern Railroad were "made and declared to be to all intents and purposes in law a part of the Houston & Great Northern Railroad, and shall be under the control and management of the said Houston & Great Northern Railroad in like manner as every other part of their railroad, and all rights, privileges and franchises granted or secured in the charter of either or all of the aforesaid corporations, shall inure to and be exercised and enjoyed by the said Houston & Great Northern Railroad Company as fully and to the same intent as they could have been by either of said companies."

17. The International Railroad Company was chartered August 5th, 1870, by the act of the legislature of the State of Texas on that date, whereby James W. Barnes and others and their successors and associates were constituted into a body corporate, which act was entitled "An Act to incorporate the International Railroad Company and to provide for the aid of the State of Texas in constructing the same."

18. By Section 2 of the act this road was authorized to build and operate a railway and telegraph line from a point on Red River across the State of Texas by Austin and San Antonio to the Rio Grande River, at or near Laredo, and otherwise as in the act provided.

19. By Section 14th of the act it was provided: "Said company shall have the right to connect itself with any other railroad company within or without the State, and under such terms as to it shall seem best to operate and maintain its said railroad in connection or consolidation with any such other railroad company."

20. By Section 16 of this act it was provided: "The State expressly reserves the right to regulate the rates of freight and passage upon said railroad, making no distinction between said railroad or any other in said State."

21. By Section 7 of the act it was provided that "The immediate control and direction of the affairs of said company shall be vested in a Board of not less than five directors who shall elect from their number one president and one vice president."

22. By Section 8 of the act it was provided: "The principal office of said company shall be established at such point on the line of said railway as may be deemed most convenient for the transaction of its business and may be moved, from time to time, to such places on said line as the progress of the work of construction may render expedient and necessary."

23. In the years 1872, 1873, or 1874, or both, by agreements of the Board of Directors and of the stockholders, the International Railroad and the Houston & Great Northern Railroad were consolidated.

24. By the act of April 24th, 1874, entitled: "An Act to authorize the International & Great Northern Railroad Company to issue bonds" the existence of the consolidation was recognized as an existing fact, and the consolidated road authorized to issue bonds and borrow money and execute a mortgage and convert the bonds of the International Railroad or of the Houston & Great Northern Railroad into the stock of the International & Great Northern Railroad Company.

Said Act of the Legislature validating such consolidation provided in substance and effect "that all acts heretofore done in the name of either of said Companies shall have the same *binding force* and effect upon the said International and Great Northern Railroad Company, that they have had upon the respective Companies; and all rights and liabilities existing between said Companies, or either of them and the State, or third parties shall inure to said International and Great Northern Railroad

Company the same as they existed with the respective Companies."

25. By the act of March 10th, 1875, of the Legislature of Texas, entitled: "An Act for the relief of the International Railroad Company, now consolidated with the Houston & Great Northern Railroad Company under the name of the International & Great Northern Railroad Company," it was recited that the two roads had been consolidated under the name of the International & Great Northern Railroad Company and provision made for a settlement of certain matters between the State and the International Railroad, and the issue of land certificates in settlement thereof on the terms of the act.

26. By reason of the above legislative charters and acts of the respective corporations and legislation, the International & Great Northern Railroad Company, now sold out, was formed, not under one charter, but by the consolidation set out above, there never having been issued to it after consolidation a new charter.

27. After the formation of the International & Great Northern Railroad Company, various additions and extensions of trackage were made to the properties of the International & Great Northern Railroad Company.

28. The International Railroad Company commenced the construction of its road and had its headquarters at Hearne, Texas, where they remained until the consolidation with Houston & Great Northern Railroad and until they were moved to Houston, Texas.

29. On moving the headquarters and general offices of the International Company to Houston, Texas, they were consolidated at Houston, Texas, in Harris County, with the general offices and headquarters and domicile of the Houston & Great Northern Railroad Company, where the domicile of the Houston & Great Northern Railroad Company was.

30. The headquarters and general offices of the consolidated International & Great Northern Railroad Company remained at Houston, Texas, the headquarters of

the company and where it was provided the domicile and principal office of the Houston & Great Northern Railroad Company should be. The terms of the consolidation subjected the consolidated company to the obligations and duties of both constituents.

31. The headquarters and general offices of the International & Great Northern Railroad Company remained at Houston, Texas, until in June, 1875, when they were removed to Palestine, Texas, whence they were removed to St. Louis, Mo., in the year 1881.

32. By the by-laws of the Houston & Great Northern Railroad Company and the International Railway Company (binding on and assumed by the International & Great Northern Railroad Company) and by the by-laws of the International & Great Northern Railroad Company, as well as by the laws of the State, the control of the respective corporations and of the consolidated corporation were lodged in the respective Boards of Directors, by which all contracts had to be approved in order to become the contracts of the roads, and this was also provided for in the charters of the constituent companies, whereby the control and the power to make contracts was lodged in such Board or Boards.

33. Neither by the charters nor by the by-laws, all made in conformity to the general law, was Grow or Hoxie authorized to make the agreements alleged by the plaintiffs to have been contracts formed by them.

33-a. On or about the 1st of April, 1871, the International Railroad Company, under the resolutions of directors and stockholders, executed a mortgage and deed of trust to John A. Stewart and William H. Osborne as Trustees, which was duly recorded in the several counties of the State of Texas and in Anderson County. This mortgage was executed for the purpose of securing certain bonds, of which there was outstanding at the date of the foreclosure thereof, next below described, 4,224 bonds for $1000 each of the date of the mortgage, payable in United States gold, and bearing interest at the rate of

seven per cent per annum, payable semi-annually in gold.

33-b. Default being made on said bonds or the interest, they were sued on in the United States Circuit Court for the Western District of Texas, at Austin, in Equity Case No. 138 for foreclosure and recovery, in which suit the Trustees Stewart and Osborne were complainants and the International Railroad Company, the International & Great Northern Railroad Company, John S. Bonds and Thomas W. Pearsall, Trustees, etc., Moses Taylor and William Dodge, Trustees, etc., were defendants; and in this suit it was decreed that there was due the complainants and the holders of the bonds or coupons by the International Railroad Company, and its successor, the International & Great Northern Railroad Company, on the 1st of April, 1879, $5,457,678.20 in gold, and that, the International Railroad and International & Great Northern Railroad were severally chargeable with the whole amount, and that the complainants were entitled to collect from these companies and from the mortgaged properties, directed to be sold, this amount, together with the charges, expenses, costs and allowance in the decree provided for. Provision was made for the sale of the property under the direction of Burr G. Duval, the Master, that it should be sold in one parcel and conveyance made as in the decree provided. This decree foreclosed the lien and mortgage as ascertained and stated in the decree, upon the International Railroad Company's railway and all of its properties as in the decree set out, together with all the corporate rights, privileges and franchises of said railroad, including the franchise to be a corporation, which the International Railroad possessed on the 1st day of April, 1871, or which it afterwards acquired and which was necessarily material and useful in connection with the ownership, use and operation of the said railway. A copy of the decree, marked Exhibit "Q" is attached hereto and made a part of this pleading.

33-c. As authorized and directed by this decree, Du-

val, the Master, made sale of said properties included in the mortgage and foreclosed upon as alleged above and as ascertained and settled by the decree of the court, for a consideration of $500,000 more or less, to John S. Kennedy and Samuel Sloan as Trustees, and to the survivor of them in fee simple absolute.

33-d. The sale last mentioned above being reported by the Master, Duval, to the court, the same court on the 4th of August, 1879, entered its decree confirming the sale and directing the master upon the payment to him of all balance due of the bid, to convey the property sold to Kennedy and Sloan, Trustees, by a conveyance vesting said properties, including the chartered powers and privileges of the International Railroad Company, and of the International & Great Northern Railroad Company so far as the latter succeeded to the title of the International Railroad Company and the true ownership of the road, with all the powers, rights, franchises, privileges and benefits of the International Railroad Company and of the International & Great Northern Railroad Company in Kennedy and Sloan as provided in the decree of foreclosure and as provided in the decree confirming the sale, all as appears in a copy attached hereto, made a part hereof and marked Exhibit "R".

33-e. On or about the 14th of October, 1879, Duval, the special master, in pursuance of the order of sale, the decree of foreclosure, the terms of the mortgage foreclosed, all of which were ascertained and truly settled and stated in the decree, conveyed to Kennedy and Sloan all of the property sold, reciting the payment to him of the full amount of the bid, and conveyed the International Railroad Company's railway and all its corporate rights, privileges and franchises, and also the franchises and chartered powers and privileges of the International & Great Northern Railroad so far as the latter succeeded to the title of the International Railroad, and all property covered by the mortgage described in the decree, a copy of which deed is hereto attached and made a part hereof

and marked Exhibit "S", which deed having been duly executed was duly delivered.

33-f. On the 15th of January, 1874, the International Railroad Company under due resolutions of its directors and stockholders, executed a mortgage and a deed of trust to John S. Barnes and Thomas W. Pearsall securing the indebtedness next below stated, as ascertained and settled in the decree of foreclosure of such mortgage, and also on the 15th of January, 1874, the Houston & Great Northern Railroad Company under adequate and due resolution executed a mortgage to the said Barnes and Pearsall as Trustees to secure an indebtedness as in the decree next below stated and in the mortgage set out, and these mortgages mortgaged the property and conveyed the property to trustees which is described and ascertained and stated in the decree of foreclosure next below described.

33-g. Default being made on such mortgages, John S. Barnes and Thomas W. Pearsall as Trustees sued the International & Great Northern Railroad Company in the United States Circuit Court for the Western District of Texas at Austin, in Equity No. 132 on the docket of that court, and the case proceeded for foreclosure of the above mortgages on August 4, 1879. The court entered its decree for certain amounts and for foreclosure, wherein it was decreed that the mortgages above mentioned were valid; that there was outstanding on them 2,448 bonds for $1000 each secured by the mortgage of the International and 3,062 bonds for $1000 each secured by the mortgage of the Houston & Great Northern; that the International & Great Northern was the successor of both mortgagors and had assumed their obligations; and that there was due to the complainants interest and principal on said mortgages $8,297,226.93; that by the mortgage of the International Railroad mentioned, all of its railway was covered and properties as in the decree stated, including all corporate rights, privileges and franchises of that company, whether then held or thereafter ac-

quired, and that, by the mortgage executed by the Houston & Great Northern there was mortgaged all of that company's railway built or to be built and as in the decree described, and all of its franchises and rights, including all of its property, real and personal; that both series of mortgages had been defaulted upon and that all of the property mortgaged by the International Railroad should be sold as one property, and all of the property mortgaged by the Houston & Great Northern Railroad be sold as one property; and it was otherwise decreed as in the decree set out, that the sale should be made to the highest bidder without reserve. A copy of said decree in cause No. 132 is attached hereto and made a part hereof and marked Exhibit "T."

33-h. Acting under the foregoing decree, the Master, Duval, sold the above described properties to John S. Kennedy and Samuel Sloan, Trustees, and made report on his sale to the court, which thereupon on the 14th of August, 1879, confirmed the sale and directed the Master to convey to the said Kennedy and Sloan all the property so sold, vesting in them title thereto and the true ownership of said roads, with all the powers, rights, privileges, franchises and benefits of the International Railroad Company, of the Houston & Great Northern Railroad Company, and of the International & Great Northern Railroad Company, on the terms of the decree of approval, which is attached hereto, marked Exhibit "U," and made a part hereof.

33-i. In pursuance of this decree of approval Duval, the Master, executed a deed to Kennedy and Sloan, Trustees, the purchaser, whereby he conveyed to them all of said properties so sold, and to the survivor of them, in fee simple as Trustees, a copy of which deed is attached hereto, marked Exhibit "V," and made a part of this pleading.

33-j. On or about the ——— day of ——— the Houston & Great Northern Railroad Company, and not later than the month of February, 1873, authorized and di-

rected the execution of a mortgage and deed of trust, which was duly made to Moses Taylor and W. E. Dodge to secure a bond issue, and as more completely described in the next number below. This bond issue was defaulted upon.

33-k. The bond issue being defaulted upon, Moses Taylor and W. E. Dodge, Trustees in the mortgage, as complainants, sued the Houston & Great Northern Railroad Company, the International & Great Northern Railroad Company, John A. Stewart and William H. Ozman, Trustees, etc., Hayes, Receiver, and Barnes and Pearsall, Trustees, in Equity Cause No. 137, in the United States Circuit Court for the Western District of Texas at Austin, and on April 15, 1879, that court entered its decree for the recovery of money and foreclosure, wherein it was stated that the material facts set forth in the bill of complaint were true, and decreed that the International & Great Northern Railroad Company was the successor and assignee of the Houston & Great Northern Railroad Company and had assumed its obligations, including the bonds sued on; and that on April 1, 1879, there was unpaid on said bonds $5,404,827.75; that the mortgage and deed of trust was duly executed and that by it the Houston & Great Northern Railroad Company had mortgaged all of the company's railway, built or to be built, together with all of its franchises and rights and all of its property, real and personal, except certain lands, and all as in the decree more fully set out; and that both the Houston & Great Northern and its successor, the International & Great Northern Railroad Company, had defaulted on the interest on the bonds and that there should be a foreclosure, which was decreed, and that the property should be sold by Duval as Special Master on the terms stated in the decree. This decree is attached hereto, is marked Exhibit "W," and made a part hereof.

33-l. Acting under such decree and in accordance therewith, Duval made sale of the properties described in the decree, and reported the same to the court, and said

court on August 4, 1879, confirmed the sale which had been made to the above men, Kennedy and Sloan, as Trustees, for $500,000 in gold, and directed the Master to convey to the said Kennedy and Sloan, as Trustees, upon their making complete payment, the road-bed, tracks, franchises and chartered powers and privileges of the Houston & Great Northern, and International & Great Northern Railroad so far as the latter succeeded to the title of the Houston & Great Northern Railroad, granted to them by virtue of their charter or by any laws, and all the powers, rights, privileges and franchises and properties as in the decree of foreclosure, and the decree of approval, or either, stated, which decree of approval is hereto attached, marked Exhibit "X," and made a part hereof.

33-m. Acting in accordance with this decree, the said Duval as Special Master by deed dated the 14th of October, 1879, conveyed to Kennedy and Sloan, Trustees, all and singular the railway of the Houston & Great Northern Railroad Company, built and to be built, its franchises and rights, and other properties as in the deed described, including the franchises and chartered privileges of the Houston & Great Northern Railroad Company and the International & Great Northern Railroad Company so far as the latter succeeded to the title of the Houston & Great Northern Railroad Company granted them by virtue of their charter or by any other laws of the State of Texas, Kennedy and Sloan having made complete payment, and all as is more completely described in the deed hereto attached, marked Exhibit "Y," and made a part hereof.

33-n. The receiverships or receivership involved in the above mentioned suits, upon which the sales resulted in 1879, were all wound up and discontinued.

33-o. On or about November 1, 1879, John S. Kennedy and Samuel Sloan, as Trustees, executed a deed to the International & Great Northern Railroad Company wherein they recited that they had acquired the proper-

ties conveyed to them by three deeds executed by Duval as Special Master and above set out, and that the International & Great Northern Railroad Company had agreed to purchase all the properties so acquired under said three deeds in consideration of bonds in the amount of 5,374 bonds for $1000 each and 500 bonds for $500 each, secured by a purchase money mortgage; and the further amount of 4,474 bonds of $1000 each and 500 bonds of $500 each secured by a purchase mortgage, the last two sets of bonds to be secured by a second mortgage. The deed then states that Kennedy and Sloan, as Trustees, in consideration of the sum of $10,348,000 paid by these bonds, the receipt of which was acknowledged, conveyed to the International & Great Northern Railroad Company, its successors and assigns, in fee simple absolute forever all and singular the railway of the International Railroad Company, together with all of its properties whatsoever, and all corporate rights and privileges and franchises of the International Railroad Company, and all and singular the railway of the Houston & Great Northern Railroad Company, built and to be built, with its right of way, properties, franchises and rights, and all of its property, real and personal, except lands other than those necessary for right of way, depot and shop grounds, and all of the franchises and chartered powers and privileges of the International Railroad Company and of the Houston & Great Northern Railroad Company, and of the International & Great Northern Railroad Company, granted to them by virtue of their charters or any other laws, and all of the properties whatsoever of said railroads, which deed was duly delivered and executed to the International & Great Northern Railroad Company.

34. Wherefore, upon all of the matters above, the International & Great Northern Railway Company represents that the plaintiffs can not prevail, and pleads all of the above in defense to their suit, not waiving its reliance upon all of the above, for every defense which can

be based thereon or any part thereof; the defendant on the above represents:

(a) All issues herein involved have been disposed of and are barred by the decrees of the United States Circuit Courts hereinabove set out, and the proceedings in those cases, which are now plead in complete bar of this suit.

(b) Should there be any matter remaining undisposed of by the litigations and proceedings in the United States Circuit Court above set out and resulting in foreclosure, yet by the decree of foreclosure, being hereto attached, and the several matters therein stated, and the express reservations of that decree, and the implied reservations of that decree and the implications and warranties and guarantees to the purchaser at the sale under that decree, that all liabilities and claims should be matters to be disposed of only in that court or litigated there, Federal question is now raised, to-wit: The reservations of that decree and the right of the United States District Court alone to pass upon any question not then disposed of, including every issue, either of law or fact, tendered in this case, which Federal question is now expressly opposed to this litigation, both because it appears that the Federal Court disposed of every matter herein involved, and this proceeding is conducted in conflict with the proceedings in that court; and because if they were not so disposed of they were reserved for consideration and litigation in that court alone, and so guaranteed to the purchaser and every person holding under him, under said decree hereto attached, marked Exhibit "H."

(c) It appears above that the second mortgage bondholders buying under the said foreclosure decree bought with their decree and second mortgage bonds, except to the extent of $244,253.55, which they paid in cash, buying through Nicodemus, who was and who is now alleged to have been their agent. But such second mortgage bond-holders bought under such burden and losses that there availed for the payment of their second mortgage

bonds an insufficiency, the amount of their bid being not less than $317,387.72 short of the amount due on such bonds, and they buying under the obligations and liabilities of the receiver and the decree of foreclosure to their loss.

(d) It is pointed out in this connection that the plaintiffs rely upon the act of the legislature of Texas of 1889, which was approved March 27th, 1889, and is entitled "An Act to require all railroad companies to keep and maintain permanently their general offices, machine shops and round houses within the State of Texas at certain places, and to keep all books, accounts, etc., at said offices, and to provide penalties for failing to comply therewith."

(e) Also in this connection it is now alleged that the plaintiffs claim and so assert that by the said act of March 27th, 1889, now carried into the Revised Statutes of the State of Texas of 1911, and contained in Articles 6423, 6424 and 6425 thereof, they acquired a burden or lien upon the properties, the intangibles and franchises, of the defendant and a security or servitude against the same and a right of performance against and out of and by the same given by the retroactive act of 1889.

(f) In this connection it is alleged that, if there was any contract made for the location of the headquarters and shops at Palestine, which is not admitted, then that such contract or contracts were not legally definable in the terms of the act of 1889 and that the act of 1889 has attempted to put additional burdens and give additional security and make additions to such contract or contracts, whereby the obligation of the contract or contracts, if they ever existed, is violated.

(g) Further, the mortgage of 1881 foreclosed in the United States Court under the decree set out above, and under which this defendant, and the sale thereunder, has acquired the properties and franchises of the International & Great Northern Railroad Company, preceded the act of 1889, and the trustee and bondholders thereon did

not know and could not have known of the existence of any such alleged contracts as are sued on in this case; and if they did know of the same, they were purely personal contracts and unsecured, but the plaintiffs now insist that they are secured *in rem* and by the retroactive act of 1889.

35. Therefore, the International & Great Northern Railway Company opposes to any recovery by the plaintiffs and to their maintenance of this case, the following defenses, now seasonably presented as Federal questions and founded upon the Constitution of the United States of America:

(a) The act of 1889, and carried into Articles 6423, 6424 and 6425 of the Revised Statutes of Texas, as relied on and applied by the plaintiffs in this case, is unconstitutional and void and violative of sub-section 1 of Section 10 of Art. 1 of the Constitution of the United States of America, prohibiting any State from passing a law impairing the obligations of contracts; in that the attempt to enforce the act of 1889 above mentioned, of the Legislature of the State of Texas, against this defendant as giving a lien and fixing a burden and service upon the properties and adding to the obligations, if any, of the alleged contracts, and attempting to attach and add to those alleged contracts, duties and conditions as set out in the statute, is null and void when applied to the prior contracts alleged in this case, and violates their obligations.

(b) Because of the act of the Legislature of 1889 and Articles 6423, 6424 and 6425 of the Revised Statutes of the State of Texas, are violative of Sub-section 1 of Section 10 of Art. 1 of the Constitution of the United States and impair the obligation of contracts, therein prohibited to be done by the law of any State, because they violate the contract and mortgage duly executed between the International & Great Northern Railroad Company, now sold out, and of the trustee of the second mortgage and the bondholders therein secured; which mort-

gage has been settled, ascertained and declared by the decree of foreclosure of the United States Court, all as set out above; in that said act of 1889 and as carried into the present Revised Statutes of the State of Texas, adopted in 1911, and as asserted and claimed to be by the plaintiffs, adds to and places burdens on the original contracts, if any, stated by them, and as claimed by them secured such contracts by such subsequent law as against the properties or property or some of them now held by the defendant and owned by it under foreclosure sale, as set out above; and in that such statutes as claimed by the plaintiffs by such subsequent act of 1889, convert what were before at most merely personal contracts into secured contracts and obligations as a burden upon the property and running with the same in violation of the contract, being the mortgage executed in 1881, and in the accomplishment, as claimed, of a preference created by such statute, to be prior in law though junior in time, to the obligations of the contracts secured by the mortgage and bonds of the International & Great Northern Railroad Company, whereby, as so applied, the statute is unconstitutional and void.

(c) And also, this said statute of 1889 and as carried into the Revised Statutes of Texas of 1911, is unconstitutional and void and in violation of sub-section 1 of Section 10 of Art. 1 of the Constitution of the United States of America; in that, by such sub-section every ex post facto law of the State is prohibited; and in that, by said statute of the State of Texas for a violation thereof, forfeiture of charter and a penalty of $5000 per day, is denounced to be recovered by the State; whereby under the construction of plaintiff's ex post fact, there has been given a penalty to be made prior in law, though junior in fact, to the mortgage under which this defendant holds, so that such immense penalties shall be collected as contended by plaintiffs out of the properties of this defendant, whereby such act, so violating the Constitution of the United States, is unconstitutional and void.

(d) Furthermore, said statute of the State of Texas as construed and attempted to be enforced by the plaintiffs, is unconstitutional and void and violative of Section 1 of Art. 14 of the Amendments to the Constitution of the United States of America, commonly called the 14th Amendment; in that, as plaintiffs construe and attempt to enforce said statute by the denunciation of the penalties stated above and the insistence that the statute and its penalties are applicable to the defendant, an attempt is made to abridge the privileges and immunities of the defendant and to deprive it of its property without due process of law, and to deny to it the equal protection of the laws by penalizing or threatening to penalize it, should it resort to the courts to resist this action, and to litigate its rights in the premises; whereby, such act is unconstitutional and void by reason of the immensity of the penalties and the attempt thereby to shut the doors of the courts to the defendant in its attempt to test the legality of the claims of the plaintiffs and the constitutionality of said statute.

(e) Furthermore, the said statute of the State of Texas as construed by plaintiffs and sought to be applied by them is unconstitutional and void and violative of Section 1 of Article 14 of the Amendments to the Constitution of the United States; in that, under its terms and burdens, it is an undue interference with the business and the obligations of the defendant, which it owes to the public, both in State and interstate commerce, whereby by meddling and dictating to the defendant it attempts to interfere with the discretion and power of the defendant, although a public carrier, to conduct its business within its own discretion, in obedience to constitutional laws of the State and of the United States; in that it denounces the forfeiture provided above and attempts by subsequent statute to place burdens and liens, as claimed by the plaintiffs; and in that it prescribes where a great number of persons in the service of the defendant must conduct their business and their offices and reside; there-

by denying to this defendant the equal protection of the laws and depriving it of its property, without due process of law; by such illegal interference with its just and legal discretion to carry on its duties to the public and to perform its obligations to its stockholders and to other persons.

(f) Said act of 1889 of the Legislature of Texas, as originally enacted, and as contained in the Revised Statutes of the State and construed by the plaintiffs, is unconstitutional and void and violative of Section 1 of Art. 14 of the Amendments of the Constitution of the United States of America, in that such act is applicable only to chartered railroad companies and is not applicable to individuals, associations, receivers or other persons operating railroad carriers in the State of Texas or to other persons or corporations other than railroads, whatsoever. Whereby, such act constitutes legislation against a species or class not classifiable on any ground, or reason, or law, and places upon such species or class a burden not placed upon other persons in the same course or line of business or upon other corporations and associations doing business in the State of Texas; thereby violating the inhibition of said Section 1 against the passage of laws denying to any persons within the jurisdiction of the State "the equal protection of the laws" and abridging the privileges and immunities of the defendant and depriving it of its property without due process of law.

(g) The defendant invokes the protection of the Constitution of the United States and presents the foregoing defenses under that Constitution in opposition to any recovery by the plaintiffs herein and to the maintenance of their action in any respect.

36. And furthermore, upon all of the allegations in this Section IX made, invoking the Constitution and the laws of the State of Texas and the common law and equity, the International & Great Northern Railway Company says that the plaintiffs should not recover herein or have any relief awarded to them on their construction

of the act of 1889, as originally enacted and as carried into the Revised Statutes of 1911:

(a) Because the same asserts a penalty and a fine of amount prohibited by the Constitution of the State of Texas.

(b) Because the statute as construed and applied by the plaintiffs is retroactive.

(c) Because the plaintiffs seek to recover in violation of the obligations of the contracts which they plead by adding to and burdening the same, and in violation of the mortgage of 1881.

(d) Because such statute is ex post facto and denounces penalties asserted to be a burden upon the defendant, the successor to the purchaser.

(e) Because the statute denies to the defendant the equal protection of the law and is violative of the due process of law.

37. And in addition to all of the other reasons and grounds presented above, the International & Great Northern Railway Company pleads all of the matters in this Section IX. set out, and says that it is ready, able and willing to verify the same and pleads the same in every respect in bar of plaintiffs' action, if any they have.

38. And also, not waiving any of the above, but insisting upon all of the same, the defendant represents that, the plaintiffs cannot prevail in this case because, by the proceedings of the United States courts and foreclosures, and sales therein held in the year 1879 as stated above, and the conveyance by Kennedy and Sloan to International & Great Northern Railroad Company, every right and claim whatsoever, if any there was, which the plaintiffs or their predecessors may have had in or on the contracts they sued on, were eliminated, it being now alleged in connection with the above that the International & Great Northern Railroad Company had no notice of the same, but also that if said rights existed, they were purely personal; and

Furthermore, in this connection, the defendant re-

alleges all of the above and represents that the plaintiffs are relying upon the Act of the Legislature of the State of Texas of 1889, carried into Articles 6423, 6424 and 6425 of the Revised Statutes of Texas, and represents that as relied on and replied to by the plaintiffs in this case, such act is unconstitutional and void and violative of subsection 1 of Section 10 of Art. 1 of the Constitution of the United States of America, prohibiting any State from passing a law impairing the obligation of contracts, in that the attempt to enforce the Act of 1889 above mentioned against this defendant as giving a lien and fixing a burden and service upon the properties and adding to the obligations, if any, of the alleged contracts, and attempting to attach and add to these alleged contract conditions as set out in the Statute, is null and void and violates these obligations, because such properties had been passed free and clear; and because the sales, foreclosures and transactions set out above, made in 1879, through the United States Court, eliminated any obligation of the International & Great Northern Railroad Company, either personal of that corporation or as in, out or on its charter franchises, or other properties, as to such contracts, if they existed, and because an attempt to revive the same is contrary to the Constitution of the United States of America and the section stated; and

Furthermore, the defendant states Section 1 of Article 14 of the Amendments to the Constitution of the United States of America, in that the plaintiffs are attempting under the Act of 1889, and by the mere force of said Act as construed by them, to revive obligations which had ceased under the law of the land to be obligations binding on the International & Great Northern Railroad Company, or any of its properties, in that the Statute so construed and applied is unconstitutional and void and in conflict with said Section 1 of Article 14 of the Amendments, whereby the plaintiff by the attempted revival of such dead contracts and the burdens attempted to be placed under them, is deprived of its property without

due process of law, and denied the equal protection of the laws.

39. The defendant invokes the provision of the charter of the Houston & Great Northern Railroad Company, and the other charters set out above, or plead, whereby the domicile of that road and of the International & Great Northern Railroad was at Houston, Texas; and represents that the Act of 1889 and as now in the Revised Statutes of Texas, if applicable, requires the domicile and offices to be in Houston, Texas; and defendant says that the charter of the Houston and Great Northern Railroad Company named Houston, Texas, as the place for the locating of the General Offices; and that the International and Great Northern Railroad Company was a Railroad whose charter named Houston, Texas, as the place for the locating of its General Offices, and named no other place.

X.

Further specially pleading, subject to its various positions taken above and insisting upon and preserving each of them, the International & Great Northern Railway Company represents as follows:

1. It repeats and re-avers all of the allegations contained in the last two special pleas above, and makes the same a part of this special plea.

2. The Act of 1889 referred to above, commonly known as the office-shops act, and as now embodied in the Revised Statutes of the State of Texas of 1911, in Sections 6423, 6424 and 6425, has been construed by the ultimate court of the State of Texas, being the Supreme Court of the State, and construed in accordance with the contentions of the defendant herein, under which construction by the Supreme Court of Texas its charter, set out above, was taken out in August, 1911, as above alleged, and in that charter it was provided in the third section thereof that "the place at which shall be established and maintained the principal business office, the public office and

general offices of this corporation, is the City of Houston, in Harris County, State of Texas."

3. This charter was dated the 8th of August, 1911.

4. Section 2 of the Charter is as follows:

"SECOND: This corporation is organized for the purpose of acquiring, owning, maintaining and operating the railroads heretofore forming the International and Great Northern Railroad and purchased by Frank C. Nicodemus, Jr., one of the undersigned, at a sale thereof, held on June 13, 1911, pursuant to a decree of foreclosure and sale entered on or about May 10, 1910, in certain judicial proceedings brought for the foreclosure of a mortgage of the International and Great Northern Railroad Company known as its Second Mortgage, said decree having been made and entered by the United States Circuit Court for the Northern District of Texas, in a certain cause therein pending, wherein The Farmers' Loan and Trust Company, Trustee, was complainant and International and Great Northern Railroad Company and others were defendants, which said decree was subsequently adopted and entered, in certain ancillary causes between the same parties, by the Circuit Court of the United States for the Southern District of Texas, the Eastern District of Texas and the Western District of Texas; said railroads being described as follows, to-wit:

> All and singular the lines of railroad in the State of Texas formerly belonging to the International and Great Northern Railroad Company, extending from the town of Longview, in the County of Gregg in said State, through said County and through the Counties of Rusk, Smith, Cherokee, Anderson, Leon, Robertson, Milam, Williamson, Travis, Hays, Comal, Bexar, Medina, Frio, La Salle, Encinal, and Webb, to Laredo in said last-mentioned County; and from the town of Mineola, in Wood County, to Troupe, in Smith County; and from the City of Palestine, in Anderson County, through the Counties of Houston, Trinity, Walker and Montgomery to Houston, in

Harris County; and from the town of Spring, in Harris County, through the Counties of Montgomery, Waller, Grimes, Brazos, Robertson, Falls, McLennan, Limestone, Hill, Navarro, Ellis and Johnson to the City of Fort Worth, Tarrant County; with branches and branch lines from the town of Overton to the town of Henderson, in Rusk County, from the town of Round Rock to Georgetown, in Williamson County, from the town of Phelps to the town of Huntsville, in Walker County, from the City of Houston, in Harris County, to the town of Columbia, in Brazoria County, from Navasota, in Grimes County, to Madisonville, in Madison County, from Calvert Junction to Calvert, in Robertson County, and from Waco Junction to East Waco, in McLennan County; including also the railway and railway tracks and property appurtenant thereto, and certain tracts of land in and adjacent to the City of Houston, in Harris County, known as the Houston Belt Terminals; a total distance of about eleven hundred and six (1106) miles; and including also the trackage rights formerly belonging to said International and Great Northern Railroad Company from Houston, in Harris County; to Galveston, in Galveston County, Texas, over the railroad of the Galveston, Houston and Henderson Railroad Company of 1882, under an agreement between said railroad companies dated November 19, 1895.

This corporation shall have all of the powers and privileges conferred by the laws of the State of Texas upon chartered railroads, including the power to construct and extend."

5. On August 10th, 1911, this charter having been presented to the Attorney General of the State of Texas, as provided by law, for his consideration, he made thereon the following certificate:

"CERTIFICATE.

This is to certify that the original Articles of Incor-

poration of International and Great Northern Railway Company were submitted to me on the 10th day of August, 1911, and having carefully examined the same I find them in accordance with the provisions of Chapter I of Title 94 of the Revised Statutes of Texas and any and all amendments thereto, and not in conflict with the laws of the United States or of the State of Texas.

J. P. LIGHTFOOT,
Attorney General.

Filed in the office of the Secretary of State this 10th day of August, 1911.

C. C. MCDONALD,
Secretary of State."

Having carefully considered the same, and thereupon the charter was duly filed with the Secretary of State, and the new corporation began to operate.

6. The immediate questions herein were decided and involved in the case of Kansas City Mexico & Orient Railway Company of Texas vs. City of Sweetwater, and reported in 131 S. W. 25, and in....Tex. Ct. of Civil Appeals Reports p. ...., and also having been affirmed by the Court of Civil Appeals in the above mentioned report thereof, was reversed and rendered in favor of the Railway Company by the Supreme Court of Texas, as appears by the report of the case in 137 S. W. Rep. 1117 and 104 Texas 329.

7. Under the practice of the Supreme Court of Texas, there was before it the opinion of the Court of Civil Appeals and the charge of the trial judge contained therein, and the record and transcript of the whole case.

8. The decision of the Supreme Court reported in 137 S. W. p. 1117, in 104 Texas page 329, was rendered May 31st, 1911, and which opinion before the adjournment of the court at the end of June, and the judgment entered thereon became the final and absolute judgment of that court before the end of June 1911, whereby that court construed the act of 1889 in the particulars herein set out. and that a contract made with the sold out rail-

road did not bind the franchises and properties of the road or its successors incorporating under the statutes of Texas for the purpose of operating such sold out properties, this decision being necessary to the decision of the case.

9. On September 1st, 1910, the legislature of the State of Texas passed an act, approved by the Governor on that date, and put into immediate effect, carried into the Revised Statutes of Texas as Articles 6624 and 6625 of the Revision of 1911.

10. The charter of the defendant was bought and taken under the burdens of the act of September 1st, 1910, hereinabove plead, which act placed burdens to procure the charter, not theretofore existing, and burdens to operate the property on the property rights not theretofore existing, which burdens so assumed, as required by the statute in writing, by this defendant, were to the amount of not less than $1,000,000 for the liabilities imposed by such statute, whereby the charter was, in effect, purchased under such statute, and the properties under such statute taken only subject to the burdens therein provided and to the express construction of the Supreme Court of Texas of the act of 1889.

11. Wherefore, upon all of the above, the International & Great Northern Railway Company, respectfully represents:

(a) Having purchased its charter under the onerous conditions of the act of September 1st, 1910, and paid the large sums of money in numerous cash payments in discharge of the obligations therein assumed, and said charter being approved by the authorities of the State of Texas, and locating its domicile and general offices in the City of Houston, Harris County, Texas, and the Supreme Court of Texas, as set out above, having finally determined that the act of 1889 did not impose as a burden on the properties or franchises any obligation to perform such alleged contracts as are asserted in this case, the attempt now to change the decision of the Supreme Court

of Texas is an attempt by retroactive decision, after a contract and charter have been acquired, to change the purport, obligation and intent of the statute into which the construction of the Supreme Court of Texas entered; and is an attempt to violate sub-section 1 of Section 10 of Article 1 of the Constitution of the United States, prohibiting the States from passing any ex post facto law or law impairing the obligation of contracts and also is in violation of, and an attempt to violate Art. 14 of Section 1 of the Amendments of the Constitution of the United States of America, whereby an attempt is made to deprive the defendant of its property without due process of law and to deny to it the equal protection of the laws.

(b) Because the above contract, the charter of this defendant, of August 8th, 1911, having been approved by the officers of the State of Texas and providing for its domicile, headquarters and general offices at the City of Houston, in Harris County, Texas, is now attempted to be violated under the circumstances stated and as a contract in contravention of the provisions of the Constitution of the United States of America, last above stated in sub-section "a".

(c) And for these reasons, stated in Sub-sections "a" and "b" above and in this Section X. of these pleadings, the International & Great Northern Railway Company now invokes the protection of the Constitution of the United States of America on the grounds stated and now pleads and represents that these Federal Questions are raised in this case, which cannot be over-ridden by the plaintiffs, and that because of them the plaintiffs cannot recover herein.

(d) Furthermore, the defendant pleads generally all of the matters in this special plea X. set out, all in defense of this action; whereby, upon all of the above, it says the plaintiffs should not recover.

XI.

The International & Great Northern Railway Company, insisting upon all of the positions stated above and

waiving none of them, and subject to its Bill of Exception taken, overruling the plea to the venue, and its plea of abandonment, and all of the other defenses, further represents as follows:

1. The town of Palestine is a small interior town of about 10,000 population. It is not a manufacturing city, nor has it any large industrial or clerical population to draw from.

2. The International & Great Northern Railway Company has a main trackage of over 1106 miles and a sketch is attached hereto showing its lines, which are colored red, and their relation to continental and interstate railroads. The map is marked Exhibit "Z."

3. The International & Great Northern Railway Company is intensely engaged in interstate traffic, the hauling of continental freight in and out of the Republic of Mexico and the hauling of freight to the port of Galveston, to be shipped coastwise to other States or abroad to foreign nations, and out of the port of Galveston and in interstate traffic through its rail connections. Its revenues, its very existence and the due performance of its duties efficiently to the general public require that it should be unhampered and be free from the shackles attempted by this suit to be imposed upon it.

4. The City of Houston is a place of over 100,000 people, rapidly growing, with a large mechanical, industrial population, and one of the great centers of railway activities in the State of Texas, and where there is a large supply of trained and expert clerical assistants obtainable, and where the executive officers of the railroad can be in constant contact with transportation, problems and men, and where they can best serve the public and the interest of the defendant. None of these conditions exist at Palestine.

5. It is claimed in the petition that not only must the general offices with all of the employees thereof and others of this great railroad be forever located and kept at Palestine, and there hampered and bound down, but

also that "its machine shops and round houses" must forever be kept at Palestine.

6. The International & Great Northern Railway Company now alleges that if the purposes of the present suit prevail, it will be forever hampered and the properties owned by it forever hampered and restricted in their proper uses by the attempt to bind them down at Palestine for the promotion of the purposes of landlords and merchants at that place, and in restriction of its ability to perform its duties to the public and of the ability of the properties to perform such duties forever.

7. Wherefore, upon all of the matters in the Section XI set out, the defendant represents:

(a) The purposes of this suit are in violation of the act of Congress to regulate commerce and the statutes of the United States, and if they prevail will forever hamper and restrict the ability of this defendant and its successors in property to perform their duties in interstate and foreign commerce and will forever and necessarily burden and encumber interstate and foreign commerce, and violate subdivision 3 of Section 8 of Article 1 of the Constitution of the United States and the power of Congress to regulate interstate commerce, and will continue a violation of the same; whereby a Federal question is raised in this case, now expressly opposed to the right of the plaintiffs to recover herein;

(b) Specific performance can not be given in this case without violation of the duties of a public carrier and the duty to the public, and not admitting that the alleged contracts exist, it is now alleged that the enforcement thereof will violate public policy and the ability of the defendant to perform its duties in interstate and other commerce and its duties to the general public. Wherefore, on account of its obligations in interstate and other commerce, it now represents that a Federal question is raised and opposes this defense to any recovery herein, and also under the law and with regard to its duties in intrastate,

as well as in other commerce, represents that plaintiffs should not recover herein.

(c) The defendant opposes the matters set forth in this Section XI to any recovery by plaintiffs upon all grounds.

SECTION XI-A.

1. The defendant re-avers and adopts all of the allegations stated in sections VII and IX above.

2. The defendant does not admit that the alleged contracts insisted upon by the plaintiffs ever existed but denies the same, and now pleading as to the claim or right of Anderson County to recover herein, pleads as follows:

3. On November 14, 1874, the County of Anderson sued the Houston & Great Northern Railroad Company by suit filed in Anderson County on or about that date and by that suit the County of Anderson, one of the plaintiffs here, undertook to invalidate and set aside as illegal and fraudulent issuance and as based upon an illegal election, the bond issue issued by Anderson County for One Hundred and Fifty Thousand Dollars in promotion of the construction of the Houston & Great Northern Railroad Company into Anderson County and referred to, though not fully set out, in the plaintiffs' First Amended Petition; with this petition Anderson County exhibited the proceedings of the Commissioners' Court and the history of the election, authorizing such bonds, and in the petition contended that the Houston & Great Northern Railroad Company and its employees and officers had fraudulently procured such election by fraudulent representations or fraudulently representing to the voters of said Anderson County that if the bond issue was carried by the voters at the election to be held in May, 1872, then that the Railroad Company would not only build its road into Palestine to a junction with the International Road and put up a depot within a half mile of the Court House of Anderson County, in Palestine, but that it would accept another proposition voted on at the said election to give Fifty Thousand Dollars to any

railroad to build to the north line of Anderson County; such proposition of Fifty Thousand Dollars being in addition to the other proposition, whereby it was alleged that the voters of Anderson County were falsely and fraudulently induced and defrauded into voting the bond issue of One Hundred and Fifty Thousand Dollars which had been received by the Railroad Company and whereby the Railroad had received such One Hundred and Fifty Thousand Dollar bond issue; and had not complied with the election and other promises made to build to the north side of the county; and in said petition and the amendments thereto, it was contended that the election and issuance of the bonds were fraudulent on the ground that unqualified persons had voted, and other grounds therein set up, all of which completely appear by such petition exhibited herewith, and the amendments thereto under the then practice, all of which were to be taken together, a copy of which is attached hereto, marked Exhibit ZA.

4. To the above petition and the amendments thereto, exhibited above, made a part of this pleading, the Houston & Great Northern demurred, by the demurrer raising the issue that nothing appeared which would give a ground of recovery, which demurrer was fundamental to the contention of the plaintiff; and further the Houston and Great Northern Railroad Company answered specifically and amended its answer from time to time, which demurrers and amended answer are made a part of this pleading and attached hereto, and marked Exhibit ZB, and which demurrers contained the point and was to the point that no ground of recovery was contained in such petition of the plaintiff.

5. Upon these demurrers and pleadings a hearing was had in the District Court of Anderson County, Texas, and the demurrers were sustained, as appears by the judgment of that court hereto attached and marked exhibit ZC and made a part hereof.

6. Upon the sustaining of those demurrers Anderson County amended, as appears by said amendment hereto

attached and marked exhibit ZD and made a part hereof, insisting upon all of its other pleadings, with the addition of this exhibit, and the demurrers being re-presented again were by the District Court of Anderson County sustained and Anderson County declined to amend. A judgment was entered, being a final judgment, against Anderson County in said case, a copy of which said judgment is attached hereto, marked exhibit ZE.

7. Thereafter Anderson County appealed the above case or took out a writ of error to the Supreme Court of Texas, where the judgment of the District Court was affirmed, as appears by the judgment of the Supreme Court of Texas hereto attached and marked exhibit ZF.

8. Wherefore, pleading as to Anderson County and answering its claim to recover anything herein or to prevail herein, the defendant represents that by the above proceedings Anderson County has been estopped to add to or change the contract between Anderson County and the Houston & Great Northern Railroad Company in reference to such bond issue, or to change or add to any of the conditions thereof or to again litigate the contract on which the bond issue was made. Wherefore, this defendant pleads all of the above matters in adjudication of the contract of the company herein.

XII.

1. The defendant re-avers and adopts all of the allegations stated in Sections VIII and IX above.

2. The defendant does not admit that the alleged contracts insisted upon by the plaintiffs ever existed, but denies the same, and does not waive any of its positions taken above, but insists upon all of the same; but subject to the same, makes this further defense:

3. Plaintiff asserts that under the Act of 1889, carried into the present Revised Statutes, and referred to above, commonly known as the offices-shops act, they have a burden or claim or lien upon the property or properties

of the defendant to secure the performance of the alleged contracts asserted by them.

4. The plaintiffs were not parties to the foreclosure proceedings in the United States courts as set out above, but, as appears above, they were invited to become parties, or to assert their claims along with all other persons.

5. By reason of the foreclosures set out above, the title to all of the properties has passed to this defendant, being acquired on consideration of the great sums of money, or their equivalent, paid by this defendant.

5. By reason of the proceedings set out above, this defendant not only has acquired title to the property, but also is the assignee of all the rights of the second mortgage, which has been described and which was foreclosed.

7. The value of the right or rights, if they exist, claimed by the plaintiffs, if they are tantamount to the lien or burden upon the property or any of the properties of the defendant, is far below and short of the amount of such foreclosures, second mortgage and the decree therefor and interest thereon, and the amount of the obligations assumed by this defendant upon the purchase of the property, and is far below either of these amounts.

8. Wherefore, upon the above the defendant respectfully represents that the equity or right, if any the plaintiffs have (the defendant does not admit that they have any), is of value so small in relation to the amounts which the plaintiffs would have to pay, that it would not avail them to go through any process in the exercise of any right of redemption, if any they have; and furthermore, they are estopped through their failure to come into the foreclosure proceedings to assert any such right through such foreclosure proceedings.

Wherefore, the defendant says it is apparent that the plaintiffs could only recover, if they could recover at all, through the assertion of an equity or redemption as omitted parties to the foreclosure proceedings and that, if they did assert such equity, it would be of no avail because

burdened and conditioned by the payment of such immense sums of money for its successful assertion, which the plaintiffs do not offer to pay and which they can not pay.

Wherefore the defendant prays that such equity of redemption, if any there be, of the plaintiffs, be forever barred and be adjudged to be of no value. It pleads the above also in bar of any recovery by plaintiffs.

XIII.

Further specially pleading, if further special pleading be necessary, and maintaining all of its positions taken above and insisting upon each and every one of them, and not admitting that the plaintiffs have any right of recovery herein, but denying the same; not admitting that alleged contracts have existed, but denying the same; the defendant re-avers all of the allegations contained in Section VIII above and in Section XI above, and thereon represents as follows:

1. If the plaintiffs have any right by their omission from the foreclosure proceedings set out above, and if they have any property right or title whatsoever on or in any of the property of this defendant, tangible or intangible, which can be asserted and is not barred upon the considerations and defenses set up above, then this defendant represents that it is the assignee of the second mortgage and of the decree asserting and settling the same entered by the United States Circuit Court for the Northern District of Texas, all as set out above, and of the liens, rights and obligations therein created, and it prays as against the plaintiffs that if the plaintiffs should be thought to have any right whatsoever not eliminated on the defenses and considerations stated above; that is, the plaintiffs have foreclosure of said mortgage and such decree and enforcement thereof in all parts as against these plaintiffs, and all of their rights, and that this court do now adjudge in such contingency all of the rights and interests whatsoever of the

plaintiffs to be sold and foreclosed by directing said property and rights of the plaintiffs and any other properties to be sold for the purpose of making the amount under the second mortgage and said decree, and interest thereon, and the cost of this proceeding, unless the plaintiffs shall pay the same to the defendant; and in the event that any equity or right of the plaintiffs, if right they have, be not barred by the court or held for naught upon the considerations asserted above.

XIV.

Wherefore upon all of the above, and each and every one of its positions taken in this answer, the International & Great Northern Railway Company prays that the plaintiffs take nothing, and that it have all such relief, whether prayed for specially above or not, legal or equitable, general or special, which may be its due.

F. A. WILLIAMS,
N. A. STEDMAN,
ANDREWS, BALL & STREETMAN,
MORRIS & SIMS,
NORMAN, SHOOK & GIBSON,
W. E. DONLEY,
F. B. GUINN,
WILSON, DABNEY & KING.
Attorneys for Defendant.

EXHIBIT A.

IN THE UNITED STATES CIRCUIT COURT FOR THE NORTHERN DISTRICT OF TEXAS.

The Mercantile Trust Company, Trustee,
Complainant,

vs.

The International and Great Northern Railroad Company, Defendant.

To the Honorable the Judges of the Circuit Court of the United States for the Northern District of Texas, in the Fifth Circuit, Sitting in Equity:

The Mercantile Trust Company, a corporation organ-

ized and existing under the laws of the State of New York, and a resident of the said State of New York, brings this its bill of complaint against the International and Great Northern Railroad Company, a corporation organized and existing under the laws of the State of Texas and a resident of the said State of Texas.

And thereupon, humbly complaining, your orator, The Mercantile Trust Company, shows unto your Honors as follows:

First: That your orator, The Mercantile Trust Company, is a corporation organized and existing under the laws of the State of New York, and is a citizen and resident of said State of New York.

That the defendant, the International and Great Northern Railroad Company, is a corporation organized and existing under the laws of the State of Texas, and is a citizen and resident of said State of Texas.

Second: That the said defendant, the International and Great Northern Railroad Company, owns and operates a line of railroad, the main lines whereof, as now constructed, owned and operated by the said defendant Company, extend from the Town of Longview, in the County of Gregg, through said county and the counties of Rusk, Smith, Cherokee, Anderson, Leon, Robertson, Milam, Williamson, Travis, Hays, Comal, Bexar, Medina, Frio, La Salle, Encinal and Webb, to Laredo, in said last mentioned county; and from the town of Mineola, in Wood County, to Troup, in Smith County, and from the City of Palestine, in Anderson County, through the counties of Houston, Trinity, Walker, and Montgomery, to Houston, in Harris County, and from the town of Spring, in Harris County, through the counties of Montgomery, Waller, Grimes, Brazos, Robertson, Falls, McLennan, Limestone, Hill, Navarro, Ellis and Johnson, to the City of Fort Worth, in Tarrant County, with branches and branch lines from the town of Overton to the town of Henderson, in Rusk County; from the town of Round Rock to Georgetown, in Williamson County; from the

town of Phelps to the town of Huntsville, in Walker County, and from the City of Houston, in Harris County, to the town of Columbia, in Brazoria County; from Navasota to Madisonville; from Calvert Junction to Calvert, from Waco Junction to East Waco; also the railway and railway tracks and property appurtenant thereto, and certain tracts of land in and adjacent to the City of Houston, in Harris County, known as the Houston Belt Terminals; a total distance of about 1106 miles of completed railroad, all in the State of Texas; owned by the said defendant, the International and Great Northern Railroad Company; all of which lines of railroad and branches, with the exception of the line from the town of Spring, in Harris County, to the City of Fort Worth, in Tarrant County, a distance of 271.8 miles; and said branch lines of railroad from Navasota to Madisonville, a distance of 44.7 miles; from Calvert Junction to Calvert, a distance of 5.3 miles; from Waco Junction to East Waco, a distance of 1.7 miles; also the Houston Belt Terminals, 10.2 miles above mentioned, were so owned and operated by the said defendant Company on and prior to March 1, 1892, the latter named lines, branches and terminals having since been constructed; and are now owned and operated by said defendant company, and all of said lines, branches and terminals above described are, by the terms and provisions of the said defendant company's mortgage, dated March 1, 1892, to your orator, as trustee, hereinafter more fully referred to and set forth, embraced in and covered by the lien of said mortgage; and that all of the corporeal premises aforesaid are situate and lie in the State of Texas, and a large and important part of the railroad and property included in said premises are situated and lie in that part of said State defined and delineated by Federal Law as the Northern District of Texas.

THIRD: Your orator further shows that prior to the execution and delivery to your orator of the indenture of mortgage, dated March 1, 1892, hereinafter referred to, the defendant did make, execute and deliver to various

persons its First Mortgage Six per cent bonds to the aggregate amount of $7,974,000, each dated on the first day of November, 1879, and maturing on the first day of November, 1919, and secured the same by mortgage or deed of trust bearing date on said first day of November, 1879, executed and delivered by it to John S. Kennedy and Samuel Sloan, of the City of New York, trustees; and did make, execute and deliver to various persons its Second Mortgage Six per cent bonds to the aggregate amount of $7,054,000, each bearing date the fifteenth day of June, 1881, and maturing on the first day of September, 1909, and secured the same by mortgage or deed of trust, and bearing date on the said fifteenth day of June, 1881, executed and delivered by it to The Farmers Loan and Trust Company, of the City of New York, trustee: and that all of said First and Second Mortgage Bonds were and had been for many years prior to said first day of March, 1892, outstanding; and that the defendant Company had defaulted in the payment of the interest due on May 1, 1889, and in the payment of all interest due thereafter down to and including the interest due on November 1, 1891, upon said First Mortgage Bonds; and had likewise so defaulted in the payment of the interest due on March 1, 1889, and in the payment of all interest due thereafter down to and including the interest due on September 1, 1891, upon its Second Mortgage Bonds; and suits to foreclose said First and Second Mortgages had been instituted by the trustees of said mortgages in the Circuit Court of the United States for the Eastern District of Texas.

That on said first day of March, 1892, the defendant company was indebted to the amount of $546,902.12, upon a certain judgment recovered on the eleventh day of March, 1889, in an action instituted by Jay Gould against the defendant company in the District Court of Smith County, Texas.

That prior to said March 1, 1892, a plan and agreement for the reorganization of the hereinabove recited accrued

indebtedness of the defendant company, which plan bore date of the twenty-seventh day of January, 1892, was approved and entered into by and between the defendant and the holders of its outstanding and unpaid coupons, of its stock and of said judgment, wherein and whereby it was among other things, provided:

1st. That one-half of the amount due upon all said defaulted First Mortgage coupons should be paid in cash, and for the remaining one-half of the amounts so due said company should execute its Certificate of Indebtedness, bearing interest from November 1st, 1891, at the rate of five per cent. per annum, the principal thereof payable in six successive yearly installments, beginning on the first day of November, 1892; the payment of the principal and interest of said certificate to be secured by a deposit of said coupons with the Central Trust Company, of New York, as Trustee.

2nd. That the defaulted Second Mortgage coupons of the party of the first part (less the amount paid upon the coupon of September 1st, 1891, in cash), aggregating the sum of $1,190,362.50, should be payable at their face in new Third Mortgage Bonds of the said Company.

3rd. That the amount due upon said judgment of March 11th, 1889, should be paid dollar for dollar in said new Third Mortgage Bonds.

4th. That stockholders of the said Company should advance to it the amount of money necessary to meet the cash requirements of said Plan and Agreement for Reorganization, to-wit: the sum of $1,026,863.23, and should receive for such advancement the amount thereof in said new Third Mortgage Bonds at par.

FOURTH: That in pursuance of the Plan and Agreement referred to in the last foregoing paragraph hereof, the stockholders of said defendant company advanced to it the sum of $1,026,863.23 for the purpose of enabling it to meet the said cash requirements of said plan and agreement, and said defendant made, executed and delivered its certificate of indebtedness as in said plan and

agreement contemplated, covering one-half of the amounts then due on said defaulted First Mortgage coupons and secured the same by a deposit of said coupons as in said plan and agreement provided, and paid in cash, to and for account of the holders of said coupons, the remaining one-half of the amount so due with interest, to-wit, the sum of $768,667.09, and paid in cash upon the interest installment of September 1, 1891, on its said Second Mortgage bonds the sum of $79,357.50, and paid in cash all further cash requirements of its indebtedness, as in said plan and agreement provided.

FIFTH: That, for the purpose of providing for the unpaid coupons upon its Second Mortgage Bonds and its indebtedness upon said judgment of March 11, 1889, and its indebtedness for the amount contributed and advanced by the stockholders (all of which requirements aggregated the sum or amount of $2,764,127.85) and for other corporate uses, the defendant company, pursuant to due and lawful authority and to due corporate action of its board of directors and stockholders, authorized the making, execution and issue of its bonds (being the Third Mortgage bonds provided to be issued in said plan and agreement hereinabove referred to) of the denominations of $500 and $1,000 respectively, to the aggregate amount of $3,000,000, to be dated on the first day of March, 1892, and maturing on the first day of September, 1921, and bearing interest at the rate of four per cent. per annum, payable to and until September 1, 1897, only out of net earnings of said defendant railroad company; and thereafter absolutely on the first days of March and September in each year; and in order to secure the payment of the principal and interest of said bonds according to the tenor thereof, the defendant company, pursuant to due lawful authority and to due corporate action of its board of directors and stockholders, duly made and executed under its corporate seal and delivered to your orator, as trustee, a mortgage or deed of trust known as its Third Mortgage, a copy whereof is hereto attached marked Exhibit "A,"

and made a part hereof, wherein and whereby the said defendant company granted, bargained, sold, transferred and conveyed to your orator as trustee, or to its successor or successors in the trusts thereof, all and singular, the railroads, lands, tenements, hereditaments, properties, rights and franchises of said defendant company then owned or thereafter to be owned, constructed or acquired by it, further described in said mortgage or deed of trust, as follows: "The line of railroad extending from the Town of Longview in the County of Gregg, through said county and through the counties of Rusk, Smith, Cherokee, Anderson, Leon, Robertson, Milam, Williamson, Travis, Hays, Comal, Bexar, Medina, Frio, La Salle, Encinal and Webb, to Laredo, in said last mentioned county; and from the town of Mineola, in Wood County, to Troupe, in Smith County, and from the City of Palestine, in Anderson County, through the counties of Houston, Trinity, Walker and Montgomery to Houston, in Harris County, with branches and branch lines from the town of Overton to the town of Henderson, in Rusk County; from the town of Round Rock to Georgetown, in Williamson County; from the town of Phelps to the town of Huntsville, in Walker County, and from the City of Houston, in Harris County, to the town of Columbia, in Brazoria County; a total distance of about 775 miles of completed railroad, all in the State of Texas; including all its tracks, right of way, main lines, branches, superstructures, depots, depot grounds, station houses, engine houses, car houses, freight houses, wood houses, sheds, watering places, workshops, machine shops, bridges, viaducts, culverts, fences and fixtures, together with all its leases, leasehold interests, leased or hired lands, leased or hired railroads, and all its locomotives, tenders, cars, carriages, coaches, trucks, and other rolling-stock, its machinery, tools, weighing scales, turn-tables, rails, wood, coal, oil, fuel, equipment, furniture, and materials of every name, nature and description, together with all the corporate rights, privileges, immunities and franchises of said Rail-

road Company, now held or hereafter to be acquired (including the franchise to be a corporation), and all the tolls, fares, freights, rents, income, issues and profits thereof, and all the reversion and reversions, remainder and remainders thereof," all of which above described premises, property, rights, franchises and appurtenances were in and by said mortgage or deed of trust granted, bargained, sold, transferred and conveyed to your orator and to its successor or successors, to have and to hold the same unto your orator and its successor or successors forever, to the only proper use, benefit and behoof of your orator, its successor or successors, in trust for the equal pro-rata benefit and security of all and every the persons or corporations which might be or become holders of any of the bonds issued under said mortgage or deed of trust, without any preference or priority of one bond over another by reason of priority in time of issue or negotation thereof, or otherwise, and for the uses and purposes and upon the trusts and conditions in said mortgage or deed of trust declared and expressed.

SIXTH: Your orator further shows that your orator accepted said mortgage or deed of trust of March 1, 1892, and has continuously been and now is the trustee under said mortgage.

SEVENTH: Your orator further shows that at or about the time of the execution and delivery of said mortgage, and at various dates thereafter, the defendant Railroad Company, being thereunto duly authorized by law and corporate action, did duly make, execute and issue under its corporate seal, and did deliver to various persons, firms and corporations, for value and for the considerations and purposes and as and in the denominations and form in said mortgage provided, its bonds to the aggregate amount of $2,960,500, all of which said bonds were duly certified by your orator as trustee as in said mortgage provided, all of which said bonds are now outstanding under and secured by said mortgage. Your orator further shows that bond scrip, in amounts less than $500,

has been, as your orator is informed and believes, duly issued by the defendant company, as and with the rights in said mortgage provided, and that such scrip is now outstanding to the aggregate amount of $5,552.50.

EIGHTH: Your orator further shows that said mortgage to your orator as trustee among other things provides as follows:

ARTICLE SECOND: Until default shall be made in the payments of principal or interest, or some part of either principal or interest, as herein provided, the said party of the first part shall possess, control, manage, operate, use and enjoy the said railways, rolling stock, equipments, franchises, real estate, and other property, and shall receive, take and use the rents, incomes, profits and tolls thereof for its own uses and purposes, as if this Indenture had not been made.

But in case default shall be made in the payment of the principal or of any interest on any of the aforesaid bonds, issued under and secured by this instrument according to the tenor thereof, or of any of the coupons thereto attached, and if such default shall continue for the period of six months after demand made for the payment of the same at the financial agency of the said party of the first part, aforesaid, in the City of New York, it shall be lawful, subject to waiver of such default as hereinafter provided, for the said Trustee, the said party of the second part, or its successor or successors in this trust, by itself, its attorneys, or agents, to enter in and upon, and take possession of, all and singular, the railways, premises and property, rights and interests, hereby conveyed and mortgaged, or intended so to be, and each and every part thereof, and to exclude the said party of the first part and its agents wholly therefrom, and to hold and use the same, and to control, manage and operate, by its superintendents, managers, receivers, agents, servants, employees and attorneys, the said railways, and to manage and conduct the business thereof, and to make, from time to time, at the expense of the trust estate, all repairs and replace-

ments, and such useful alterations, additions and improvements thereto, as well in respect to the rolling stock and equipments as to the said railways and appurtenances, and all other matters and things which will promote the interests of the parties hereto, as may seem to it, the said Trustee, judicious and proper, and to collect and receive all tolls, freights, incomes, rents, issues and profits of the same and every part thereof, and, after deducting the expenses of operating said railways, and of conducting its business, and paying all proper and legitimate debts and obligations, and for all repairs, replacements, alterations, additions and improvements, as aforesaid, and all taxes, assessments and other proper charges upon the said property and premises, or any part thereof, as well as a just and reasonable compensation for its own services and the services of all agents, clerks, servants and other employees, properly engaged or employed, including reasonable attorneys' and solicitors' fees, then to apply the moneys arising as aforesaid to the payment of the interest in arrear, or which shall become due, on the outstanding bonds secured hereby, in the order in which such interest shall be or become due, ratably to the persons the coupons therefor, and after paying all such interest which shall have become due, to apply the same to the payment of the principal of the aforesaid bonds which may, at that time, be due and unpaid, ratably, without discrimination or preference.

And further, provided that the said party of the first part, at any time hereafter before the full payment of said bonds, whenever it, the said party of the first part, shall deem it proper and expedient for the better security of the said bonds, shall be willing to voluntarily surrender to the said Trustee, the said party of the second part, or its successor or successors in this trust, the possession, control and management of the said railways, premises and property, and the business thereof, for any term of years, certain or indefinite, although there may not have occurred such default as to entitle the said party of the

second part to enter into the possession of the whole or any part of the said railways, rolling stock, premises, property and rights hereby mortgaged, or intended so to be, it shall be the duty of the Trustee, the said party of the second part, or its successor or successors in this trust, upon satisfactory indemnity, upon any such surrender and delivery, to enter into and upon the premises so surrendered and delivered, and to take and receive possession, control and management of said railways and property so surrendered, for such terms or terms of years, certain or indefinite, as may be agreed upon by the said parties hereto, but without prejudice to the rights of said party of the second part, subsequently, to insist upon and maintain such possession, control and management beyond such term whenever it would have been entitled thereto, if such voluntary surrender had not been made. And upon the voluntary surrender and delivery of the said premises or property, or any part thereof, as aforesaid, the said party of the second part, or its successor or successors in this trust, shall, during the time for which such possession and control shall be by it taken, and while the same shall remain in its possession thereunder, receive the income and revenues thereof, and work, use and manage, control, operate and employ the same in such lawful way as may be the most beneficial, as well to the interests of the public as to the holders of said bonds, intended to be secured hereby, and of the party of the first part, and in all respects in accordance with the law and the provisions o this Article.

ARTICLE THIRD: *In case default shall be made* in the payment of any interest upon any of said bonds, or of the principal thereof, as aforesaid, and shall continue for six months after demand made for payment, as aforesaid, it shall be lawful, unless such default be waived as herein provided, for the said Trustee, the said party of the second part, or its successor or successors in this trust, after entry as aforesaid, or other entry, or without entry, by its attorney or attorneys, agent or agents, to sell and

dispose of all and singular the said railways and appurtenances, property and premises, rights, interests and franchises hereby conveyed or mortgaged, or intended so to be, at public auction, to the highest bidder, at such time and place in the City of Palestine, in the State of Texas, as it may designate, having first given public notice of the time, place and terms of such sale by advertisement published not less than once a week for six consecutive weeks in one or more newspapers published in the cities of Palestine, Texas, and New York, with the right to adjourn such sale or sales from time to time, in the discretion of such Trustee, giving reasonable notice of such adjournment, and after so adjourning, to make the sale at the time and place to which the same may be adjourned, and on the consummation of the sale upon the terms and conditions thereof, to make and deliver to the purchaser or purchasers thereof good and sufficient deed or deeds in law for the same in fee simple, which sale, made as aforesaid, shall be a perpetual bar, both at law and in equity, against the said party of the first part and all other persons lawfully claiming, or to claim, the said railways and appurtenances, property and premises, rights, interests and franchises, or any part thereof so sold, by, from, through, or under it. And after deducting from the proceeds of such sale just allowances for all expenses of said sale, including attorneys' and counsel fees, and all other expenses, advances and liabilities which may have been made or incurred by the said Trustee in operating said railways or in maintaining the same, or in managing its business while in possession thereof, and all payments which may have been made by it for taxes and assessments and other proper charges upon the said railways and appurtenances, property and premises, rights, interests and franchises, or any part thereof, as well as reasonable compensation for its own services, then to apply the said proceeds to the payment of the principal of such of the aforesaid bonds as may be at such time unpaid, whether the same shall have previously become due or

not, and of the interest which shall, at that time, have accrued on the said principal and be unpaid, without discrimination or preference, but ratably to the aggregate of said unpaid principal and accrued and unpaid interest added together, and after satisfaction of all the said bonds secured hereby, with the interest thereon, to pay over the surplus of such proceeds, if any, to the said party of the first part, or to such party as may then be entitled to receive the same.

This provision is cumulative to the ordinary remedy by foreclosure in the courts, and the Trustee herein or its successor or successors in this trust, upon default being made as aforesaid, may, at its discretion, and upon the written request of the holders of the majority in value of the said bonds then outstanding and unpaid, shall (upon being properly indemnified) institute proceedings to foreclosure this mortgage or deed of trust, in such manner (by sale under the power herein given, or by suit) as the holders of a majority in value of said bonds may direct, and if no such direction is given in this behalf, then in such manner as the said Trustee may deem most expedient.

For the debt or bonds secured hereby the said Railroad Company, the said party of the first part, is liable in personam, and any deficit after exhausting the mortgaged security may be enforced against the said Company or its other property, but not against the stockholders individually.

NINTH: Your orator further shows that the defendant company has failed to pay and has made default in the payment of the following amounts of interest represented by coupons from the said outstanding Third Mortgage bonds which fell due upon the following dates, respectively, namely:

March 1, 1901, $32,530; September 1, 1901, $32,530; March 1, 1902, $32,530; September 1, 1902, $32,530; March 1, 1903, $32,530; September 1, 1903, $32,530; March 1, 1904, $37,430; September 1, 1904, $37,430;

March 1, 1905, $37,430; September 1, 1905, $37,430; March 1, 1906, $37,430; September 1, 1906, $37,430; March 1, 1907, $37,430; September 1, 1907, $37,430. Total, $494,620; and that said coupons have been duly presented for payment to the defendant company and payment thereof has been refused and the defendant company has been ever since and now is in default in the payment of the interest and coupons due upon its said Third Mortgage bonds in the amounts and at the dates in the foregoing schedule specified, which said interest and coupons in default aggregate the sum of $494,620; and said defendant railroad company has wholly failed, neglected and refused to pay the same, and still so fails, neglects and refuses.

TENTH: Your orator further shows that the said defendant the International and Great Northern Railroad Company is insolvent and unable to meet its operating expenses and accrued obligations and to defray the cost of improvements and of enlarged and improved facilities required by the constituted authorities of the State of Texas to be made and finished by it; and that it has incurred a large amount of floating and unsecured indebtedness which it is wholly unable to pay and discharge.

ELEVENTH: Your orator further shows that said mortgage of March 1, 1892, specifically pledges to your orator the tolls, fares, freights, rents, income, issues and profits of the premises embraced in said mortgage; and that the income and revenues of the premises described in said mortgage are an essential part of the security of your orator, and your orator is entitled to have such income and revenues forthwith, immediately and continuously appropriated to the payment of the interest upon said bonds secured by said mortgage; and that said mortgage specifically pledges to your orator the franchise to maintain and operate the railway and property in said mortgage described and that your orator is entitled to the possession of the premises embraced in said mortgage, and to maintain and operate said railroad, and to receive

and apply the tolls and revenues thereof, as in said mortgage provided, and to have the said mortgaged premises sold and administered; and, to the end that it may be put in such possession and have a decree enforcing its security, it brings this its bill of complaint.

WHEREFORE, and forasmuch as your orator is remediless in the premises under and by the strict rules of the common law, and can have relief only in a court of equity, where matters of this nature are properly cognizable and reviewable, your orator files this its bill of complaint, and prays, the premises considered:

1. That said mortgage or deed of trust of March 1, 1892, executed and delivered by the defendant to your orator and hereinabove mentioned and described, may be decreed to be a lien upon all the property, real, personal and mixed, rights, franchises, lands, grants, titles, railroads, branches and extensions in said mortgage or deed of trust described, and then owned, and upon all property subsequently owned, acquired or constructed by the defendant company, and the nature, extent and character of said property may be ascertained and determined; and that the defendant, the International and Great Northern Railroad Company, may be decreed to pay unto your orator all moneys now due or to become due and payable under and by virtue of said mortgage or deed or trust so executed to your orator as aforesaid. And that in default thereof the said defendant railroad company and all persons claiming under it may be forever barred and foreclosed of and from all equity of redemption and claim of, in and to said mortgaged premises and every part and parcel thereof, and that all and singular said mortgaged premises with the appurtenances, property and effects, rights, immunities and franchises in said mortgage mentioned and conveyed, or intended so to be, may be sold under a decree of this honorable court, and that out of the money arising from the sale thereof, after deducting from the proceeds of any such sale just allowances for all disbursements and expenses of said sale, including attor-

neys' and counsel's fees, and the reasonable charge of your orator for services rendered as trustee, and for all expenses incurred by it in the premises and all payments which may be made for taxes or assessments or otherwise on the said premises or any part thereof, the said proceeds be applied to the payment of the principal of such of the aforesaid bonds as may be at that time unpaid, whether or not the same shall previously have become due, and of the interest which shall at that time have accrued upon said principal and be unpaid.

And your orator further prays that an account may be taken of the bonds secured by said Third Mortgage of March 1, 1892, to your orator, as trustee, and of the amount due upon such bonds for principal and interest, or either.

2. That a receiver may be appointed according to the usual course and practice of this court, with the usual powers of receivers in like cases, of the railroad, franchises and premises embraced in and covered by said mortgage to your orator as trustee; and that the said receiver be empowered, instructed and directed to take possession of the railway, rolling stock and appurtenances, and of all extensions, branches, property and premises embraced in said mortgage, and to operate the same and to collect and receive the income and tolls thereof and to properly account for the net earnings received therefrom after deducting the expenses of operating the same, and the amount of taxes, assessments and prior charges upon said railroad and property; and that the defendant, the International and Great Northern Railroad Company, be decreed to make such transfers or conveyances to said receiver appointed as herein prayed, and to the purchaser or purchasers at any sale or sales of all or any part of said property, as may be made in conformity with the provisions of said mortgage, or under the decree of this honorable court, which may be necessary and proper to put such purchaser or purchasers, or either of them, in possession of the property so purchased.

3. Your orator further prays that a writ of injunction be issued out of and under the seal of this honorable court by one of your Honors, according to the form of the statute in such case made and provided, directing, commanding, enjoining and restraining the said defendant from interfering with, transferring, selling, or disposing of any of the property mentioned in and covered by said mortgage or deed of trust; and that your orator may have such other or further relief in the premises as the nature and circumstances of this case may require, and to this honorable court shall seem meet.

4. That your Honors may grant unto your orator a writ of subpœna, directed to the International and Great Northern Railroad Company, thereby commanding it at a certain time and under a certain penalty therein to be named personally to be and to appear before this honorable court, then and there to answer to all and singular the matters aforesaid, but not under oath (an answer under oath being expressly waived) and to stand and abide by and perform such order, directions or decree as shall be made herein and as to your Honors shall seem equitable and just.

And your orator as in duty bound will ever pray.

THE MERCANTILE TRUST COMPANY,
By ALEXANDER & GREEN,
COKE, MILLER & COKE,
Its Solicitors.

W. W. GREEN,
H. C. COKE,
Of Counsel.

THE STATE OF TEXAS,
County of.....

T. S. Miller, being duly sworn, says that he is one of the solicitors for the complainant in the foregoing bill of complaint; that he knows the contents of said bill, and he verily believes the same to be true, and that he has de-

rived his knowledge and information in respect of the matters and things alleged in said bill from an examination of papers, documents and records relating thereto, and from personal conference with the duly authorized representatives and agents of the complainant herein.

T. S. MILLER.

Sworn to and subscribed before me, this 25th day of February, 1908.

(L. S.) GABRIEL FERNANDEZ, JR.,
Notary Public.

EXHIBIT "A."

INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY

—TO—

THE MERCANTILE TRUST COMPANY, TRUSTEE.

Four Per Cent Gold Third Mortgage.

Dated March 1, 1892.

THIS INDENTURE, made this first day of March, 1892, between the INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY, a corporation, organized and existing under the laws of the State of Texas, party of the first part, and the MERCANTILE TRUST COMPANY, a corporation organized and existing under the laws of the State of New York, Trustee, party of the second part:

WHEREAS, the party of the first part did heretofore make, execute and deliver to various persons its First Mortgage Six Per Cent. to the aggregate amount of $7,954,000, each dated on the first day of November, 1879, and maturing on the first day of November, 1919, and secured the same by a mortgage or deed of trust bearing date on said first day of November, 1879, executed and delivered by it to John S. Kennedy and Samuel Sloan, of the City of New York, trustees; and the said party of the first part did heretofore make, execute and deliver to va-

rious persons its second mortgage six per cent. bonds to the aggregate amount of $7,054,000, each bearing date the 15th day of June, 1881, and maturing on the first day of September, 1909, and secured the same by a mortgage or deed of trust, bearing date on said fifteenth day of June, 1881, executed and delivered by it to The Farmers' Loan and Trust Company, of the City of New York, Trustee;

And Whereas, the party of the first part defaulted in the payment of the interest due on May 1st, 1889, and in the payment of all interest due thereafter down to and including the interest due on November 1st, 1891, upon said First Mortgage bonds; and likewise so defaulted in the payment of the interest due on March 1st, 1889, and in the payment of all interest due thereafter down to and including the interest due on September 1st, 1891, upon said Second Mortgage bonds; and suits to foreclose said First and Second Mortgages were instituted by the Trustees of said mortgages in the Circuit Court of the United States for the Eastern District of Texas.

And Whereas, the party of the first part is, at the date hereof, indebted to the full amount of $546,902.12, upon a certain judgment recovered on the 11th day of March, 1889, in an action instituted by Jay Gould against the party of the first part in the District Court of Smith County, Texas;

And Whereas, a Plan and Agreement for the Reorganization of the hereinbefore recited accrued indebtedness of the party of the first part, bearing date the 27th day of January, 1892, was approved and entered into by and between the Company (party hereto of the first part), and the holders of its outstanding and unpaid coupons, of its stock and of said judgment, wherein and whereby it was, among other things provided:

1st. That one-half of the amount due upon all of said defaulted First Mortgage coupons should be paid in cash, and for the remaining one-half of the amounts so due said Company should execute its Certificates of Indebtedness, bearing interest from November 1st, 1891, at the

rate of five per cent. per annum, the principal thereof payable in six successive yearly installments beginning on the first day of November, 1892; the payment of the principal and interest of said certificate to be secured by a deposit of said coupons with the Central Trust Company of New York, as Trustee.

2d. That the defaulted Second Mortgage coupons of the party of the first part (less the amount paid upon the coupon of September 1st, 1891, in cash), aggregating the sum of $1,190,362.50, should be payable at their face in new Third Mortgage bonds of the said Company.

3d. That the amount due upon said judgment of March 11th, 1889, should be paid dollar for dollar in said new Third Mortgage bonds.

4th. That stockholders of the said Company should advance to it the amount of money necessary to meet the cash requirements of said Plan and Agreement for Reorganization, to-wit: the sum of $1,026,863.23, and should receive for such advancement the amount thereof in said new Third Mortgage bonds at par.

And Whereas, in pursuance of said Plan and Agreement for Reorganization, the stockholders of the said Railroad Company have advanced to it the said sum of $1,026,863.23 for the purpose of enabling it to meet the said cash requirements of said Plan and Agreement, and said Company has made, executed and delivered its said Certificate of Indebtedness, covering one-half of the amounts due upon its said defaulted First Mortgage coupons and has secured the same by a deposit of said coupons as in said Plan and Agreement provided; and has paid in cash to and for account of the holders of said coupons the remaining one-half of the amounts so due, with interest, to-wit, the sum of $768,667.09, and has paid in cash upon the interest installment of September 1st, 1891, on its said Second Mortgage bonds, the sum of $79,357.50; and has paid in cash the cost and expense of said Reor-

ganization, including compensation to the Trustees of said mortgages, the charges of Bondholders' Committees, the fees of counsel for said Committees and for complainants, in said foreclosure suits, &c, to-wit, the sum of $178,838.64;

And Whereas, for the purpose of providing for the unpaid coupons upon its Second Mortgage bonds, and its indebtedness upon said judgment of March 11, 1889, and its indebtedness for the amount of said contribution and advancement of stockholders (all of which requirements aggregate the sum or amount of $2,764,127.85) and for other corporate uses, the party of the first part has, by due corporate action of its Board of Directors, determined to make, execute and issue its bonds (being the Third Mortgage bonds provided to be issued in said Plan and Agreement for Reorganization) of the denominations of Five Hundred Dollars and One Thousand Dollars, respectively, to the aggregate amount of Three Million Dollars, dated on the first day of March, 1892, maturing on the first day of September, 1921, and bearing interest at the rate of four per cent. per annum, payable until and including September 1st, 1897, only out of the net earnings of the party of the first part, and thereafter absolutely; and to secure said bonds by the execution and delivery to the Mercantile Trust Company. Trustee, of this Mortgage or Deed of Trust;

And Whereas, the making, execution and delivery of said last-mentioned bonds and of this Mortgage or Deed of Trust has been duly authorized by a resolution adopted by a vote of more than two-thirds of all of the stock of the party of the first part at a meeting of its stockholders duly called and held for that purpose, upon notice of more than sixty days, served and published in accordance with the requirements of law; and, in like pursuance of law, a copy of said resolution has been duly recorded in the office of the Secretary of State of the State of Texas;

And Whereas, each of said bonds is in substantially the following form:

UNITED STATES OF AMERICA.
THE INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY.

THIRD MORTGAGE FOUR PER CENT. BOND.

Due September 1st, 1921.

No..... $1,000

The International and Great Northern Railroad Company, for value received, hereby acknowledges itself indebted to The Mercantile Trust Company, Trustee, or bearer, in the sum of one thousand dollars which sum the said Railroad Company promises to pay, at its Financial Agency in the City of New York, to the bearer, unless this bond is registered, and, if registered, then to the registered holder hereof, in Gold Coin of the United States of the present standard of weight and fineness, on the first day of September, in the year 1921; together with interest thereon at the rate of four per cent. per annum, from the first day of March, 1892, payable semi-annually in like gold coin on the first days of March and September in each year upon presentation of the annexed coupons as they severally become due at the said agency of the Company in the City of New York. The payment of the interest coupons maturing on the first day of September, 1892, and of all succeeding coupons down to and including the coupons maturing on the first day of September, 1897, is subject to the terms and conditions stated in the deed of trust or mortgage hereinafter mentioned, to the effect that the said coupons shall be payable only out of such net earnings of the said Railroad Company, if any, as shall remain after deducting from the gross earnings acquired during the periods to which such coupons respectively relate, the operating and maintenance expenses, taxes, interest upon prior mortgage and guaranteed bonds, the interest upon and annual installments of principal of this Company's First Mortgage coupon Cer-

tificate of indebtedness, repairs, renewals, replacements, insurance, alterations, additions, betterments and equipments. If such net earnings shall be insufficient to provide for the payment of such interest coupons in full, they shall be applied to the payment of such coupons at such reduced rate as they may suffice to pay, and the amount so paid shall be in full satisfaction of the coupons to which the payment shall be applied. The interest upon this bond during the said period (from the date hereof to and including the first day of September, 1897), to which the said terms and conditions of said mortgage relate, shall not be cumulative, and in case no net earnings for the six months covered by any interest coupon maturing during said period shall remain after the deductions aforesaid, the said coupon and the obligation of the Company therein contained shall cease and become of no effect.

This bond is one of a series of thirty-five hundred bonds of like tenor and date, numbered consecutively from 1 to 3,500, inclusive, of which bonds numbered from 1 to 2,500, inclusive, are of the denomination of $1,000 each, and bonds numbered from 2,501 to 3,500 inclusive, are of the denomination of $500 each; all of which are equally secured by a Third Mortgage or Deed of Trust of even date herewith executed and delivered by said Company to The Mercantile Trust Company of New York, Trustee, covering the entire railroad of said Railroad Company, together with all the rolling stock, equipment, appurtenances, privileges and immunities of the said Company now owned or hereafter acquired.

If default shall be made in the payment of any semi-annual installment of interest which shall mature on this bond as herein and in said coupons provided, when the same shall become due and be demanded, and such interest shall remain unpaid for six months after such demand, the principal of this bond shall become due and payable in the manner provided in said mortgage or deed of trust.

This bond shall pass by delivery or by transfer on the

books of said Railroad Company in the City of New York; after registration of ownership certified hereon by the transfer agent of said Company, no further transfer except on the books of the Company shall be valid unless transferred to bearer on said books, after which this bond shall pass by delivery as at first, but shall continue subject to registration and transfer to bearer successively at the option of each holder.

This bond is to be valid only when authenticated by a certificate endorsed hereon, signed by the Trustee, to the effect that it is one of the bonds secured by said mortgage or deed of trust.

In Witness Whereof, the said Railroad Company has caused its corporate name to be hereto signed by its President or Vice-President, and its corporate seal to be hereunto affixed, attested by its Assistant Secretary this first day of March, 1892, and the annexed coupons to be executed with the engraved signature of its Assistant Treasurer.

The International and Great Northern Railroad Company.

By

President.

Attest:

Assistant Secretary.

Now, Therefore, This Indenture Witnesseth:

That the International and Great Northern Railroad Company, party of the first part, for and in consideration of the premises and of the sum of one dollar to it duly paid by the party of the second part, and in order to secure the payment of the principal and interest of the bonds secured hereby, according to the tenor thereof, but in the manner and subject to the conditions herein provided, has granted, bargained, sold, transferred and conveyed, and does hereby grant, bargain, sell, transfer and convey unto the said The Mercantile Trust Company, par-

ty of the second part, and to its successor or successors in this trust, all and singular the lands, tenements and hereditaments of the said Railroad Company, now owned or hereafter to be acquired by it, and all and singular the railroads and railroad property now owned or to be hereafter constructed or acquired by it, the main line whereof, as now constructed, extends from the Town of Longview, in the County of Gregg, through said county and through the counties of Rusk, Smith, Cherokee, Anderson, Leon, Robertson, Milam, Williamson, Travis, Hays, Comal, Bexar, Medina, Frio, La Salle, Encinal and Webb, to Laredo in said last mentioned county; and from the town of Mineola in Wood County, to Troup, in Smith County, and from the City of Palestine, in Anderson County, through the counties of Houston, Trinity, Walker, and Montgomery to Houston, in Harris County, with branches and branch lines from the town of Overton to the town of Henderson, in Rusk County, from the town of Round Rock to Georgetown, in Williamson County; from the town of Phelps to the town of Huntsville, in Walker County; and from the City of Houston in Harris County, to the town of Columbia, in Brazoria County; a total distance of about 775 miles, of completed railroad, all in the State of Texas; including all its tracks, rights of way, main lines, branches, superstructures, depots, depot grounds, station houses, engine houses, car houses, freight houses, wood-houses, sheds, watering places, workshops, machine shops, bridges, viaducts, culverts, fences and fixtures, together with all its leases, leasehold interests, leased or hired lands, leased or hired railroads, and all its locomotives, tenders, cars, carriages, coaches, trucks, and other rolling-stock, its machinery, tools, weighing scales, turntables, rails, wood, coal, oil, fuel, equipment, furniture, and material of every name, nature and description, together with all the corporate rights, privileges, immunities and franchises of said Railroad Company, now held or hereafter to be acquired (including the franchise to be a corporation), and all the tolls,

fares, freights, rents, income, issues and profits thereof, and all the reversion and reversions, remainder and remainders, thereof, in trust, however, for the uses and purposes hereinafter mentioned.

To Have and to Hold, the above described premises, property, rights, franchises and appurtenances unto the said party of the second part and its successor or successors forever to the only proper use, benefit and behoof of the said party of the second part, its successor or successors; In Trust, nevertheless, for the equal *pro rata* benefit and security of all and every the persons or corporations who may be or become holders of any of the bonds issued hereunder, without any preference or priority of one bond over another, by reason of priority in time of issue or negotation thereof, or otherwise, and for the uses and purposes and upon the trusts and conditions herein declared and expressed.

This Mortgage Is Expressly made and declared to be subject to the mortgage of the said Railroad Company, party hereto, of the first part, dated on the first day of November, 1879, covering the railroad and property of the Railroad Company, then owned or thereafter to be acquired, executed to John S. Kennedyand Samuel Sloan, Trustees, to secure the bonds of the Railroad Company issued and to be issued thereunder as therein provided; and subject also to the mortgage of the Railroad Company dated on the 15th day of June, 1881, likewise covering the railroad and property of the Railroad Company then owned or thereafter to be acquired, executed to the Farmers' Loan and Trust Company, Trustee, to secure the bonds of the Railroad Company issued and to be issued thereunder, and as therein provided; and subject to all of the provisions of said last-mentioned mortgages, and to the powers, rights and privileges, as well as the covenants, duties and obligations, of the party of the first part therein, respectively set forth and contained.

The said Railroad Company, party of the first part, hereby covenants and agrees to and with the said Trustee,

party of the second part, for the benefit of the bondholders secured hereby, that it will pay all lawful taxes and assessments upon said property hereby mortgaged at any time legally levied and assessed thereon; that it will suffer no mechanic's, statutory or laborer's liens, which shall have priority to this mortgage, to be created or placed on any part or portion of said railways or any part of the estate and property hereby mortgaged, to the end that the priority of this mortgage shall at all times be maintained; and that it shall and will diligently preserve all the rights and franchises to it granted and upon it conferred, and shall and will at all times maintain, preserve and keep the same and every part thereof, with the rolling stock, fixtures and appurtenances, and every part and parcel thereof, in good repair, working order and condition, and shall and will from time to time make all needful and proper repairs, renewals, replacements and useful and proper alterations, additions, betterments and improvements.

And the said Railroad Company further covenants that it will not issue, negotiate, sell or otherwise dispose of the bonds to be issued hereunder in any manner inconsistent with the provisions of these presents and its covenants and agreements in that behalf herein contained; and for the purpose of securing to the holders of the said bonds to be issued hereunder that none of said bonds shall be issued except as herein provided, it is hereby stipulated and agreed by and between the parties hereto, that the said Trustee herein, or its successor or successors, in said trust, shall (without further corporate action or resolution of the Railroad Company) certify and deliver said bonds only as follows:

1. Bonds secured by this Indenture shall be issued, certified and delivered by the said Trustee in payment, at par, for the hereinbefore recited advancements and contributions of the stockholders of the party of the first part made for the purpose of enabling it to provide for the cash requirements of the said Plan and Agree-

ment for Reorganization, dated on the 27th day of January, 1892. Said advancements and contributions aggregate the sum of $1,026,863.23, and bonds secured by this Indenture shall, for the purpose specified in this clause, be issued only to that aggregate amount at their face or par, and shall be so issued only in exchange for the receipt or receipts of the said Railroad Company for said advancements or contributions.

2. Bonds secured by this Indenture shall be issued, certified and delivered by the said Trustee, in payment, at their face, for the defaulted Second Mortgage coupons of the said Railroad Company hereinbefore recited (except for the proportion of the coupons of September 1st, 1891), paid in cash as aforesaid), and shall be so delivered in exchange for said coupons dollar for dollar. The said defaulted coupons include the coupons matured March 1st, 1889, and all subsequent coupons down to and embracing the coupons matured September 1st, 1891, and the aggregate amount of said defaulted coupons (less the said proportion of the coupons of September 1st, 1891, paid in cash as aforesaid), is the sum of $1,190,362.50, and bonds issued under this indenture for the purpose specified in this clause shall only be issued to an aggregate amount at their face, equal to said last mentioned sum. The coupons received by the Trustee in exchange for said bonds shall be delivered to the Railroad Company and cancelled.

3. Bonds secured by this Indenture shall be issued, certified and delivered by the said Trustee in payment, at par, of the amount due upon said hereinbefore recited judgment of March 11th, 1889, recovered in said action brought by Jay Gould against the International and Great Northern Railroad Company in the District Court of Smith County, Texas. The amount so due upon said judgment, at the date hereof, is $546,902.12, and for the purpose specified in this clause bonds secured hereby shall be issued only to an amount at their face aggregating said last mentioned sum, and shall be so issued and

delivered only upon the delivery to said Trustee of a duly executed satisfaction and release of said judgment, or of duly authenticated evidence that said judgment has been satisfied and discharged.

4. The remaining bonds provided to be issued and certified under this Indenture shall be certified by said Trustee and delivered to the said Railroad Company, and the said Railroad Company, party hereto of the first part, hereby covenants and agrees that it will not issue, use or negotiate the same, except for good and lawful consideration, and for its legitimate corporate uses.

In all cases where any persons under the terms of this Indenture are entitled to receive bonds secured hereby in any amounts less than $500, such persons shall receive, from the Railroad Company Scrip Certificates for such fractional amounts, which said Certificates shall be convertible at their face into said bonds bearing the then current coupon, and all subsequent coupons, when presented in amounts aggregating $500 or $1,000, or multiples thereof.

And Said Railway Company Hereby Further Covenants that it will at all times hereafter, as long as any of the bonds to be issued hereunder shall remain outstanding, keep an agency in the City of New York, and that it will pay the principal and interest of the said bonds, at the times and in the manner therein provided. But the covenant to pay the said coupons annexed to said bonds maturing on the first day of September, 1892, and each six months thereafter to and including the coupon maturing on the first day of September, 1897, is subject to the following condition and agreement: The said Company shall state each six months an account of the gross earnings, income, receipts, interests, dividends and profits received from the said mortgaged property. It shall charge against such gross income all operating and maintenance expenses, taxes, repairs, renewals, replacements and insurance, and also such expenditures for useful and proper alterations, additions, betterments and equipment

as shall be authorized or approved by its Directors, and in each statement it shall charge six months' interest upon all of its outstanding prior mortgage bonds and six months' interest on its said Certificate of Indebtedness secured by deposited First Mortgage coupons and also one-half of the annual installment of the principal of said Certificate, and also six months' interest paid by said Company on all bonds which have been guaranteed by it prior to March 1, 1892. Such net earnings as shall remain after the charges above specified shall have been made shall be applied to the payment of said coupons. If such net earnings shall be insufficient to provide for the payment of such interest coupons in full they shall be applied to the payment of such coupons at such reduced rate as they may suffice to pay, and the amount so paid shall be in full satisfaction of the coupons to which the payment shall be applied. The account provided to be kept in this section shall be stated within six months after the maturity of each of said coupons. It shall be stated for the period of six months to which the matured coupon applies. If the account shall show net earnings for such period sufficient to pay such coupons in part only, the application of such earnings to such part payment shall be in full satisfaction of such coupons, which shall be surrendered and cancelled on the receipt of such part payment. The said interest accruing on this bond during the said period from the date hereof to and including the first day of September, 1897, to which the provisions of this clause relate, shall not be cumulative; and in case no net earnings for the six months covered by any interest coupon maturing during said period, after the deductions aforesaid, shall be shown by such account, the coupon for said period and the obligation of the Company therein contained shall cease and become of no effect.

It Is Hereby Agreed and Declared, that the aforesaid described property, rights, interests and franchises hereby conveyed or mortgaged are to be held by such Trustee

and its successor or successors upon and for the additional trusts, uses and purposes following, to-wit:

Article First. This indenture is upon the express condition, that if the said Railroad Company, the said party of the first part, shall well and truly pay, or cause to be paid, to the holder or holders of said bonds, the principal sums of money therein mentioned, according to the true intent and meaning thereof, with the interest thereon, according to the terms and conditions thereof and of the interest coupons thereto attached, then, and in that case, the lien or incumbrance hereby created for the security and payment thereof, and all estate, right, title and interest of the said party of the second part in the property aforesaid, shall cease and determine, and at the request of the said party of the first part, or its assigns, this Indenture shall be satisfied and discharged, and a release and satisfaction thereof shall be entered of record in each and all of the several counties in which this Indenture shall have been recorded, at the cost of the said party of the first part.

Article Second. Until default shall be made in the payment of principal or interest, or some part of either principal or interest, as herein provided, the said party of the first part shall possess, control, manage, operate, use and enjoy the said railways, rolling stock, equipments, franchises, real estate and other property, and shall receive, take and use the rents, incomes, profits and tolls thereof for its own uses and purposes, as if this Indenture had not been made.

But in Case Default Shall be Made in the payment of the principal or of any interest on any of the aforesaid bonds, issued under and secured by this instrument according to the tenor thereof, or of any of the coupons thereto attached, and if such default shall continue for the period of six months after demand made for the payment of the same at the financial agency of the said party of the first part, aforesaid, in the City of New York, it shall be lawful, subject to waiver of such default as herein-

after provided, for the said Trustee, the said party of the second part, or its successor or successors in this trust, by itself, its attorneys, or agents, to enter in and upon, and to take possession of all and singular the railways, premises and property, rights and interests, hereby conveyed and mortgaged, or intended so to be, and each and every part thereof, and to exclude the said party of the first part, and its agents wholly therefrom, and to hold and use the same, and to control, manage and operate, by its superintendents, managers, receivers, agents, servants, employees and attorneys, the said railways, and to manage and conduct the business thereof, and to make, from time to time, at the expense of the trust estate, all repairs and replacements, and such useful alterations, additions and improvements thereto, as well in respect to the rolling stock and equipments, as to the said railways and appurtenances, and all other matters and things which will promote the interests of the parties hereto, as may seem to it, the said Trustee, judicious and proper, and to collect and receive all tolls and freights, incomes, rents, issues, and profits on the same and every part thereof, and after deducting the expenses of operating said railways, and of conducting its business, and paying all proper and legitimate debts and obligations, and for all repairs, replacements, alterations, additions and improvements, as aforesaid, and all taxes, assessments and other proper charges upon the said property and premises, or any part thereof, as well as a just and reasonable compensation for its own services and the services of all agents, clerks, servants and other employees, properly engaged or employed, including reasonable attorneys' and solicitors' fees, then to apply the moneys arising as aforesaid to the payment of the interest in arrear or which shall become due, on the outstanding bonds secured hereby, in the order in which such interest shall be or become due, ratably to the persons holding the coupons therefor, and after paying all such interest which shall have become due, to apply the same to the payment of the

principal of the aforesaid bonds which may, at that time, be due and unpaid, ratably, without discrimination or preference.

And further provided that the said party of the first part, at any time hereafter before the full payment of said bonds, whenever it, the said party of the first part, shall deem it proper and expedient for the better security of the said bonds, shall be willing to voluntarily surrender to the said Trustee, the said party of the second part, or its successor or successors in this trust, the possession, control and management of the said railways, premises and property, and the business thereof, for any term of years, certain or indefinite, although there may not have occurred such default as to entitle the said party of the second part to enter into the possession of the whole or any part of the said railways, rolling stock, premises, property and rights hereby mortgaged, or intended so to be, it shall be the duty of the Trustee, the said party of the second part, or its successor or successors in this trust, upon satisfactory indemnity, upon any such surrender and delivery, to enter into and upon the premises so surrendered and delivered, and to take and receive possession, control and management of said railways and property so surrendered, for such term or terms of years, certain or indefinite, as may be agreed upon by the said parties hereto, but without prejudice to the rights of said party of the second part, subsequently to insist upon and maintain such possession, control and management beyond such term whenever it would have been entitled thereto, if such voluntary surrender had not been made. And upon the voluntary surrender and delivery of said premises or property, or any part thereof, as aforesaid, the said party of the second part or its successor or successors in this trust shall, during the time for which such possession and control shall be by it taken, and while the same shall remain its possession thereunder, receive the incomes and revenues thereof, and work, use and manage, control, operate and employ the same in such lawful

way as may be the most beneficial, as well to the interests of the public as to the holders of said bonds, intended to be secured hereby, and of the party of the first part, and in all respects in accordance with the law and the provisions of this Article.

Article Third. In Case Default Shall Be Made in the payment of any interest upon any of said bonds, or of the principal thereof, as aforesaid, and shall continue for six months after demand made for payment, as aforesaid, it shall be lawful, unless such default be waived, as herein provided, for the said Trustee, the said party of the second part, or its successor or successors in this trust, after entry as aforesaid, or other entry, or without entry, by its attorney or attorneys, agent or agents, to sell and dispose of all and singular the said railways and appurtenances, property and premises, rights, interests and franchises hereby conveyed or mortgaged, or intended so to be, at public auction, to the highest bidder, at such time and place in the City of Palestine, in the State of Texas, as it may designate, having first given public notice of the time, place and terms of such sale by advertisement published not less than once a week for six consecutive weeks in one or more newspapers published in the cities of Palestine, Texas, and New York, with the right to adjourn such sale or sales from time to time, in the discretion of such Trustee, giving reasonable notice of such adjournment, and after so adjourning, to make the sale at the time and place to which the same may be adjourned, and on the consummation of the sale upon the terms and conditions thereof, to make and deliver to the purchaser or purchasers thereof good and sufficient deed or deeds in law for the same in fee simple, which sale, made as aforesaid, shall be a perpetual bar, both at law and in equity, against the said party of the first part and all other persons lawfully claiming or to claim, the said railways and appurtenances, property and premises, rights, interests and franchises, or any part thereof so sold, by, from, through, or under it. And after deducting from the

proceeds of such sale just allowances for all expenses of said sale, including attorney's and counsel fees, and all other expenses, advances and liabilities which may have been made or incurred by the said Trustee in operating said railways or in maintaining the same, or in managing its business while in possession thereof, and all payments which may have been made by it for taxes and assessments and other proper charges upon the said railways and appurtenances, property and premises, rights, interests and franchises, or any part thereof, as well as reasonable compensation for its own services, then to apply the said proceeds to the payment of the principal of such of the aforesaid bonds as may be at such time unpaid, whether the same shall previously become due or not, and of the interest which shall, at that time, have accrued on the said principal and be unpaid, without discrimination or preference, but ratably to the aggregate of said unpaid principal and accrued and unpaid interest added together, and after satisfaction of all said bonds secured hereby, with the interest thereon, to pay over the surplus of such proceeds, if any, to the said party of the first part, or to such party as may then be entitled to receive the same.

This provision is cumulative to the ordinary remedy by foreclosure in the courts, and the Trustee herein or its successor or successors in this trust, upon default being made as aforesaid, may, at its discretion, and upon the written request of the holders of the majority in value of the said bonds then outstanding and unpaid, shall (upon being properly indemnified) institute proceedings to foreclose this mortgage or deed of trust, in such manner (by sale under the power herein given, or by suit) as the holders of a majority in value of said bonds may direct, and if no such direction is given in this behalf, then in such manner as to the said Trustee may seem most expedient.

For the debt or bonds secured hereby the said Railroad Company, the said party of the first part, is liable

in personam, and any deficit after exhausting the mortgaged security may be enforced against the said company or its other property, but not against the stockholders individually.

Article Fourth. In Case Default Shall Be Made in the payment of any semi-annual installment of interest on any of the said bonds, and the time and in the manner in the said bonds and interest coupons provided, and if such default shall continue for the period of six months after due demand made for payment, as aforesaid, then and in such case, the principal sum of all the said bonds secured hereby shall, in case a majority in interest of the holders of the said bonds, in writing, under seal, so elect, become and be immediately due and payable, anything contained in the said bonds to the contrary notwithstanding. And a majority in interest of the holders of said bonds may, by writing, under their hands and seals, executed at a meeting of the said bondholders, or without such meeting, declare or instruct the then Trustee in this trust to declare the said principal of the said bonds to be due and immediately payable, or may waive, or may instruct the said Trustee to waive such right to so declare, or may revoke any such declaration already made, in each case on such terms and conditions as such majority in interest may deem proper, provided, always, and it is hereby declared, that no such action of the Trustee or bondholders shall extend to or be taken to affect any subsequent default, or to impair the rights resulting therefrom. But such right to waive shall in like manner exist in case of subsequent defaults, to be exercised at any time before the entry of a decree of foreclosure, by a majority in interest of the bonds secured hereby.

Meetings of the holders of the said bonds hereby secured, for the determination of, or action upon, any of the questions upon which, by any of the provisions hereof, the majority in interest of said bondholders may have the right to decide, may be called by the then Trustee, or in such other mode as may be, from time to time, fixed by

such majority in interest, of the holders of said bonds in respect to such meetings, and until said bondholders shall so act, such powers may be exercised by the said Trustee in this trust, and all acts or resolutions of the said bondholders affecting the rights or remedies, or for the benefit of the said bondholders, or the duties of the Trustee, or the interest of the trust hereby created, shall be authenticated by all the signatures of all the persons assenting thereto, as well as by a record of the proceedings to be kept of any such meetings.

But it is understood and hereby expressly declared and agreed, that no act or resolution of any meeting of bondholders, or of the Trustee, nor any act or election of, or instrument executed by, a majority in interest of all said bonds, shall impair, control, or affect the rights, interests or remedies, legal or equitable, of any non-assenting bondholder, except in the particulars, and to the extent to which the same is expressly made controlling by the provisions contained herein.

But in case the mortgaged premises shall be sold under the power of sale contained in the said First or Second mortgage executed by the Railroad Company (party hereto of the first part), or in case said mortgaged premises shall be sold in pursuance of judicial proceedings for the foreclosure of either of said prior mortgages, then in any and either such case the principal of all the bonds secured hereby shall thereupon become and be immediately due and payable simultaneously with such sale.

Article Fifth. The party of the first part, its successors and assigns, further covenants and agrees with the party of the second part and its successors in the trust to make, execute and deliver all such further deeds, instruments and assurances as may from time to time be necessary, and as the party of the second part, or its successor in the trust, may be advised by counsel learned in the law to be necessary for the better securing to the party of the second part and its successor in the trust

the premises hereby conveyed, and for carrying out the objects and purposes of this Indenture.

Article Sixth. Said Railroad Company, the said party of the first part, for itself and all other persons hereafter claiming through or under it, and who may, at any time hereafter, become holders of liens junior to that of these presents, hereby expressly waives and releases all right to have the assets comprised in the security intended to by created by these presents, marshalled upon any foreclosure or other enforcement thereof, and it is expressly hereby agreed and declared that the Trustee herein, and any Court in which foreclosure of this mortgage, or administration of the trusts hereby created is sought, shall have the right to sell the entire property of every description comprised in or subject to the trusts of these presents as a whole in one single lot, if it shall in its discretion think fit. And a majority in interest of said bonds may, by instrument in writing, direct the Trustee or petition the said Court to sell the said property in such manner.

Article Seventh. It is hereby expressly agreed that in no case shall any claim, benefit or advantage be taken by the party of the first part, its successors or assigns, of any valuation, stay, appraisement, redemption or extension laws, and of laws requiring mortgages, liens, hypothecations, or other securities for money to be foreclosed by action therefor, now existing, or which may hereafter exist, which but for this provision herein might prevent or postpone the sale of said premises, property rights and interests to the purchaser under the powers, and upon compliance with the provisions herein provided, and said party of the first part does hereby covenant with the said party of the second part, the said Trustee or its successor or successors, in the trust hereby created, that it will not, in any manner, set up or seek to take the benefit or advantage of any such valuation, stay, appraisement, redemption or extension law.

Article Eighth. And it is further mutually agreed by

and between the parties hereto, and it is hereby declared to be a condition upon which the said party of the second part and its successor or successors in the trust hereby created, have assented to these presents and accepted this trust, that the said Trustee and its successor in this trust shall not in any manner be held responsible for persons employed by it, when selected with reasonable care, nor shall the Trustee be answerable except for its own willful default, and in all cases the then Trustee, the party of the second part, shall be authorized to pay such reasonable compensation as it shall deem proper to all the attorneys, officers, agents, servants and employes whom it may reasonably employ in the management of this trust; and that the said Trustee and its successor or successors shall have and be entitled to just compensation for all services it may render in connection with the management of the trust hereby created, to be paid by the said party of the first part out of the trust estate, nor shall the Trustee be compelled to perform any act under this indenture unless satisfactorily indemnified.

And it is agreed and hereby provided that the said Trustee and its successor or successors in this trust may be removed, and a successor may be appointed at any time, by any court of competent jurisdiction, upon application of a majority in interest of the holders of the then outstanding bonds hereby secured.

And it is also agreed and hereby provided that two-thirds in value of the outstanding bondholders secured hereby may, upon their own motion, at any time, with or without cause, by an instrument or instruments in writing, under seal, signed by them to that effect, and without calling a meeting of the bondholders for that purpose, remove the said Trustee and any successor to the trust hereby created, and in writing under seal appoint one or more Trustees herein, whether the last Trustee shall have been appointed by a court of competent jurisdiction or otherwise, anything herein to the contrary notwithstanding. In case of such removal and appointment of Trus-

tees by the bondholders the writing shall be signed by each bondholder or his or her agent, stating the place of residence of such holder and the serial numbers and the amounts of the bonds, and in every case the affidavit of the holder shall accompany the instruments of removal and appointment, to the effect that the party signing such instrument is the owner or holder of the bonds for which he or she signs, and stating the serial number and the amount in value of each bond and the owner's or holder's place of residence.

It is also hereby expressly agreed and provided that in case of the appointment, in any of the modes herein provided, of a successor or successors, to the trust hereby created, such successor shall be invested with all and singular the powers and duties hereby conferred and imposed upon the said Trustee herein, and hereby designated, so long as he or they may remain such successor Trustee.

Article Ninth. The said Trustee, the said party of the second part, hereby promises and agrees that in no case will it deliver or certify any of the bonds secured hereby, except in conformity with the provisions of this instrument.

Article Tenth. The said Trustee, or any successor to this Trust, shall have the right, and is hereby empowered, and authorized, on any sale under, or foreclosure of this mortgage or deed of trust to buy in the mortgaged property at a price not exceeding the amount of the mortgage bonds secured hereby, and to hold and possess the property so purchased, and to control, manage, use and operate the same and receive the incomes, rents, issue and profits thereof, for the benefit of the holders of the bonds secured hereby, and upon the trusts and subject to the terms of this Indenture.

Article Eleventh. And in case of any foreclosure sale, or of any sale made under any of the provisions of this deed of trust, the purchaser or purchasers thereat, shall be entitled, in making settlement for, and payment of, the purchase money therefor, to deliver to the then Trustee,

toward the payment of such purchase mnoey, any of the said bonds and interest coupons secured hereby, and held by such purchaser or purchasers, counting such bonds and interest coupons for such purpose at a sum not exceeding that which shall be payable out of the net proceeds of such sale to the holder or holders of such bonds and interest coupons, as his or their share and proportion in that character of such net proceeds of sale, after allowing for the proportion of payment which may be required in cash for the costs and expenses of the sale, and which proportion of cash payment shall be determined and announced by the then Trustee previous to any such sale; and if such proportionate sum shall be less than the amount of such bonds or interest coupons, to make such settlement by receipting thereon for the amount to be credited thereupon.

Article Twelfth. Whereas, The respective Trustees in the first Mortgage, dated November 1st, 1879, and the Second Mortgage, dated June 15th, 1881, of the said party hereto of the first part (which mortgages are prior and paramount in lien to this Indenture), are, by the terms of said mortgages, respectively authorized, upon the written request of the party of the first part, to release any lands which shall have become disused for corporate purposes from the liens of said respective mortgages, upon condition that lands conveyed to the party of the first part in exchange for such released lands shall be brought under and made subject to the liens of said mortgages, or, in case of the sale of such disused lands, that the proceeds of such sale shall be paid to the said respective Trustees, to be by them applied to the purchase of bonds secured by said mortgages; *it is hereby expressly agreed* by both parties hereto that all such conveyances and releases of disused lands which shall be executed by the Trustees of the said Mortgages of November 1st, 1879, and June 15th, 1881, in conformity with the terms thereof, or which, after the satisfaction and discharge of said Second Mortgage, shall be so executed by the Trustees of said First Mortgage, only, shall, *ipso facto,* and without any release or

other conveyance by the Trustee hereof, operate also to release the property therein described from the lien of this Indenture. It is further agreed that after the bonds secured by said prior mortgages of November 1st, 1879, and June 15th, 1881, shall have been paid and said mortgages shall have been discharged and satisfied, the party of the second part, its successor or successors in this trust, may, upon the written request of the party of the first part, its successors or assigns, convey or release any lands which it or they may cease to use for its corporate purposes by reason of any changes of location of any station house, buildings or cattle yards, connected with its railroad, or by reason of any change of the track of said railroad, provided that, at the same time, such instruments shall be executed as shall cause the lien of this mortgage to attach to all lands, tenements and hereditaments taken and used by the party of the first part, its successors or assigns, in place of the lands disused as aforesaid; and that in case of the sale of any such lands, without exchanging them for other lands, the proceeds of such sale shall be paid to the party of the second part, or its successor in the trust, and be by it applied to the purchase of bonds secured by this mortgage, which bonds when purchased, shall be cancelled, and a certificate of the respective numbers and amounts of the bonds so cancelled shall be immediately furnished by the Trustee to the party of the first part, its successors or assigns.

Article Thirteenth. The words "Trustee," "said Trustee," and "party of second part," as used in this instrument, shall be construed to mean the Trustee or Trustees for the time being of this deed of trust, and whenever a vacancy shall exist, or any change of Trustees shall be made, to mean the surviving or continuing or successor Trustee. And any surviving, continuing or successor Trustee herein shall be possessed of, and be fully competent to exercise, all the powers and duties granted and conferred by these presents to the said Trustee named in this instrument as the party of the second part.

Article Fourteenth. And inasmuch as it is intended that this instrument shall be recorded in the proper offices in each of the several counties of the State of Texas wherein the railway property and premises conveyed hereby, or intended so to be, or some part thereof is situated, as nearly at the same time as possible, this Indenture further witnesseth that, although ten or more copies or counterparts thereof are simultaneously executed by said Railroad Company, the said party of the first part, in pursuance of the aforesaid resolutions of the said Company, and delivered to the said Trustee, and the said Trustee, in evidence of its acceptance of the trusts created, has likewise duly executed said ten or more copies or counterparts; all of said copies or counterparts so executed and delivered, each as an original, shall constitute but one and the same instrument.

In Testimony Whereof, The International and Great Northern Railroad Company, the said party of the first part, has caused its corporate name to be hereunto signed by its Second Vice President, and its corporate seal, attested by its Secretary, to be hereunto affixed; and the Trustee, the said party of the second part, has signified its acceptance of the trusteeship, herein created, by likewise causing its corporate name to be hereunto signed by its President, and its corporate seal, attested by its Secretary, to be hereunto affixed, the day and year first above written.

The International and Great Northern Railroad Company.

By Henry B. Kane,

Attest: *Second Vice President.*

A. R. Howard,

(Seal) *Secretary.*

The Mercantile Trust Company,

By Louis Fitzgerald,

Attest: *President.*

H. C. Deming,

(Seal) *Secretary.*

EXHIBIT "B."

IN THE UNITED STATES CIRCUIT COURT FOR THE NORTHERN DISTRICT OF TEXAS.

THE MERCANTILE TRUST COMPANY,
Trustee, Complainant,
vs.
THE INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY,
Defendant.

ORDER.

Upon reading and considering the verified bill of complaint in this cause, and on motion of counsel for the complainant, and the defendant, the International and Great Northern Railroad Company, appearing by counsel and assenting thereto, and due deliberation being had it is

ORDERED, ADJUDGED AND DECREED, by the Court that:

1. Thomas J. Freeman be and he is hereby appointed receiver of all the railroads, lands, franchises, property and premises embraced in and covered by the mortgage made by the International and Great Northern Railroad Company to the complainant herein as trustee, dated March 1, 1892.

2. That said receiver be and he is hereby directed to take possession of the railroads, rolling stock, appurtenances, property and premises embraced in said mortgage, and to operate the same, and to collect and receive the income and tolls thereof, and to hold and retain the net revenues thereof in such manner and to the end that the same may be applied under such orders as the Court shall hereafter make in the premises, as and for the purposes provided in said mortgage of the International and Great Northern Railroad Company to the complainant herein as trustee.

3. That said Receiver is also authorized and empowered to institute and prosecute such suits as may in his judgment be necessary for the proper protection of said property, and to likewise defend any actions which have

been or may be brought seeking to establish claims, liens or demands against said property of which he is hereby appointed receiver.

4. That within sixty days from this date, said receiver shall execute a bond to the Clerk of this Court, with one or more sureties approved by this Court, or by any Judge thereof, for the benefit of whom it may concern, in the penal sum of Fifty Thousand Dollars, conditioned to the effect that he will faithfully discharge the duties of receiver herein and obey the orders of this Court.

5. IT IS FURTHER ORDERED, that all parties having in their possession any of the said mortgaged property shall deliver said property to said receiver, and each and every of the officers, directors, agents and employees of the International and Great Northern Railroad Company, and all other persons and corporations, are hereby restrained and enjoined during the pendency of this action, or until the further order of this Court, from interfering with, transferring, concealing or disposing of any of the property of the defendant, the International and Great Northern Railroad Company, embracing in its said mortgage of March 1, 1892, or from taking possession of, or in any way interfering with the same, or any part thereof, or from interfering in any manner to prevent the discharge by said receiver of his duties or the operation by him of the said property under the orders of this Court.

6. The right is reserved to the parties hereto to apply to the Court for any further or other instructions to said receiver; and this Court reserves the right to make such further orders as may be proper, touching the payment of all just claims and accounts for labor, supplies, services, salaries, and other liabilities of the defendant Company, and to charge such claims upon the mortgaged premises as prior and preferred claims; and this order is made upon the express condition that such claims, accounts and liabilities as may by this Court be so charged and all valid debts and liabilities incurred by the receiver

in the operation of said railroad and property shall be paid by the receiver hereby appointed out of the earnings of said railroad and property, or out of the corpus of said property, if such earnings shall be insufficient for that purpose.

A. P. McCormick,
United States Circuit Judge, Fifth Circuit.

KNOW ALL MEN BY THESE PRESENTS:

That we, Thomas J. Freeman, as principal, and the United States Fidelity & Guaranty Company, of Baltimore, Md., as surety, are held and firmly bound unto the Judges of the Circuit Court of the United States for the Fifth Judicial Circuit and Northern District of Texas, in the sum of Fifty Thousand Dollars ($50,000.00) to be paid to said Judges, their successors in office or assigns, for the payment of which, well and truly to be made, we and each of us bind ourselves jointly and severally, and our respective heirs, executors, administrators and successors, firmly by these presents.

Signed and sealed on this the 27th day of February, 1908.

NOW, the condition of the above obligation is such that,

Whereas, by an order made on the 25th day of February, 1908, in a cause therein pending wherein the Mercantile Trust Company of New York is Complainant, and the International and Great Northern Railroad Company is Defendant, said cause being filed in the United States Circuit Court for the Northern District of Texas, at Fort Worth, Texas, the above named Thomas J. Freeman was appointed Receiver of all of the railroads of the said Defendant Company situated and located in the State of Texas, and of all the property of said Company, including all its rights, franchises, money, books, accounts, lands and premises of every kind and description, either in Texas or wherever situated; and

Whereas, said order be and is hereby approved and said Thomas J. Freeman confirmed in his appointment

and continued as such Receiver, and that he give bond as required by said order in the sum of Fifty Thousand ($50,000.00) Dollars, with good and solvent surety to be approved by a Judge of said Court.

Now, if the said Thomas J. Freeman shall duly account for what shall come into his hands as such Receiver and pay and apply the same from time to time as said Receiver may be directed by said Court, and obey such orders as said Court may make in the direction of said trust, and if said Thomas J. Freeman shall fully discharge the duties of said trust, then the above obligation to be void; else to remain in full force and effect.

IN WITNESS WHEREOF the parties hereto have affixed their signatures, this February 27th, 1908.

THOMAS J. FREEMAN, *Principal.*
THE UNITED STATES FIDELITY AND GUARANTY COMPANY (Seal)
By W. L. LEEDS
And R. E. L. SANER,
Attorneys in Fact
Surety.

EXHIBIT "C."

NO. 2514 EQUITY.

CIRCUIT COURT OF THE UNITED STATES,
NORTHERN DISTRICT OF TEXAS.

THE FARMERS' LOAN AND TRUST COMPANY, Trustee,
vs. *Complainant,*
INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY, THE MERCANTILE TRUST COMPANY AND THOMAS J. FREEMAN, as Receiver of the International and Great Northern Railroad Company, *Defendants.*

BILL OF COMPLAINT.

TO THE HONORABLE THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, SITTING IN EQUITY.

The Farmers' Loan and Trust Company, a corpora-

tion duly created by and existing under the laws of the State of New York, a citizen of said State, and having its principal office and place of abode in the City of New York in said State, by leave of court first duly had and obtained, brings this its bill of complaint against the International and Great Northern Railroad Company, a corporation duly created by and existing under the laws of the State of Texas, a citizen of said State, and having its principal office and place of abode in the City of Palestine in said State, The Mercantile Trust Company, a corporation duly created and existing under the laws of the State of New York, a citizen of said State, and having its principal office and place of abode in the City of New York in said State; and Thomas J. Freeman, as Receiver of said International and Great Northern Railroad Company, a citizen of the State of Texas, and having his place of abode in the City of Palestine in said State;

And thereupon your orator complains and says:

I. Your orator is a corporation duly organized and existing under the laws of the State of New York and a citizen and resident of said State, and as such corporation is fully authorized and empowered to hold in trust the property conveyed to it in trust, as hereinafter fully stated, and to execute the trusts reposed in it under and by virtue of the mortgage and deed of trust hereinafter described.

II. The defendant, International and Great Northern Railroad Company (hereinafter called the "Railroad Company"), is a corporation organized and existing under the laws of the State of Texas and a citizen and resident of said State; the defendant The Mercantile Trust Company is a corporation organized and existing under the laws of the State of New York and a citizen and resident of said State; and the defendant Thomas J. Freeman is a citizen of the State of Texas and a resident of said State.

III. Your orator is informed and believes, and therefore alleges, that the Railroad Company now owns, and

until the latter part of the month of February, 1908, possessed and operated, a line of railroad in the State of Texas extending from the town of Longview, in the County of Gregg in said State, through said county and through the counties of Rusk, Smith, Cherokee, Anderson, Leon, Robertson, Milam, Williamson, Travis, Hays, Comal, Bexar, Medina, Frio, La Salle, Encinal and Webb to Laredo in said last-mentioned county; and from the town of Mineola in Wood County, to Troup, in Smith County, and from the City of Palestine, in Anderson County, through the counties of Houston, Trinity, Walker and Montgomery to Houston, in Harris County, and from the town of Spring, in Harris County, through the counties of Montgomery, Waller, Grimes, Brazos, Robertson, Falls, McLennan, Limestone, Hill, Navarro, Ellis and Johnson to the City of Fort Worth, in Tarrant County, with branches and branch lines from the town of Overton to the town of Henderson, in Rusk County; from the town of Round Rock to Georgetown, in Williamson County; from the town of Phelps to the town of Huntsville, in Walker County, and from the City of Houston, in Harris County, to the town of Columbia in Brazoria County; from Navasota in Grimes County to Madisonville in Madison County; from Calvert Junction to Calvert, from Waco Junction to East Waco; also the railway and railway tracks and property appurtenant thereto, and certain tracts of land in and adjacent to the City of Houston, in Harris County, known as the Houston Belt Terminals; a total distance of about 1106 miles of completed railroad, all in the State of Texas; that all of such lines of railroad and branches (with the exception of the line from Austin to Laredo, a distance of 233 miles, the line from the town of Spring, in Harris County, to the City of Fort Worth in Tarrant County, a distance of 271.8 miles; and said branch lines of railroad from Navasota to Madisonville, a distance of 44.7 miles; from Calvert Junction to Calvert, a distance of 5.3 miles; from Waco Junction to East Waco, a distance of 1.7 miles; also the Houston Belt Ter-

minals, 10.2 miles above mentioned), were so owned, possessed and operated by the Railroad Company on and prior to June 15, 1881, the latter named lines, branches and terminals having been since that date acquired by the said defendant.

IV. On or about the 15th day of June, 1881, and thereafter, the Railroad Company, by its officers duly authorized, and under its corporate seal, duly made and executed its bonds as hereinafter alleged to an amount of principal aggregating ten million three hundred and ninety-one thousand dollars ($10,391,000), said bonds being dated on said 15th day of June, 1881, and payable in gold coin of the United States of the then standard of weight and fineness, at the agency of the Railroad Company in the City of New York, on the first day of September, in the year 1909, and bearing interest payable upon presentation of coupons therefor annexed to said bonds at said agency, at the rate of six per cent. per annum from the first day of March, 1881, said interest being payable semi-annually, in like gold coin, on the first days of March and September in each year; all said bonds and coupons being severally in the form shown in the mortgage and deed of trust hereinafter referred to.

V. On or about the 27th day of January, 1892, by an agreement between the Railroad Company and (among others) the holders of all said bonds then outstanding under said mortgage and deed of trust, the interest upon said bonds was reduced to four and one-half per cent. per annum for a period of six years from and after September 1, 1891, such reduction to extend to and include the interest payable on September 1, 1897; and it was further agreed that after September 1, 1897, and until the maturity of said bonds, the same should bear interest at the rate of five per cent. per annum; provided, however, that in case of default continued for the period of ninety days in the payment of any coupons upon said bonds unmatured at the date of said agreement, the original rate of interest, namely, six per cent., should be re-

stored, and such coupons should be collectible and enforceable at such original rate of interest. All the bonds thereafter issued under said mortgage and deed of trust by the Railroad Company bore interest in accordance with the provisions of the said agreement.

VI. On or about the 15th day of June, 1881, the Railroad Company, being thereunto by law duly authorized, duly made, executed, acknowledged and delivered to your orator, as trustee, its certain mortgage and deed of trust, dated on that day, a copy of which is annexed hereto marked Exhibit A and made a part hereof, and thereby conveyed to your orator, as trustee, and to its successor or successors in said trust forever, all and singular the lands, tenements and hereditaments of the Railroad Company then owned or thereafter to be acquired by it, including all its railroads, tracks, rights of way, main lines, branch lines, superstructures, depots, depot-grounds, station-houses, engine-houses, car-houses, freight-houses, wood-houses, sheds, watering places, work shops, machine shops, bridges, viaducts, culverts, fences and fixtures, together with all its leases, leased or hired lands, leased or hired railroads, and all its locomotives, tenders, cars, carriages, coaches, trucks and other rolling stock, its machinery, tools, weighing scales, turn-tables, rails, wood, coal, oil, fuel, equipment, furniture and material of every name, nature and description, then held or thereafter to be acquired, together with all the corporate rights, privileges, immunities and franchises of the Railroad Company then held or thereafter to be acquired (including the franchise to be a corporation), and all the tolls, fares, freights, rents, income, issues and profits thereof, and all the reversion and reversions, remainder and remainders thereof, in trust, however, for the uses and purposes in said mortgage mentioned, excepting, however, and reserving from the lien of said mortgage, all land grants, lands, land certificates, town lots and town sites then or at any prior time owned or controlled by the Railroad Company, which were not, on the first day of November,

1879, and had never since been actually occupied and in use by the said Company and necessary to the occupation and maintenance of its lines of railroad; said property, premises, things, rights, privileges, immunities and franchises to be had and to be held unto your orator, or its successor or successors, in trust for the owners and holders of the bonds to be issued under said mortgage and deed of trust, as hereinafter set forth, and of the coupons thereto attached, and subject to the possession, control and management of the directors of the Railroad Company, its successors or assigns, so long as it or they should well and truly perform all and singular the stipulations of said bonds and the covenants of said mortgage and deed of trust. And your orator, the said trustee, then duly accepted the trust created by said mortgage and deed of trust and united in the execution of the same to evidence such acceptance. Said mortgage and deed of trust was thereafter duly recorded in each of the counties in which was situated any part of the mortgaged property.

VII. The said mortgage and deed of trust was and is the proper act and deed of the Railroad Company, by it authorized, made and delivered in all respects in conformity with law, and the same was and is a valid conveyance for the purposes therein stated, and is now a valid and subsisting lien upon all said property therein described and upon all said lines, branches and terminals hereinabove in paragraph No. III. described, and upon the Railroad Company's franchises, railroads, tracks, rights of way, main lines, branch lines, superstructures, depots, depot grounds, station-houses, engine-houses, car-houses, freight-houses, wood-houses, sheds, watering places, work shops, machine shops, bridges, viaducts, culverts, fences and fixtures, together with all its leases, leased or hired lands, leased or hired railroads, and all its locomotives, tenders, cars, carriages, coaches, trucks and other rolling stock, its machinery, tools, weighing scales, turn-tables, rails, wood, coal, oil, fuel, equipment, furniture and material of every name, nature and description.

VIII. In and by said mortgage and deed of trust it was provided that the bonds that might be issued under said mortgage should not exceed the number and amount of bonds then issued under a then existing second mortgage executed by the Railroad Company on or about November 1, 1879, to Samuel Thorne, William Walter Phelps and John S. Barnes, trustees, and surrendered to your orator in exchange for bonds issued under said mortgage or deed of trust dated June 15, 1881, until the said second mortgage be satisfied and discharged of record, and should not exceed five thousand two hundred and eighty-four bonds for the sum of $1,000 each, and five hundred bonds for the sum of $500 each, with the addition of ten bonds for $1,000 each, for each mile of completed railroad which had been constructed or acquired by the Railroad Company since the first day of May, 1880, or which should be newly constructed or acquired by the Railroad Company, its successors or assigns, after the execution of said mortgage and deed of trust dated June 15, 1881; and that no bond should be issued for railroads to which the Railroad Company, its successors or assigns, had not a good and valid title; and that if there should be any lien or encumbrance upon railroads thereafter acquired by the Railroad Company, its successors or assigns, other than the two mortgages already executed by the said International and Great Northern Railroad Company and then outstanding, dated November 1, 1879, the issue of new bonds on account of such railroads should be withheld, to the amount of such lien or encumbrance, until the same be discharged; and further, that your orator, or its successor in the trust, might, in its discretion, accept a certificate, signed by the president and chief engineer of the Railroad Company, its successors or assigns, as conclusive evidence of the number of miles of completed railroad so newly constructed or acquired.

IX. From time to time the Railroad Company, under and in accordance with the provisions of said mortgage

and deed of trust, and due corporate action having been had, under its corporate seal has made, executed and delivered, and your orator, as Trustee under said mortgage and deed of trust, in accordance with the provisions thereof and in the manner therein provided, has certified, in the form therein set forth, ten thousand, one hundred and forty-one (10,141) of said bonds hereinbefore and in said mortgage and deed of trust described, each for the sum of $1,000, and five hundred (500) of said bonds, each for the sum of $500, amounting in the aggregate to the principal sum of ten million, three hundred and ninety-one thousand dollars ($10,391,000), all of which bonds, as your orator is informed and believes, have been duly issued and negotiated for value by the Railroad Company, and are now valid outstanding obligations of the Railroad Company, entitled to the lien and security of said mortgage and deed of trust, so that on the first day of March, 1908, and for some time prior thereto, there had been issued and outstanding under said mortgage and deed of trust, and entitled to the lien and security thereof, bonds amounting in the aggregate to the principal sum of ten million, three hundred and ninety-one thousand dollars ($10,391,000), bearing coupons for the interest maturing on and after March 1, 1908.

The holders and owners of said bonds and coupons are numerous, and the names and residences of many of such holders are unknown to your orator, so that your orator cannot now state the same, and it is impossible that they should be made parties to this your orator's bill of complaint.

X. In and by said mortgage and deed of trust to your orator it was, among other things, provided that in case the Railroad Company, its successors or assigns, should fail to pay the interest on any of said bonds at any time when the same might become due and payable, according to the tenor thereof, and should continue in such default for six months after such payment had been demanded at its or their agency in the City of New York,

then and thereupon the principal of all of the bonds thereby secured should be and become immediately due and payable, provided the said trustee should give written notice to the Railroad Company, its successors or assigns, of its option to that effect, while such default continued, which notice it should be bound to give, if required in writing to do so by the holders of twenty-five per centum of said bonds then outstanding; and that in such case, or upon the principal of said bonds becoming in any other way due and payable, and remaining unpaid, in whole or in part, after demand thereof, the said trustee, or its successor in the trust, might, in its discretion, and should, upon the request of the holders of fifty per centum of the bonds then outstanding, take, with or without entry or foreclosure, actual possession of said railroad and of all and singular the property, things and effects thereby conveyed, and personally or by attorney, manage and operate the same, and receive all the tolls, rents, income and profits thereof, until such time as the said bonds and the interest thereon be fully paid or satisfied, and should apply the moneys so received by it, first, to the expenses of the trust thereby created, the management of the said railroad and its appurtenances, and the needful repairs thereof; next, to the payment of interest overdue upon the said bonds and interest upon delayed interest; and afterwards, to the payment of the principal of said bonds. And it was further therein provided that your orator, or its successor in the trust, upon becoming entitled to take possession of the railroad and property aforesaid, might, in its discretion, and should, on the written request of holders of at least one-half of the bonds then unpaid and outstanding, cause the premises so mortgaged to be sold, either as an entirety or in such parcels as it should deem necessary or proper, having due regard to the interests of all parties, to the highest bidder at public auction.

XI. In and by said mortgage and deed of trust it was, among other things, further provided that your orator

should, after deducting from the proceeds of such sale the cost and expenses thereof, and of the execution of said trust, and all payments for taxes, assessments and counsel fees, and its own reasonable compensation, apply so much of the proceeds as might be necessary to the payment of the principal and interest remaining unpaid upon the said bonds and coupons, together with interest upon overdue coupons down to the time of the sale without giving preference to either principal or interest; and said mortgage and deed of trust declared that it was the intention thereof, that, so long as the railroad and its appurtenances should be managed by the trustee or a receiver as a going concern, the income should be applied to the payment of interest in preference to the principal, but that after a sale of the railroad and its appurtenances no such preference should be made in the distribution of the proceeds.

XII. In and by said mortgage and deed of trust, it was, among other things, further provided that upon any sale of mortgaged premises, whether by the trustee or under decree of the Court, the holders of the bonds thereby secured or any of them, or the trustee on behalf of all of them, should have a right to purchase upon equal terms with other persons; and further that the amount of the bonds secured by the said mortgage or deed of trust should be receivable upon such sale as cash for the amount of cash which would be payable on such bonds out of the proceeds of such sale; and further, that in case of the purchase of the said property or any part thereof by the trustee, the same should be held for the benefit of the bondholders, in proportion to their respective interests in the bonds, and the property thus purchased should be conveyed to such person or corporation as might be designated by a majority in value of the bondholders present at a meeting of the bondholders in the city of New York, regularly called by the trustee, upon reasonable public notice published in two newspapers of that city, provided that such conveyance should be made upon such terms as

would, in the judgment of the trustee, secure to each and every bondholder his just proportion of interest in the property purchased as aforesaid; and further that in no case should any claim, benefit or advantage be taken by the Railroad Company, its successors or assigns, of any valuation, appraisement, extension or relief laws to prevent such entry or sale as aforesaid, and that nothing in said mortgage and deed of trust contained should be construed as limiting the right of your orator, as trustee thereunder, to apply to the Courts for judgment or decree of foreclosure and sale under the said mortgage and deed of trust, or for the usual relief in the course of such proceedings; and further, that your orator as such trustee might, in its discretion, apply to any competent court for relief by way of foreclosure or otherwise, if so advised by counsel.

XIII. The said mortgage and deed of trust contained provisions as to exchanging bonds issued thereunder for bonds of said prior issue secured by said mortgage of November 1st, 1879, to Samuel Thorne, William Walter Phelps and John S. Barnes, as trustees, and further provided that in the event of all the income bonds issued under the said mortgage to said Thorne, Phelps and Barnes being deposited with your orator or its successor in the trust, it would forthwith use its best diligence to procure from said Thorne, Phelps and Barnes, trustees of said mortgage, a satisfaction and discharge upon the record of said mortgage to them, and delivering to them, if necessary for that purpose, the said income bonds, duly cancelled, and taking all steps that might be necessary or proper for the purpose of procuring the complete discharge of the lien of the said mortgage to them, to the end that the mortgage to your orator might become a lien upon all the property therein mentioned, second only to a first purchase money mortgage, executed to John S. Kennedy and Samuel Sloan, trustees, and dated November 1, 1879.

XIV. In the said mortgage or deed of trust it was

also, among other things, provided that your orator or its successor in the trust might take such legal advice and employ such assistance as might be necessary in its judgment for the proper discharge of its duties, and should be entitled to receive just and reasonable compensation for all duties performed by it in the discharge of its said trust, and for all of its reasonable expenses and disbursements, which compensation, it was provided, should be paid by the Railroad Company, its successors or assigns, and should also be a lien upon and payable out of the funds coming into the hands of your orator or its successor in the trust.

XV. In and by said mortgage and deed of trust it was further provided that upon the payment of the principal and interest of all the bonds thereby secured, the estate thereby granted to your orator should be void, and the right to all the real and personal property thereby granted and conveyed should revert to and revest in the Railroad Company, its successors or assigns, in law and in equity, without any acknowledgment of satisfaction, reconveyance, surrender, re-entry or other act.

XVI. The said mortgage dated November 1st, 1879, so made as aforesaid by the Railroad Company to Samuel Thorne, William Walter Phelps and John S. Barnes, as trustees, has been duly satisfied and canceled and discharged of record, and the bonds thereby secured duly canceled, and the same no longer constitutes a lien upon any of the property covered by the said mortgage and deed of trust made to your orator as aforesaid.

XVII. The Railroad Company, as your orator is informed and believes, has failed to pay the interest, amounting to the sum of $259,775, on all the said bonds so issued and outstanding under said mortgage and deed of trust of June 15th, 1881, as aforesaid, which became due and payable on the 1st day of March, 1908, although demand for the payment of some of such interest was duly made at its agency in the City of New York, and said sum still continues in default and is now due and payable as interest upon said bonds.

XVIII. Your orator is informed and believes, and therefore alleges, that on or about the 26th day of February, 1908, in a certain cause in equity pending in this court wherein said The Mercantile Trust Company was complainant and the Railroad Company was defendant, brought for the purpose of foreclosing a so-called third mortgage alleged to have been made by the Railroad Company to The Mercantile Trust Company on or about the first day of March, 1892, such proceedings were had that an order was made by this court appointing the defendant Thomas J. Freeman, receiver of the said railroads, franchises and premises hereinbefore described, and the income thereof, subject as aforesaid to the lien of said mortgage and deed of trust to your orator; and said defendant Freeman, by virtue and under authority of said order, has entered into and is now in possession of and operating all of said railroads and other property hereinbefore described, which are thereby in the custody of this court.

XIX. By means of the appointment of the defendant Freeman, as receiver aforesaid, already made, the defendant The Mercantile Trust Company, as Trustee under the mortgage to it, claims and asserts a lien or right upon and to the income, issues and profits of the said railroads, property and premises, superior to the lien of the said mortgage and deed of trust to your orator.

XX. Your orator is informed and believes and therefore alleges that the Railroad Company is insolvent and wholly unable to pay its debts and obligations and that the said property and premises covered by the said mortgage and deed of trust so made to your orator, as aforesaid, are and constitute very inadequate security for the payment of the amounts due and to become due for principal and interest upon the said bonds issued under said mortgage and deed of trust, and that the said mortgaged property and premises are so situated that they cannot, nor can any part thereof, be sold in parcels without great injury to the interests of the beneficiaries under your

orator's trust, namely, the holders of the bonds secured by the said mortgage or deed of trust so made to your orator as aforesaid; that in order to protect the rights of your orator and of the said bondholders in and to the said property and premises, including the incomes, issues and profits thereof, and to preserve the said property and premises and the revenues thereof which form an essential element of the security under said mortgage and deed of trust, and so that the interests of the holders of the bonds issued under said mortgage and deed of trust may be preserved, a receiver or receivers should be forthwith appointed of the property, premises, rights, franchises, income, issues, profits and revenues covered by said mortgage and deed of trust.

XXI. Your orator is informed and believes and therefore alleges that prior to the execution and delivery to it of said mortgage and deed of trust, the Railroad Company made, executed and delivered unto John S. Kennedy and Samuel Sloan, as trustees, its so-called first mortgage and deed of trust, dated November 1, 1879, wherein and whereby it conveyed to the said trustees all and singular its lands, tenements and hereditaments then owned or thereafter to be acquired by it, including all its railroads, franchises, income, issues and profits, in trust, for the owners and holders of bonds to be issued under said mortgage and deed of trust, bearing interest at the rate of six per cent. per annum, payable semi-annually on the first days of May and November in each year and to become due and payable on the 1st day of November, in the year 1919, a large number of which bonds have been issued and are now outstanding under said mortgage and deed of trust dated November 1, 1879. Your orator is informed and believes and therefore alleges that the interest upon said so-called first mortgage bonds has been paid up to and including the instalment thereof which fell due on the 1st day of November, 1907.

XXII. Your orator is informed and believes and therefore alleges that the defendants. The Mercantile

Trust Company and Thomas J. Freeman, as receiver of said International and Great Northern Railroad Company, have or claim to have some interest in or lien upon the premises and property covered by the said mortgage and deed of trust to your orator sought to be foreclosed in this suit, or some part thereof; but such interest or lien, if any, has accrued subsequently to the lien of the said mortgage and deed of trust to your orator, and is subject and subordinate thereto; that the defendant Freeman, as receiver as aforesaid, also now holds and detains and claims possession of and title to a large amount of rolling stock and equipment and other personal property which is subject to and covered by the said mortgage and deed of trust to your orator and is claimed by your orator as trustee aforesaid under and by virtue of said mortgage and deed of trust; and that the said Freeman, as said receiver, also holds and detains and claims title to certain of the income, issues, profits, revenues and earnings of the Railroad Company which are also subject to and covered by the said mortgage and deed of trust to your orator, and are likewise claimed by it as trustee aforesaid.

XXIII. The holders of a large number of said bonds and coupons issued and outstanding under said mortgage and deed of trust made to your orator as aforesaid have requested your orator to proceed to foreclose said mortgage and to take such steps as your orator may be advised to protect and enforce the rights and interests of your orator as Trustee under said mortgage and deed of trust and of the said holders of said bonds and coupons, and your orator has been advised by counsel to apply to this Court for relief in the premises.

XXIV. By reason of the matters and things hereinbefore alleged there is due to your orator as trustee under the said mortgage and deed of trust, the amount of said coupon interest which fell due on said bonds on the first day of March, 1908, as aforesaid, to wit, the sum of $259,775, with interest thereon from said first day of March.

No proceedings have been had at law or in equity for the collection of said mortgage debt, or any part thereof, save only this suit.

XXV. In consequence of the embarrassed condition of the financial affairs of the Railroad Company and on account of the many difficulties which are manifest upon and from the allegations hereinbefore set forth, involved in the execution of your orator's said trust, it is difficult for your orator, as trustee, to execute adequately its said trust in the way and manner specified and provided in and by the said mortgage and deed of trust, without the aid and interposition of this Honorable Court sitting in equity, nor can the said trust be executed, as your orator is advised and charges, and the rights of all parties interested be ascertained and fully protected in the premises, otherwise than by judicial sale of the mortgaged premises and all the franchises, property, premises and appurtenances covered by the said mortgage and deed of trust to your orator.

XXVI. Your orator further shows that this is a suit of a civil nature in equity and that the matter in dispute, exceeds, exclusive of interests and costs, the sum of $5,000.

In consideration whereof, and forasmuch as your orator is remediless in the premises by the rules of the common law, and can have adequate relief only in a Court of Equity, where matters of this nature are properly cognizable and relievable; to the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and that they may separately and severally answer make (but not under oath, their answer under oath being hereby expressly waived), according to the best of their knowledge, information and belief, to all the matters and charges aforesaid, and that as fully in every respect as if the same were here again repeated and they thereunto particularly interrogated; that your orator be placed in possession of the mortgaged premises personally, or that a receiver

or receivers may be appointed in this cause of all and singular the rights, franchises and property, of every name and nature, including the income, issues, profits, revenues and earnings, of the said defendant, International and Great Northern Railroad Company, covered by said mortgage and deed of trust of June 15th, 1881, with power and authority to operate said railroad and carry on the business of said Railroad Company under the protection of this Court with all the usual powers and duties of receivers in such cases, and with authority to proceed to recover, by suit or otherwise, all property in the hands of other parties belonging to said Railroad Company, and all moneys justly due to it and unlawfully withheld by any person on any pretense whatever; that an injunction may issue out of this Court, restraining and enjoining the said Railroad Company and all and every its agents and servants, and all other persons, from in any way interfering with the possession or control of the property of said Railroad Company under the control of said receiver or receivers, and from selling, transferring, conveying, leasing, or otherwise disposing of or incumbering any of the property, rights or franchises of the said Railroad Company; that all the rights and franchises, and all the property, real and personal, of the said Railroad Company may be declared subject to the lien of the said mortgage and deed of trust dated June 15th, 1881; that an account may be taken of the amounts due for coupon interest upon the bonds secured by the said mortgage and deed of trust and now outstanding, with interest thereon; that an account may also be taken of the amount of the principal outstanding and unpaid upon each and all of the bonds secured by said mortgage and deed of trust; that the amounts so found due for principal and interest may be found to be a lien on the property of the said Railroad Company according to the terms of said mortgage and deed of trust and prior and superior to the interests or liens or claims of the defendants therein and thereto; that the said Railroad Company may

be decreed to pay the amounts so found to be due upon said coupons for interest, and the interest upon said coupons, within a short day to be fixed by the Court; that in default thereof, all the said mortgaged property and franchises of the said Railroad Company may be sold under a decree of this Court and according to law and the practice of this Court, to satisfy the entire amount of principal and unpaid interest upon the said bonds and coupons; that out of the proceeds of said sale, or the net earnings while in the hands of said receiver so to be appointed, there may be paid, first, the costs and expenses of your orator in this suit, including proper attorneys', solicitors' and counsel fees, with a proper compensation to your orator for its own services as trustee, to be allowed by the Court, and that the residue thereof may be applied to the payment of the amounts due upon the said mortgage bonds and coupons thereto, with interest thereon; that if there be any surplus, it may be applied in such way as this Court may direct; that all the defendants in this suit may be barred of and from any equity of redemption of and in the said property and franchises; and that any deficiency on such sale may be entered in this cause as a judgment against the said International and Great Northern Railroad Company; and that your orator may have such other and further relief in the premises as the circumstances of the case may require and as may be agreeable to equity;

May it please your Honors to grant unto your orator a writ of subpoena issuing out of and under the seal of this Honorable Court directed to the defendants International and Great Northern Railroad Company, The Mercantile Trust Company, and Thomas J. Freeman, as Receiver of said International and Great Northern Railroad Company

to appear and answer this bill.

And your orator will ever pray, etc.

THE FARMERS' LOAN AND TRUST COMPANY,
By
E. S. MARSTON,
President.

Attest:
A. V. HEELY,
(SEAL) Secretary.

TURNER, ROLSTON & HORAN,
BAKER, BOTTS, PARKER & GARWOOD,
Solicitors for Complainant.

JAMES F. HORAN,
JAMES A. BAKER, JR.,
Of Counsel.

EXHIBIT "A."

INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY.

SIX PER CENT. GOLD MORTGAGE OF 1881.

THIS INDENTURE, made the fifteenth day of June, in the year of our Lord one thousand eight hundred and eighty-one, between the INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY, a corporation existing under the laws of the State of Texas, of the first part, and the FARMERS' LOAN AND TRUST COMPANY, of the City of New York, a corporation existing under the laws of the State of New York, of the second part:

WHEREAS, the party of the first part heretofore, on the first day of November, in the year 1879, executed a certain indenture of mortgage to Samuel Thorne, William Walter Phelps and John S. Barnes, trustees, to secure four thousand four hundred and seventy-four income bonds for the sum of one thousand dollars each and five hundred income bonds for the sum of five hundred dollars

each, and also a series of similar bonds for the sum of one thousand dollars each, to the amount therein prescribed; all of them bearing interest to such amount, not exceeding eight per centum per annum, as should be earned within each calendar year, beginning with the year 1879, as therein set forth:

And Whereas, many holders of the said bonds desire to exchange them for bonds of this company, bearing interest at the rate of six per centum per annum, absolutely and free from all contingency, to be secured in the manner hereinafter described:

And Whereas, the party of the first part had, on May 1, 1881, issued five thousand two hundred and eighty-four income bonds, as hereinbefore described, for the sum of one thousand dollars each, and five hundred such income bonds for the sum of five hundred dollars each, and intends to issue in exchange for said bonds a like amount of bonds in the form hereinafter prescribed and secured by this mortgage, and also a series of similar bonds, for the sum of one thousand dollars each, to the amount hereinafter prescribed: all of which bonds, notwithstanding the same may be issued at different times, are equally secured by these presents, are to be authenticated by a certificate signed by the party of the second part, and are to be substantially in the following form:

INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY.

No. $1,000.

Interest at Six Per Centum Per Annum.
Due September 1, 1909.

The International and Great Northern Railroad Company of Texas, for value received, hereby acknowledges itself indebted to the Farmers' Loan and Trust Company, of the City of New York, trustee, in the sum of one thousand dollars, United States gold coin, which sum the said company promises to pay, at its agency in the City of New York, to the bearer, unless this bond is registered,

and if registered, then to the registered holder thereof, in gold coin of the United States, of the present standard of weight and fineness, on the first day of September, in the year 1909, together with interest thereon at the rate of six per centum per annum from the first day of March, 1881, payable semi-annually, in like gold coin, on the first days of March and September in each year, upon presentation of the annexed coupons, as they severally become due, at the said agency of the company in the City of New York.

This bond is one of a series of like tenor and date, of which 5, 284 for $1,000 each, and 500 for $500 each, are intended to be issued in exchange for a like amount of income bonds issued before the first day of May, 1881, and secured by a second mortgage, and ten for $1,000 each, but no more, may be issued for each mile of completed road thereafter constructed or acquired by the said company; all bonds of this series being equally secured by a mortgage or deed of trust, of even date herewith, executed by the said company to the Farmers' Loan and Trust Company of the City of New York, as trustee, covering the entire railroad of the said company, together with all the rolling stock, equipment, appurtenances, income, franchises (including the franchise to be a corporation), privileges and immunities of the said company, now owned or hereafter acquired, and also by the deposit with the said trustee of income bonds under the existing second mortgage upon the same property, executed to Samuel Thorne, William Walter Phelps and John S. Barnes, as trustees, to an amount equal to the bonds of this series issued, or to be issued, until the said existing second mortgage is fully satisfied and discharged of record: which income bonds are to be held by the said trustee for the protection of bonds of this series.

Upon default in the payment of interest on this bond for six months after it becomes payable and has been demanded, the trustee may, subject to the provisions of the said mortgage, declare the principal of all the bonds im-

mediately payable, and must do so, if required by the holders of one-fourth of all such bonds outstanding.

This bond may be registered on the books of the company at its agency in the City of New York, after which no transfer except upon the books of the company will be valid; but it is not to be deemed registered until the name of the holder is registered upon the back of the bond as well as upon the books of the company. It may be registered in favor of "bearer," after which it will be transferable by delivery alone, until again registered in the name of the holder.

This bond shall not become obligatory until the certificate indorsed hereon is signed by the said trustee or its successor in the trust.

IN WITNESS WHEREOF, the said International and Great Northern Railroad Company has caused this bond to be subscribed by its president or vice-president, and assistant treasurer, and its corporate seal affixed hereto, this fifteenth day of June, in the year one thousand eight hundred and eighty-one.

THE INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY,

by

President.

Assistant Treasurer.

(COUPON.)

The International and Great Northern Railroad Company will pay to the bearer, at its agency in the City of New York, dollars, in gold coin, on , being six months' interest due that day on Bond No.

(TRUSTEE'S CERTIFICATE.)

It is hereby certified, That the International and Great Northern Railroad Company has executed to the Farmers' Loan and Trust Company of the City of New York a mortgage or deed of trust, as described in the within bond, and that no more of such bonds have been certified

to by the undersigned than are authorized by said deed of trust.

THE FARMERS' LOAN AND TRUST COMPANY,
Trustee,

by

President.

NOW, THEREFORE, THIS INDENTURE WITNESSETH: That the said International and Great Northern Railroad Company, in order to secure the payment of the said bonds and interest thereon, and in consideration of the sum of one dollar to it paid by the party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, transferred and conveyed, and does hereby grant, bargain, sell, transfer and convey unto the said Farmers' Loan and Trust Company of the City of New York, party of the second part, and to its successor or successors in this trust, forever, all and singular the lands, tenements and hereditaments of the said railroad company, now owned or hereafter to be acquired by it, including all its railroads, tracks, rights of way, main lines, branch lines, superstructures, depots, depot grounds, station-houses, engine-houses, car-houses, freight-houses, wood-houses, sheds, watering places, work shops, machine shops, bridges, viaducts, culverts, fences and fixtures, together with all its leases, leased or hired lands, leased or hired railroads, and all its locomotives, tenders, cars, carriages, coaches, trucks and other rolling stock; its machinery, tools, weighing scales, turn-tables, rails, wood, coal, oil, fuel, equipment, furniture and material of every name, nature and description), now held, or hereafter to be acquired, together with all the corporate rights, privileges, immunities and franchises of said railroad company, now held or hereafter to be acquired (including the franchise to be a corporation), and all the tolls, fares, freights, rents, income, issues and profits thereof, and all the reversion and reversions, remainder and remainders thereof, in trust, however, for the uses and purposes hereinafter mentioned, excepting, however, and reserving

from the lien of this mortgage, all land grants, lands, land certificates, town lots and town sites now or at any prior time owned or controlled by the said company, which were not, on the first day of November, 1879, and have never been actually occupied and in use by the said company and necessary to the occupation and maintenance of its lines of railroad:

To have and to hold the said property, premises, things, rights, privileges, immunities and franchises hereby conveyed, or intended so to be, unto the Farmers' Loan and Trust Company of the City of New York, party of the second part, or its successor or successors, in trust for the owners and holders of the said bonds, or any of them, subject to the terms and stipulations of said bonds and of the coupons thereto attached, and subject also to the possession, control and management of the directors of the party of the first part, its successors or assigns, so long as it or they shall well and truly perform all and singular the stipulations of the said bonds and the covenants of this indenture.

That the bonds which may be issued under this mortgage shall not exceed the number and amount of bonds then issued under the existing second mortgage, executed by said company on the first day of November, 1879, to Samuel Thorne, William Walter Phelps and John S. Barnes, trustees, and surrendered to the party of the second part in exchange for bonds issued under this mortgage, until the said second mortgage is satisfied and discharged of record, and shall not exceed five thousand two hundred and eighty-four bonds for the sum of $1,000 each, and five hundred bonds for the sum of $500 each, with the addition of ten bonds, for $1,000 each, for each mile of completed railroad which has been constructed or acquired by the party ofthe first part since the first day of May, 1880, or which shall be newly constructed or acquired by the party of the first part, its successors or assigns, after the execution of this mortgage; and no bond shall be issued for railroads to which the party of

the first part, its successors or assigns, have not a good and valid title; and if there is any lien or incumbrance upon railroads hereafter acquired by the party of the first part, its successors or assigns, other than the two mortgages already executed by the said company and now outstanding, dated the first day of November, 1879, the issue of new bonds on account of such railroads shall be withheld, to the amount of such lien or incumbrance, until the same is discharged.

That the said trustee, or its successor in the trust, may, in its discretion, accept a certificate, signed by the president and chief engineer of the party of the first part, its successors or assigns, as conclusive evidence of the number of miles of completed railroad so newly constructed or acquired.

That in case the party of the first part, its successors or assigns, shall fail to pay the interest on any of the said bonds, at any time when the same may become due and payable, according to the tenor thereof, and shall continue in such default for six months after such payment has been demanded at its or their agency in the City of New York, then, and thereupon, the principal of all the bonds hereby secured shall be and become immediately due and payable, provided the said trustee gives written notice to the party of the first part, its successors or assigns, of its option to that effect, while such default continues, which notice it shall be bound to give, if required in writing to do so by the holders of twenty-five per centum of said bonds then outstanding; and that in such case or upon the principal of said bonds becoming in any other way due and payable, and remaining unpaid, in whole or in part, after demand thereof, the said trustee, or its successor in the trust, may, in its discretion, and shall, upon the request of the holders of fifty per centum of said bonds then outstanding, take, with or without entry or foreclosure, actual possession of said railroad, and of all and singular the property, things and effects hereby conveyed, and personally, or by attorney, manage and oper-

ate the same, and receive all the tolls, rents, income and profits thereof, until such time as the said bonds and interest thereon are fully paid or satisfied, and shall apply the money so received by it, first, to the expenses of the trust hereby created, the management of the said railroad and its appurtenances, and the needful repairs thereof, next, to the payment of interest overdue upon the said bonds and interest upon delayed interest, and afterwards to the payment of the principal of the said bonds. And the said trustee, or its successor in the trust, upon becoming entitled to take possession of the railroad and property aforesaid, may, in its discretion, and shall, on the written request of the holders of at least one-half of the bonds then unpaid and outstanding, cause the said premises so mortgaged to be sold, either as an entirety or in such parcels as it shall deem necessary or proper, having due regard to the interests of all parties, to the highest bidder at public auction, in the City of Austin, giving at least sixty days' notice of the time, place and terms of such sale, and of the specific property to be sold, and whether the same will be sold as an entirety or in parcels by publishing such notice in two newspapers in the City of Austin, and in one or more newspapers in the City of New York, once in each week during the said term of sixty days; and that, upon receiving the purchase money therefor, the said trustee, or its successor in the trust, shall execute to the purchaser or purchasers thereof a good and sufficient deed of conveyance in fee simple, which sale and conveyance shall forever be a bar against the party of the first part, its successors and assigns, and all persons claiming under them, of all right, estate, interest or claim in or to the premises, property, things, franchises, privileges and immunities so sold, or any part thereof, whether the said trustee is in possession thereof or not; and the receipt of the said trustee shall be a full and sufficient discharge to such purchasers; and no purchaser holding such receipt shall be liable for the proper application of the purchase money, or in any way bound

to see that the same is applied to the uses of this trust, or in any manner answerable for its loss or misapplication, or bound to inquire into the authority for making such sale. And such sale, to a purchaser in good faith, shall be valid, whether said notice is given or not, and whether default in payment has been made or not.

That the said trustee shall, after deducting from the proceeds of such sale, the cost and expenses thereof, and of the execution of this trust, and all payments for taxes, assessments and counsel fees, and its own reasonable compensation, apply so much of the proceeds as may be necessary to the payment of the principal and interest remaining unpaid upon the said bonds and coupons, together with interest upon overdue coupons, down to the time of sale, without giving preference to either principal or interest; it being the intention of this indenture that, so long as the railroad and its appurtenances shall be managed by the trustee or a receiver as a going concern, the income shall be applied to the payment of interest in preference to the principal, but that, after a sale of the railroad and its appurtenances, no such preference shall be made in the distribution of the proceeds.

That upon any sale of the said premises, whether by the trustee or under decree of the Court, the holders of the bonds hereby secured, or any of them, or the said trustee on behalf of all the bondholders, shall have a right to purchase upon equal terms with other persons; and it shall be the duty of the said trustee, if so required in writing, a reasonable time before such sale, by the holders of a majority in value of the outstanding bonds secured hereby, and upon being offered, at the same time, adequate indemnity against all liability to be incurred thereby, to make such purchase on behalf of all the bondholders, at a reasonable price, if part only of the property hereby conveyed is sold, or, in case the whole property is sold, at a price not exceeding the whole amount of principal and interest due or accruing upon the said bonds, together with the expenses of the proceedings and sale; and the

bonds secured by this mortgage shall be receivable at such sale as cash, for the amount of cash which would be payable on such bonds out of the proceeds of such sale.

That in case of the purchase of the said property or any part thereof by the trustee, the same shall be held for the benefit of all bondholders, in proportion to their respective interests in the bonds, and the property thus purchased shall be conveyed to such persons or corporations as may be designated by a majority in value of the bondholders present at a meeting of the bondholders in the City of New York, regularly called by the trustee, upon reasonable public notice published in two newspapers of that city, provided that such conveyance shall be made upon such terms as will, in the judgment of the said trustee, secure to each and every bondholder his just proportion of interest in the property purchased as aforesaid.

That it is hereby expressly agreed that in no case shall any claim, benefit or advantage to be taken by the party of the first part, its successors or assigns, of any valuation, appraisement, extension or relief laws, to prevent such entry or sale as aforesaid, and that nothing herein contained shall be construed as limiting the right of the said trustee to apply to the courts for judgment or decree of foreclosure and sale under this indenture; or for the usual relief in the course of such proceedings; and the said trustee may, in its discretion, apply to any competent court for relief by way of foreclosure or otherwise, if so advised by counsel, instead of taking possession of or selling the said property when required to do so by bondholders.

That the party of the first part, its successors and assigns, hereby covenant and agree with the party of the second part and its successor in the trust, that the proceeds of the bonds to be issued as hereinbefore mentioned, in addition to the specified number issued in exchange for income bonds then outstanding, shall be applied in good faith to the construction or purchase of additional rail-

road, and to the furnishing of additional equipment therefor.

That the party of the first part, its successors and assigns, further covenant and agree with the party of the second part and its successor in the trust, to make, execute and deliver all such further deeds, instruments and assurances as may from time to time be necessary, and as the party of the second part, or its successor in the trust, may be advised by counsel learned in the law to be necessary, for the better securing to the party of the second part, and its successor in the trust, the premises hereby conveyed and for carrying out the objects and purposes of this indenture.

That the party of the second part, and its successor in the trust, may, upon the written request of the party of the first part, its successors or assigns, convey or release any lands which it or they may cease to use for its corporate purposes, by reason of any change of location of any station-house, building, or cattle-yards, connected with its railroad, or by reason of any change of the track of said railroad; provided that, at the same time, such instruments shall be executed as will cause the lien of this mortgage to attach to all lands, tenements and hereditaments taken and used by the party of the first part, its successors or assigns, in place of the lands disused as aforesaid; and that in case of the sale of any such lands, without exchanging them for other lands, the proceeds of such sale shall be paid to the party of the second part, or its successor in the trust, and be by it applied to the purchase of bonds secured by this mortgage, which bonds, when so purchased, shall be canceled, and a certificate of the respective numbers and amounts of the bonds so canceled shall be immediately furnished by the trustee to the party of the first part, its successors or assigns.

That upon the payment of the principal and interest of all the bonds hereby secured, the estate hereby granted to the party of the second part shall be void, and the right to all the real and personal property hereby granted

and conveyed shall revert to and revest in the party of the first part, its successors or assigns, in law and in equity, without any acknowledgment of satisfaction, reconveyance, surrender, re-entry or other act.

That the party of the second part and its successor in the trust shall and will hold all income bonds issued under the said existing second mortgage, which may be deposited with it in exchange for bonds issued under this mortgage, in trust for the benefit of the lawful holders of the bonds issued under this mortgage, and will, if necessary, or if justice requires, enforce against the said company the income bonds so held by it and the mortgage securing the same, and secure for such bonds the full benefit of the said second mortgage on the same footing with other similar bonds not deposited with the party of the second part or its successor in the trust, except that the party of the second part and its successor in the trust shall and will accept the payment of interest upon the bonds issued under this mortgage, according to the stipulations thereof, as full satisfaction and discharge of all claims against the party of the first part, its successors and assigns, for interest upon the income bonds deposited as aforesaid, and except also that the payment of the principal of any of the bonds issued under this mortgage shall be accepted as a full satisfaction of an equivalent amount of said income bonds deposited as aforesaid, and upon such payment being made by the party of the first part, its successors or assigns, and evidenced to the party of the second part or its successor in the trust by the deposit of any bonds issued under this mortgage, paid and canceled, the party of the second part, or its successor in the trust, will cancel an equivalent amount of income bonds deposited as aforesaid, and except also that, in the event of proceedings for a foreclosure or other enforcement of the said existing second mortgage, the party of the second part or its successor in the trust will not collect or authorize the collection from the party of the first part, or its successors or assigns, of any greater

amount of interest on account of the income bonds deposited with it as aforesaid, than at the rate of six per centum per annum: it being the intention of the parties hereto that the said income bonds shall be held in trust and used only for the purpose of giving to the holders of bonds issued under this mortgage an equality of lien with the holders of other outstanding income bonds, but with a rate of interest fixed at six per centum per annum.

That in the event of all of the income bonds issued under the said existing second mortgage being deposited with the party of the second part or its successor in the trust, it will forthwith use its best diligence to procure from the trustees of the said second mortgage a satisfaction and discharge upon the record of the said second mortgage, delivering to them, if necessary for that purpose, the said income bonds duly canceled, and taking every step that may be necessary or proper for the purpose of procuring the complete discharge of the lien of the said second mortgage, to the end that this mortgage may become a lien upon all the property hereinbefore mentioned, second only to the first purchase-money mortgage executed to John S. Kennedy and Samuel Sloan, trustees, and dated the first day of November, 1879; but for this purpose, the said income bonds shall not be surrendered for cancellation, until the party of the second part is reasonably satisfied that all intervening liens have been discharged or secured to be discharged.

That the party of the second part or its successor in the trust may take such legal advice and employ such assistance as may be necessary in its judgment to the proper discharge of its duties, and shall be entitled to receive just and reasonable compensation for all duties performed by it in the discharge of this trust, and for all its reasonable expenses and disbursements, which compensation shall be paid by the party of the first part, its successors or assigns, and shall also be a lien upon and payable out of the funds coming into the hands of the party of the second part or its successor in the trust.

IN WITNESS WHEREOF, the said International and Great Northern Railroad Company, party of the first part, in pursuance of the authority conferred upon it by law, and of a resolution adopted by a vote of two-thirds of all the stock of the said company, at a meeting of its stockholders, regularly called for that purpose, and held on the thirteenth day of June, 1881, and also a resolution of its Board of Directors, has caused this indenture to be subscribed in its name by its Vice-President and Assistant Secretary, and the corporate seal of said company to be affixed thereto; and the party of the second part, for the purpose of testifying to its acceptance of the trust hereby created, has also, in pursuance of a resolution of its Board of Directors, caused this indenture to be subscribed in its name by its President and Secretary, and its corporate seal to be affixed hereto, the day and year first above written.

INTERNATIONAL AND GREAT NORTHERN
RAILROAD COMPANY,
By
(SEAL.) T. W. PEARSALL,
Vice-President.

Attest:
JACOB S. WETMORE,
Assistant Secretary.

THE FARMERS' LOAN AND TRUST CO.
By
(SEAL) R. G. ROLSTON,
President.

Attest:
GEO. P. FITCH,
Secretary.

EXHIBIT "D."

IN THE UNITED STATES CIRCUIT COURT FOR THE NORTHERN DISTRICT OF TEXAS.

AT DALLAS.

The Farmers' Loan and Trust Company, Trustee,
Complainant,

vs.

The International & Great Northern Railroad Company, the Mercantile Trust Company and Thomas J. Freeman, as Receiver of the International & Great Northern Railroad Company,
Defendants.

No. 2514 IN EQUITY.

On this the 20th day of April, 1908, came on to be heard and considered the verified bill of complaint in this cause, and thereupon appeared the complainant by its solicitors, The International & Great Northern Railroad Company by its solicitors, The Mercantile Trust Company by its solicitors, and Thomas J. Freeman, Receiver of the International & Great Northern Railroad Company, in person, and signified their consent to the court to this decree; and it appearing to the court that heretofore, to-wit: on the 25th day of February, 1908, in cause No. 2501, Equity, in this court, entitled The Mercantile Trust Company, trustee, Complainant, v. The International & Great Northern Railroad Company, defendant, an order was entered appointing the defendant, Thomas J. Freeman, receiver in said cause, and he has duly qualified and given bond as such receiver and the court having been fully advised in the premises and upon due deliberation being had, and all parties consenting it is now ordered, adjudged and decreed by the court;

FIRST: That the receivership of the said Thomas J. Freeman in said cause No. 2501, The Mercantile Trust Company, trustee, Complainant, v. The International & Great Northern Railroad Company, defendant, be, and is hereby extended to cover all of the railroads, lands, fran-

chises, property and premises embraced in and covered by the mortgage made by the International & Great Northern Railroad Company to the complainant herein as trustee dated the 15th day of June, 1881.

SECOND: That said Thomas J. Freeman, Receiver, be and he is hereby directed to take possession of the railroads, rolling stock, appurtenances, property and premises embraced in said mortgage, and to operate the same, and to collect and receive the income and tolls thereof, and to hold and retain the net revenues thereof in such manner and to the end that the same may be applied under such orders as the Court shall hereafter make in the premises.

THIRD: That said Thomas J. Freeman, Receiver, is also authorized and empowered to institute and prosecute such suits as may in his judgment be necessary for the proper protection of said property, and to likewise defend any actions which have been or may be brought seeking to establish claims, liens or demands against said property of which he is hereby appointed receiver.

FOURTH: It is further ordered that said Receiver be and he is hereby fully authorized and directed to take possession of the property described in the bill of complaint and exhibits filed herein, and to act as such Receiver without taking further oath of office or executing further bond. The bond heretofore executed in said cause No. 2501, The Mercantile Trust Company, trustee, Complainant, v. The International & Great Northern Railroad Company, defendant, to have the same force and effect as if executed in this cause.

FIFTH: It is further decreed that all orders and decrees heretofore made and entered in said cause No. 2501, The Mercantile Trust Company, trustee, Complainant, vs. The International & Great Northern Railroad Company, defendant, directing and authorizing the receiver to do and perform certain things and acts in the operation of the property, and all orders appointing masters in chancery, and all general orders in the administra-

tion of the property heretofore made and entered, shall be extended and apply in this cause as fully as if made directly herein.

SIXTH: It is further ordered, that all parties having in their possession any of the mortgaged property shall deliver said property to said receiver and each and every of the officers, directors, agents and employees of the International & Great Northern Railroad Company, and all other persons and corporations, are hereby restrained and enjoined, during the pendency of this action, or until the further order of this court, from interfering with, transferring, concealing or disposing of any of the property of the defendant, The International & Great Northern Railroad Company, embraced in its said mortgage of June 15, 1881, or from taking possession of, or in any manner interfering with the same, or any part thereof, or from interfering in any manner to prevent the discharge by said Receiver of his duties of the operation by him of the said property under the orders of this court.

SEVENTH: The right is reserved to the parties hereto to apply to the Court for any further or other instructions to said Receiver; and this Court reserves the right to make such further orders as may be proper touching the payment of all just claims and accounts for labor, supplies, services, salaries, and other liabilities of the defendant company, and to charge such claims upon the mortgaged premises as prior and preferred claims; and this order is made upon the express condition that such claims, accounts and liabilities as may by this Court be so charged and all valid debts and liabilities incurred by the Receiver in the operation of said railroad and property shall be paid by the Receiver hereby appointed out of the earnings of said railroad and property, or out of the corpus of said property, if such earnings shall be insufficient for that purpose.

A. P. McCormick,
United States Circuit Judge
Fifth Circuit.

Dated April 20th, 1908.

EXHIBIT "E."

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, AT DALLAS.

GEORGE J. GOULD, ET AL.,
Complainants,
vs. No. 2525 In Equity.
INTERNATIONAL & GREAT NORTHERN RAILROAD COMPANY,
Defendant.

On this 2nd day of June, 1908, came on to be heard and considered the verified bill of complaint in cause No. 2525, wherein George J. Gould, Frank J. Gould, Edwin Gould, Helen M. Gould, Pacific Express Company, Missouri Pacific Railway Company and George J. Gould, Edwin Gould, Howard Gould and Helen M. Gould, as Executors of the Will of Jay Gould, are complainants, and International & Great Northern Railroad Company is the defendant, and thereupon appeared the complainants by their solicitor, the International & Great Northern Railroad Company by its solicitor, the Mercantile Trust Company by its solicitors, The Farmers Loan & Trust Company by its solicitors, and Thomas J. Freeman, Receiver of the International & Great Northern Railroad Company, by his attorney, and it appearing to the Court that heretofore, to-wit, on the 25th day of February, 1908, in cause No. 2501, Equity, in this Court, entitled The Mercantile Trust Company, Trustee, complainant, vs. The International & Great Northern Railroad Company, defendant, an order was entered appointing Thomas J. Freeman, Receiver in said cause, and he has duly qualified and given bond as such receiver; and thereafter, on the 20th day of April, 1908, in cause No. 2514, Equity in this court, entitled The Farmers Loan & Trust Company, Trustee, Complainant, vs. The International & Great Northern Railroad Company, The Mercantile Trust Company and Thomas J. Freeman, as Receiver of the

International & Great Northern Railroad Company, Defendants, upon the consent of all parties, an order was entered extending the receivership of Thomas J. Freeman in said cause No. 2501 to cover all of the railroads, lands, franchises, property and premises embraced in and covered by the mortgage made the basis of the Bill of Complaint in said cause No. 2514, and he has, in pursuance of said order, taken into his possession and assumed as Receiver the control of such additional property so embraced in said Order, and the Court having been fully advised in the premises, and it now appearing from the Bill of Complaint filed herein in cause No. 2525, George J. Gould et al., Complainants, against the International & Great Northern Railroad Company, defendant, that there are numerous parties holding judgments and claims against the International & Great Northern Railroad Company which are not secured by mortgage, and that said defendant is insolvent and cannot meet its obligations, and that the greater part of its property is now in the possession of said Thomas J. Freeman as Receiver in causes No. 2501 and 2514, and that the said George J. Gould and others holding judgments and claims are entitled to the appointment of a receiver of the unmortgaged assets of the defendant, if any, for their protection, but that on account of the necessity of operating said property as a whole, the rights of all parties would be best conserved by extending the present receivership to cover all of the property of the defendant of every kind and nature, rather than that there should be separate and independent receiverships, and, upon due deliberation being had,

IT IS NOW ORDERED, ADJUDGED AND DECREED:

1. That the Receivership of the said Thomas J. Freeman in cause No. 2501, The Mercantile Trust Company, Trustee, Complainant, vs. The International & Great Northern Railroad Company, Defendant, and in cause No. 2514, The Farmers Loan & Trust Company, Trustee, Complainant, vs. International & Great Northern Rail-

road Company, The Mercantile Trust Company and Thomas J. Freeman, as Receiver of the International & Great Northern Railroad Company, defendants, be and the same is hereby extended to cover all of the railroad property (real and personal), rights, privileges, franchises, choses in action, and assets of every kind and description, whether tangible or intangible, of the defendant Company, if any, which have heretofore not been covered in the orders appointing said Receiver.

2. That the said Thomas J. Freeman be and he is hereby directed to take possession of all of the said property to which his receivership is hereby extended as above recited, and to control and operate the same and to collect and receive the income and tolls thereof, and to hold and retain the net revenues thereof in such manner and to the end that the same may be applied under such orders as the Court shall hereafter make in the premises.

3. That said Thomas J. Freeman, Receiver, is also authorized and empowered to institute and prosecute such suits as may in his judgment be necessary for the proper protection of said property, and to likewise defend any actions which have been, or may be, brought seeking to establish claims, liens or demands against said property of which he is hereby appointed Receiver.

4. It is further ordered that said Receiver be and he is hereby fully authorized and directed to take possession of the property described in the bill of complaint filed in cause No. 2525, George J. Gould, et al. vs. The International & Great Northern Railroad Company, and to act as such Receiver without taking further oath of office, or executing further bond. The bond heretofore executed in cause No. 2501, The Mercantile Trust Company, Trustee, Complainant, vs. The International & Great Northern Railroad Company, Defendant, to have the same force and effect as if executed separately in said cause No. 2525.

5. It is further decreed that all orders and decrees heretofore made and entered in said cause No. 2501, The Mercantile Trust Company, Trustee, Complainant, vs. The

International & Great Northern Railroad Company, Defendant, and No. 2514, The Farmers Loan & Trust Company, Trustee, Complainant, vs. International & Great Northern Railroad Company, The Mercantile Trust Company and Thomas J. Freeman, as Receiver of The International & Great Northern Railroad Company, Defendants, directing and authorizing the Receiver to do and perform certain things and acts in the operation of the property, and all general orders in the administration of the property heretofore made and entered shall be extended and apply in this cause wherever the same are applicable as fully as if made directly in this cause.

6. It is further ordered that all parties having in their possession any of the property of any kind or nature belonging to the defendant, The International & Great Northern Railroad Company, shall deliver said property to said Receiver, and each and every of the officers, directors, agents and employes of the International & Great Northern Railroad Company, and all other persons and corporations are hereby restrained and enjoined during the pendency of this action, or until the further order of this Court, from interfering with, transferring, concealing or disposing of any of the property of the defendant, The International & Great Northern Railroad Company, of any kind or character whatever, or from taking possession of, or in any way interfering with the same or any part thereof, or from interfering in any manner to prevent the discharge by said Receiver of his duties, or the operation by him of said property under the orders of this Court.

7. The right is reserved to the parties hereto to apply to the Court for any further or other instructions to said Receiver, and this Court reserves the right to make such further orders as may be proper touching the payment of all just claims and accounts for labor, supplies, services, salaries, and other liabilities of the defendant company and to charge such claims upon the mortgaged or other premises as prior and preferred claims; and this order is made upon the express condition that such claims, ac-

counts and liabilities as may be by this Court so charged, and all valid debts and liabilities incurred by the Receiver in the operation of said Railroad and property shall be paid by the Receiver hereby appointed out of the earnings of said railroad and property, or out of the corpus of said Company, if such earnings shall be insufficient for that purpose.

A. P. McCormick,
United States Circuit Judge, Fifth Circuit.

Dated June 2nd, 1908.

EXHIBIT "F."

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, AT DALLAS.

Consolidated.

The Mercantile Trust Company, Trustee,
vs. *Complainants,* No. 2501.
The International & Great Northern Railroad Company, *Defendant.*

The Farmers Loan and Trust Company, Trustee,
vs. *Complainant,* No. 2514.
The International & Great Northern Railroad Company,
The Mercantile Trust Company, and
Thomas J. Freeman, as Receiver of The International & Great Northern Railroad Company,
Defendants.

George J. Gould, et als.,
vs. *Complainant,* No. 2525.
The International & Great Northern Railroad Company, *Defendant.*

Be it remembered that these causes came on this day to

be heard upon the motions of Thomas J. Freeman, Receiver herein, at this term, to consolidate the above styled and numbered causes, and said motion having been considered by the Court and the Court having been advised of the premises, and all parties to the aforesaid causes appearing in open court, by and through their attorneys, and no objection being made thereto, the Court orders, adjudges and decrees as follows:

1. That said causes, to-wit: No. 2501, The Mercantile Trust Company, Trustee, Complainant, vs. The International & Great Northern Railroad Company, Defendant, No. 2514, The Farmers Loan & Trust Company, Trustee, Complainant, vs. The International & Great Northern Railroad Company, the Mercantile Trust Company and Thomas J. Freeman, as Receiver of the International & Great Northern Railroad Company, defendants, and No. 2525, George J. Gould, et als., complainants, vs. The International & Great Northern Railroad Company, defendants, be, and the same are, hereby consolidated under the following number and style, to-wit:

CONSOLIDATED CAUSE.

THE MERCANTILE TRUST COMPANY, TRUSTEE,
THE FARMERS LOAN AND TRUST COMPANY, TRUSTEE,
GEORGE J. GOULD, ET ALS.,
Complainants,

vs. No. 2501.

THE INTERNATIONAL & GREAT NORTHERN RAILROAD COMPANY,
Defendant.

And it is further ordered that the bills filed in said causes shall stand as bills in said consolidated cause, and that all of said parties complainants and defendants shall retain their respective status as parties fixed by law, and the pleadings of said parties heretofore filed and as they may be amended from time to time or changed by the

order or orders of this Court; and that in case any one or more of the bills filed by the complainants in said causes hereby consolidated be finally dismissed, the remaining bill or bills shall continue to stand as the bill in such consolidated cause.

2. It is further decreed that all orders and decrees heretofore made and entered in said cause No. 2501, The Mercantile Trust Company, Trustee, Complainant, vs. The International & Great Northern Railroad Company, Defendant, and No. 2514, The Farmers Loan & Trust Company, trustee, Complainant, vs. The International & Great Northern Railroad Company, the Mercantile Trust Company, and Thomas J. Freeman, as Receiver of The International & Great Northern Railroad Company, Defendants, directing and authorizing the Receiver to do and perform certain things and acts in the operation of the property and all orders, appointing the Master in Chancery and all general orders in the administration of the property heretofore made and entered shall be extended and apply in said causes as the same are hereby consolidated as fully as if made directly in each of said causes; and likewise all orders and decrees heretofore made and entered in cause No. 2525, George J. Gould, et als., complainants, vs. The International & Great Northern Railroad Company, Defendant, shall be extended and applied in the aforesaid consolidated cause as fully as if made directly in the same.

A. P. McCormick,

June 2, 1908. *Judge.*

EXHIBIT "G."

IN THE UNITED STATES CIRCUIT COURT FOR THE NORTHERN DISTRICT OF TEXAS.

THE MERCANTILE TRUST COMPANY, Trustee,
THE FARMERS LOAN & TRUST COMPANY, Trustee,
GEORGE J. GOULD, ET AL.,
Complainants,
No. 2501. VERSUS CONSOLIDATED CAUSE.
INTERNATIONAL & GREAT NORTHERN RAILROAD COMPANY,
Defendant.

To the Honorable the Judges of the Circuit Court of the United States for the Northern District of Texas, Sitting in Equity:

Your Orator, The Farmers Loan & Trust Company, complainant in the original bill of complaint filed on or about the 20th day of April, 1908, in Equity Cause No. 2514, which was thereafter consolidated with certain other causes into the present consolidated cause under the above number and style, by leave of Court first had and obtained, brings and files this its supplemental bill of complaint, in addition to its said original bill of complaint, against said International and Great Northern Railroad Company, The Mercantile Trust Company and Thomas J. Freeman, as Receiver of the International and Great Northern Railroad Company, and thereupon complains and says:

I. That heretofore and on or about the twentieth day of April, 1908, your Orator filed its said original bill of complaint in said cause No. 2514 against the said defendants, praying among other things for the foreclosure of the mortgage and deed of trust made by the said defendant International and Great Northern Railroad Company to your Orator and bearing date the fifteenth day of June, 1881. Your Orator now refers to its said original bill and prays that all of the allegations and descriptions

therein contained may be taken as herein repeated in full.

II. That, as in and by said original bill of complaint alleged, the said defendant, International and Great Northern Railroad Company, under and in accordance with the provisions of said mortgage and deed of trust, and due corporate action having been had, under its corporate seal, made, executed and delivered, and your Orator as Trustee under said mortgage and deed of trust, in accordance with the provisions thereof, and in the manner therein provided, certified in the form therein set forth ten thousand one hundred and forty-one (10,141) of the bonds in the said original bill of complaint and in said mortgage and deed of trust described, each for the sum of One thousand dollars ($1,000), and five hundred (500) of said bonds, each for the sum of Five hundred dollars ($500), amounting in the aggregate to the principal sum of Ten million, three hundred and ninety-one thousand dollars ($10,391,000), all of which bonds, as your orator is informed and believes, have been duly issued and negotiated for value by the said defendant International and Great Northern Railroad Company, and are now valid outstanding obligations of the said International and Great Northern Railroad Company, entitled to the lien and security of said mortgage and deed of trust; so that on the first day of March, 1908, and for some time prior thereto, there had been issued and were outstanding and are now outstanding, under said mortgage and deed of trust and entitled to the lien and security thereof, bonds amounting in the aggregate to the principal sum of Ten million, three hundred and ninety-one thousand dollars ($10,391,000).

III. That, as in said original bill of complaint also alleged, it was among other things in and by said mortgage and deed of trust provided, that in case the International and Great Northern Railroad Company, its successors or assigns, should fail to pay the interest on any of said bonds at any time when the same might become due and payable, according to the tenor thereof, and should con-

tinue in such default for six months after such payment had been demanded at its or their agency in the City of New York, then and thereupon the principal of all of the bonds thereby secured should be and become immediately due and payable, provided your Orator as such Trustee should give written notice to the said International and Great Northern Railroad Company, its successors or assigns, of its option to that effect while such default continued.

IV. That, as in and by said original bill of complaint also alleged, the said International and Great Northern Railroad Company, as your Orator is informed and believes, failed to pay the interest amounting to the sum of Two hundred and fifty-nine thousand, seven hundred and seventy-five dollars ($259,775) which became due and payable on the first day of March, 1908, on all of the said bonds so issued and outstanding under said mortgage and deed of trust, as aforesaid, at the time when the same became due and payable, according to the tenor thereof, although demand for the payment of some of such interest was duly made at the agency of the said International and Great Northern Railroad Company in the City of New York. And your Orator is informed and believes, and therefore alleges, that the said International and Great Northern Railroad Company has continued in such default for more than six months after such payment was demanded as aforesaid, and still continues in such default, and that all of such default still continues, and such defaulted interest still remains unpaid. Your Orator further alleges that since the filing of its said original bill of complaint, and after the lapse of the said six months, and during the continuance of such default, to-wit, on the 14th day of May, 1909, your Orator as such Trustee gave written notice to the said International and Great Northern Railroad Company, of its option that the principal of all of the said bonds secured by said mortgage and deed of trust should be and become immediately due and payable, and declared that the same was and had become immedi-

ately due and payable. And your Orator has elected to declare and has declared, and hereby does declare, due and payable the whole principal sum of the said bonds so issued and outstanding under the said mortgage and deed of trust as aforesaid, and the same is now due and payable and unpaid.

V. That, as in and by said original bill of complaint also alleged, on or about the twenty-seventh day of January, 1892, by an agreement between the said International and Great Northern Railroad Company and (among others) the holders of all of said bonds then outstanding under said mortgage and deed of trust, the interest upon said bonds was reduced to four and one-half per cent. per annum for a period of six years from and after September 1st, 1891, such reduction to extend to and include the interest payable on September 1st, 1897; and it was further agreed that after September 1st, 1897, and until the maturity of said bonds, the same should bear interest at the rate of five per cent. per annum; provided, however, that in case of default continued for the period of ninety days in the payment of any coupons upon said bonds unmatured at the date of said agreement, the original rate of interest, namely six per cent., should be restored, and such coupons should be collectible and enforceable at such original rate of interest. All the bonds thereafter issued under said mortgage and deed of trust by the said International and Great Northern Railroad Company bore interest in accordance with the provisions of the said agreement.

VI. That the said default by the said International and Great Northern Railroad Company in the payment of the interest upon the said bonds which fell due on the first of March, 1908, was a default upon coupons upon said bonds unmatured at the date of said agreement of January 27th, 1892, and that said default has continued for more than the period of ninety days; that said period of ninety days came to an end since the filing of your Orator's said original bill of complaint, and the said original

rate of interest, namely six per cent., has been restored as aforesaid, and there is now in default upon the said coupons which fell due March 1st, 1908, in addition to the said sum of Two hundred and fifty-nine thousand seven hundred and seventy-five dollars so defaulted as in said original bill set forth, the sum of Fifty-one thousand nine hundred and fifty-five dollars.

VII. That, as your Orator is informed and believes, the said International and Great Northern Railroad Company, since the filing of your Orator's said original bill of complaint, has failed to pay a further installment of interest amounting to the sum of Three hundred and eleven thousand seven hundred and thirty dollars on all the said bonds so issued and outstanding under the said mortgage and deed of trust of June 15th, 1881, as aforesaid, which became due and payable on the first day of September, 1908, although demand for the payment of some of such interest was duly made at its agency in the City of New York and said sum still continues in default, and is now due and payable as interest upon said bonds.

VIII. That, as your Orator is informed and believes the said International & Great Northern Railroad Company, since the filing of your Orator's said original bill of complaint, has failed to pay a further installment of interest amounting to the sum of Three hundred and eleven thousand seven hundred and thirty dollars on all the said bonds so issued and outstanding under said mortgage and deed of trust of June 15th, 1881, as aforesaid, which became due and payable on the first day of March, 1909, although demand for the payment of some of such interest was duly made at its agency in the City of New York, and said sum still continues in default, and is now due and payable as interest upon said bonds.

IX. That by reason of the matters and things hereinbefore alleged there is due to your Orator as Trustee under the said mortgage and deed of trust, in addition to the amount alleged to be due in the said original bill of complaint, the principal of all of the said bonds so issued and outstanding as aforesaid, to-wit, Ten million, three hun-

dred and ninety-one thousand dollars; the sum of Fifty-one thousand nine hundred and fifty-five dollars upon the said coupon interest which fell due on said bonds on the first day of March, 1908, as aforesaid, with interest thereon from the said first day of March, 1908, the sum of Three hundred and eleven thousand seven hundred and thirty dollars, the amount of said coupon interest which fell due on the said bonds on the first day of September, 1908, as aforesaid, with interest thereon from the said first day of September, 1908; and the sum of Three hundred and eleven thousand seven hundred and thirty dollars, the amount of said coupon interest which fell due on said bonds on the first day of March, 1909, as aforesaid, with interest thereon from the said first day of March, 1909; together with interest upon the said principal sum from the said first day of March, 1909.

WHEREFORE, your Orator prays that it may have the benefit of the proceedings taken under the said original bill and that this bill be taken as supplemental thereto, and that it may have the same relief as in said original bill already prayed, and, in addition thereto, prays that an account may be taken of the amounts due upon the bonds secured by the said mortgage and deed of trust and now outstanding with interest thereon; that the said International and Great Northern Railroad Company may be decreed to pay the amounts so found to be due upon said bonds; that in default thereof all said mortgaged property and franchises of the said International and Great Northern Railroad Company may be sold under a decree of this Court, and according to law and the practice of this Court to satisfy the amounts so found due, and that your Orator may have all the relief prayed for in its said original bill of complaint in consideration of the matters herein alleged as well as those alleged in its said original bill of complaint, and that the defendants and each of them may be directed to answer the matters alleged in this its amended and supplemental bill, and that your Orator may have such other and further relief in the premises as may be just.

And your Orator will ever pray, etc.,

(SEAL) THE FARMERS LOAN & TRUST COMPANY,
By E. S. MARSTON, *President.*

Attest: A. V. HEELY,
Secretary.

TURNER, ROLSTON & HORAN,
BAKER, BOTTS, PARKER & GARWOOD,
Solicitors for Complainant, The Farmers Loan and Trust Company.
JAMES F. HORAN,
JAS. A. BAKER, JR.,
of Counsel.

EXHIBIT "H."

IN THE UNITED STATES CIRCUIT COURT FOR THE NORTHERN DISTRICT OF TEXAS.

THE MERCANTILE TRUST COMPANY, Trustee,
THE FARMERS LOAN & TRUST COMPANY, Trustee,
GEORGE J. GOULD, ET AL.,
Complainants,
VERSUS EQUITY CAUSE No. 2501.
INTERNATIONAL & GREAT NORTHERN RAILROAD COMPANY,
Defendant.

THE FARMERS LOAN & TRUST COMPANY, Trustee,
Complainant,
VERSUS EQUITY CAUSE No. 2514.
INTERNATIONAL & GREAT NORTHERN RAILROAD COMPANY, THE MERCANTILE TRUST COMPANY and THOMAS J. FREEMAN, as Receiver of the International & Great Northern Railroad Company,
Defendants.

DECREE OF FORECLOSURE AND SALE UNDER MORTGAGE OF INTERNATIONAL AND GREAT

NORTHERN RAILROAD COMPANY TO THE FARMERS LOAN AND TRUST COMPANY, TRUSTEE, DATED JUNE 15th, 1881.

These causes came on to be heard at this term upon the pleadings and proof under the bill of complaint filed in said Equity Cause No. 2514, by The Farmers' Loan & Trust Company, Trustee, on or about April 20th, 1908, and the supplemental bill of complaint of said The Farmers' Loan and Trust Company, Trustee, filed herein on or about June 7th, 1909, and upon all the papers on file, and was argued by counsel; and upon consideration thereof, it was, on motion of Geller, Rolston & Horan and Baker, Botts, Parker & Garwood, solicitors for the complainant, The Farmers' Loan and Trust Company, Trustee, all the other parties to said Equity Cause No. 2514 appearing by counsel and no objection being made.

ORDERED, ADJUDGED AND DECREED, as follows, to-wit:

I.—That all and singular the material allegations in the said bill and supplemental bill of complaint of The Farmers' Loan and Trust Company, Trustee, are true.

II.—That on or about the first day of November, 1879, the defendant International and Great Northern Railroad Company made its two certain mortgages or deeds of trust dated that day as follows:

1. A mortgage or deed of trust known as said defendant Railroad Company's First Mortgage, whereby said Railroad Company conveyed to John S. Kennedy and Samuel Sloan, Trustees, all and singular its lands, tenements and hereditaments then owned or thereafter to be acquired, including all its railroads, franchises, income, issues and profits, in trust, for the owners and holders of bonds to be issued thereunder, bearing interest at the rate of six per centum per annum, payable semi-annually on the first days of May and November in each year, and to become due and payable on the first day of November,

in the year 1919, a large number of which bonds have been issued and are now outstanding.

2. A mortgage or deed of trust made to Samuel Thorne, William Walter Phelps and John S. Barnes, as Trustees, to secure an issue of said Railroad Company's income bonds, all of which bonds have been duly retired, and which said mortgage has been duly cancelled and satisfied of record.

III.—That on or about the 15th day of June, 1881, the said defendant International and Great Northern Railroad Company did execute its certain other mortgage or deed of trust, known as its Second Mortgage, dated that day, to the Complainant, The Farmers' Loan and Trust Company, as Trustee, and therein and thereby conveyed and transferred to said complainant, as Trustee, its railroads, property and franchises, as alleged in the said bill of complaint, to secure the issue of its bonds described in the said bill of complaint. The said Second Mortgage was made and is subject to said mortgage known as said defendant Railroad Company's First Mortgage, dated November 1st, 1879.

IV.—That on or about the 1st day of March, 1892, the said defendant International & Great Northern Railroad Company made its certain other mortgage or deed of trust dated that day, known as the said defendant Railroad Company's Third Mortgage, by which it conveyed to the defendant The Mercantile Trust Company, as Trustee, all and singular its lands, tenements and hereditaments then owned or thereafter to be acquired, including all its railroads, franchises, income, issues and profits, to secure an issue of $3,000,000 of its Third Mortgage Four Per Cent. bonds, under which mortgage there have been issued and are outstanding bonds and bond scrip aggregating a face value of $2,966,052.50. The said Third Mortgage dated March 1st, 1892, was expressly made and is subject to the said First Mortgage of said defendant Railroad Company dated November 1st, 1879, and to the said Second Mortgage of said defendant Railroad Com-

pany dated June 15th, 1881, and to all of the provisions of said last-mentioned mortgages, and to the powers, rights and privileges as well as the covenants, duties and obligations of the said defendant Railroad Company therein respectively set forth and contained.

V.—That the said mortgage or deed of trust dated June 15th, 1881, being the mortgage or deed of trust set forth and described in the said bill of complaint and supplemental bill of complaint so filed by the said The Farmers' Loan and Trust Company, Trustee, as aforesaid, is a valid and subsisting mortgage and the proper act and deed of said defendant International and Great Northern Railroad Company, duly authorized and made, executed, delivered and recorded in all respects in conformity with law, and a valid conveyance for the purposes therein specified; that the said mortgage constitutes a valid conveyance of, and a valid and subsisting lien upon, the following property, premises and franchises, and of and upon all muniments of title thereto and evidences of ownership thereof, to-wit:

All and singular the lands, tenements and hereditaments of the defendant International & Great Northern Railroad Company whether owned at the date of the execution of the said Second Mortgage, namely, on the 15th day of June, 1881, or thereafter acquired by it, including its lines of railroad in the State of Texas, extending from the town of Longview, in the County of Gregg, in said State, through said county, and through the Counties of Rusk, Smith, Cherokee, Anderson, Leon, Robertson, Milam, Williamson, Travis, Hays, Comal, Bexar, Medina, Frio, LaSalle, Encinal and Webb to Laredo, in said last mentioned county; and from the town of Mineola in Wood County to Troupe in Smith County; and from the City of Palestine in Anderson County, through the Counties of Houston, Trinity, Walker and Montgomery to Houston in Harris County; and from the town of Spring in Harris County, through the counties of Montgomery, Waller, Grimes, Brazos, Robertson, Falls, McLennan, Limestone,

Hill, Navarro, Ellis and Johnson to the City of Fort Worth, Tarrant County, with branches and branch lines from the town of Overton to the town of Henderson, in Rusk County, from the town of Round Rock to Georgetown, in Williamson County, from the town of Phelps to the town of Huntsville in Walker County; from the City of Houston in Harris County to the town of Columbia in Brazoria County; from Navasota in Grimes County to Madisonville in Madison County; from Calvert Junction to Calvert, and from Waco Junction to East Waco; also the railway and railway tracks and property appurtenant thereto, and certain tracts of land in and adjacent to the City of Houston in Harris County, State of Texas, known as the Houston Belt Terminals; a total distance of about eleven hundred and six miles of completed railroad, all in the State of Texas; also the trackage rights of the said International & Great Northern Railroad Company from Houston in Harris County to Galveston in Galveston County in said State of Texas over the railroad of the Galveston, Houston & Henderson Railroad Company of 1882 accorded to it by an agreement between said last named railroad company and said International and Great Northern Railroad Company, dated November 19th, 1895; also all and singular the said International and Great Northern Railroad Company's railroad, tracks, rights of way, main lines, branch lines, superstructures, depots, depot grounds, station houses, engine houses, car houses, freight houses, wood houses, sheds, watering places, workshops, machine shops, bridges, viaducts, culverts, fences and fixtures, together with all its leases, leasehold-interests, leased or hired lands, leased or hired railroads, and all its locomotives, tenders, cars, carriages, coaches, trucks and other rolling stock, its machinery, tools, weighing scales, turn-tables, rails, wood, coal, oil, fuel, equipment, furniture and material of every name, nature and description, together with all its corporate rights, privileges, immunities and franchises, whether held at the time of the execution of the said Second Mort-

gage, namely, on June 15th, 1881, or thereafter acquired (including the franchise to be a corporation), and all the tolls, fares, freights, rents, income, issues and profits thereof, and all the reversion and reversions, remainder and remainders thereof, as well as all property purchased or held by the Receiver herein, including any balance of cash, credits and income which may remain in his hands after application thereof, as herein provided or as has been or may hereafter be directed by the Court herein, to the payment of receivership obligations and charges, and to the payment of claims which may be allowed by the Court herein against the same with priority over said Second Mortgage dated June 15th, 1881; excepting, however, all land grants, lands, land certificates, town lots, and town sites, owned or controlled by the said International & Great Northern Railroad Company, at the date of the execution of said second mortgage, namely, on June 15th, 1881, or any time prior to said date, which were not, on the first day of November, 1879, or thereafter up to the said 15th day of June, 1881, actually occupied and in use by the said Railroad Company and necessary to the occupation and maintenance of its lines of railroad; and excepting further any portions of said premises and property which may have been released from the lien and operation of said mortgage dated June 15th, 1881, and the releases for which have been duly filed for record in the proper county.

VI.—That the lien of the said mortgage dated June 15th, 1881, upon the foregoing property is prior and superior to every other lien in favor of any party to this cause, and is subject and subordinate only to the lien of the said First Mortgage dated November 1st, 1879, except as hereinafter stated and provided.

VII.—That said defendant International and Great Northern Railroad Company, under and in accordance with the provisions of the said mortgage or deed of trust dated June 15th, 1881, duly made, executed and delivered, and the Complainant The Farmers Loan and Trust Com-

pany, as Trustee, in the manner therein provided duly certified and delivered, and the said defendant Railroad Company duly issued and negotiated for value, ten million, three hundred and ninety-one thousand dollars ($10,391,000), face value, of the bonds mentioned and described in said mortgage or deed of trust, in and by each of which bonds said defendant Railroad Company promised to pay to the bearer, or, if registered, to the registered holder thereof, on the first day of September, 1909, the principal sum therein named, in United States gold coin, and interest thereon in the meantime at the rate of six (6) per centum per annum from the first day of March, 1881, payable in like gold coin, semi-annually, on the first days of March and September in each year. All of said $10,391,000 of bonds were at the time of the filing of the said bill of complaint and now are, outstanding and valid obligations of the said defendant Railroad Company entitled to the lien and security of the said mortgage or deed of trust dated June 15th, 1881.

VIII.—That on or about the twenty-seventh day of January, 1892, by an agreement between the said defendant Railroad Company and (among others) the holders of all said bonds then outstanding under the said mortgage or deed of trust dated June 15th, 1881, the interest upon said bonds was reduced to four and one-half per centum per annum for the period of six years from and after September 1st, 1891, such reduction to extend to and include the interest payable on September 1st, 1897, and it was further agreed that after September 1st, 1897, and until the maturity of said bonds, the same should bear interest at the rate of five per centum per annum; provided, however, that in case of default continued for the period of ninety days in the payment of any coupons upon said bonds unmatured at the date of said agreement, the original rate of interest, namely, six per centum per annum, should be restored and such coupons should be collectible and enforceable at such original rate of interest. All the said bonds outstanding at the time of the

making of said agreement, as well as those thereafter issued under said mortgage or deed of trust by the said defendant Railroad Company, bore interest in accordance with the provisions of the said agreement.

IX.—That on the first day of March, 1908, there became due and payable upon all the said $10,391,000 face value of said bonds so issued and outstanding under said mortgage or deed of trust dated June 15th, 1881, as aforesaid, the semi-annual interest and coupons thereon maturing on that day and amounting, at the rate of five per centum per annum, to the sum of $259,775; that demand was duly made for the payment of some of such interest, but said defendant Railroad Company made default in the payment of all such interest, and the whole amount thereof has ever since the said first day of March, 1908, remained, and still remains, due and unpaid; that the said default was a default upon coupons upon said bonds unmatured at the date of said agreement of January 27th, 1892; that said default has continued for more than a period of ninety days and had so continued prior to the filing of the said supplemental bill of complaint herein, and the said original rate of interest, namely, six per centum per annum, has been restored, and there is now in default upon the said interest and coupons which fell due on March 1st, 1908, in addition to the said sum of $259,775, the sum of $51,955, making a total of $311,730.

That there became due upon all the said $10,391,000 face value of said bonds so issued and outstanding under said mortgage or deed of trust dated June 15th, 1881, as aforesaid, the semi-annual installments and coupons thereon maturing, respectively, on the first day of September, 1908, and the first day of March, 1909; that the semi-annual installments and coupons maturing on said bonds on each of said dates respectively amounted to the sum of $311,730; that in each instance demand was duly made for the payment of some of said interest and compons, but said defendant Railroad Company made default in the payment of all said interest installments and cou-

pons and the whole amount thereof has ever since the same fell due respectively as aforesaid remained, and still remains, due and unpaid.

The payment of the interest which fell due on some of said bonds on March 1st, 1908, having been duly demanded at the agency of the said defendant Railroad Company in the City of New York, and the default in the payment of such interest having continued for six months after such payment had been so demanded as aforesaid, the complainant, The Farmers Loan & Trust Company, Trustee, after the lapse of said six months, and during the continuance of such default, and prior to the first day of September, 1909, to-wit, on the 14th day of May, 1909, duly gave written notice to the said defendant Railroad Company of its option that the principal of all the said $10,391,000 face value of said bonds should be and become immediately due and payable, and declared and duly elected that the said principal sum was and had become immediately due and payable, and thereupon the whole of said principal sum did become, and the same is now, due and payable and in default.

That in addition to the foregoing defaults upon the said bonds so issued and outstanding under the said mortgage dated June 15th, 1881, as aforesaid, the said defendant Railroad Company has defaulted in the payment of the semi-annual interest which fell due upon some of said bonds upon the following dates, the amounts of such defaults respectively being set forth opposite the said respective dates:

On March 1st, 1904	$ 75.00
On September 1st, 1904	75.00
On March 1st, 1905	75.00
On September 1st, 1905	125.00
On March 1st, 1906	75.00
On September 1st, 1906	75.00
On March 1st, 1907	75.00
On September 1st, 1907	637.50

That each of said defaults has continued from the date

upon which the same was made as aforesaid to the date of this decree, and still continues, and that all of said defaulted interest is due and unpaid; so that the following sums are now due and payable at the date of this decree for principal and coupons and interest upon the said bonds so issued and outstanding under the said mortgage dated June 15th, 1881, as aforesaid, viz:

1. The amount of $75.00 for coupons due March 1st, 1904, with interest on the amount of said coupons at the rate of six per centum per annum;
2. The amount of $75.00 for coupons due September 1st, 1904, with interest on the amount of said coupons at the rate of six per centum per annum;
3. The amount of $75.00 for coupons due March 1st, 1905, with interest on the amount of said coupons at the rate of six per centum per annum;
4. The amount of $125.00 for coupons due September 1st, 1905, with interest on the amount of said coupons at the rate of six per centum per annum;
5. The amount of $75.00 for coupons due March 1st, 1906, with interest on the amount of said coupons at the rate of six per centum per annum;
6. The amount of $75.00 for coupons due September 1st, 1906, with interest on the amount of said coupons at the rate of six per centum per annum;
7. The amount of $75.00 for coupons due March 1st, 1907, with interest on the amount of said coupons at the rate of six per centum per annum;
8. The amount of $637.50 for coupons due September 1st, 1907, with interest on the amount of said coupons at the rate of six per centum per annum;
9. The amount of $311,730 for coupons due March 1st, 1908, with interest on the amount of said coupons at the rate of six per centum per annum;
10. The amount of $311,730 for coupons due September 1st, 1908, with interest on the amount of said coupons at the rate of six per centum per annum;
11. The amount of $311,730 for coupons due March

1st, 1909, with interest on the amount of said coupons at the rate of six per centum per annum;

12. The amount of $10,391,000 for the principal of said bonds, with interest at the rate of six per centum per annum from the first day of March, 1909;

So that the entire sum due for principal and interest, and interest on the unpaid coupons, up to the day of this decree, is twelve million, one hundred and sixty-five thousand, five hundred and forty-five 60-100 dollars ($12,165,545.60).

X.—That the property and premises above described are so situated that they cannot be sold except as an entirety, due regard being had to the best interests of those interested in the same; and further that the said defendant Railroad Company is unable to pay the said sum so found to be due.

XI.—IT WAS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant International and Great Northern Railroad Company pay, or cause to be paid, within ten days after the entry of this decree to the complainant, The Farmers' Loan & Trust Company, as Trustee, for the use and benefit of the holders of the said bonds secured by the said mortgage dated June 15th, 1881, and the respective coupons for interest appertaining thereto, the sum hereinbefore found due upon said bonds and coupons, together with interest thereon at the rate of six per centum per annum from the date of this decree. In case the said amount shall be paid as herein decreed, then any party hereto may apply to this Court for such further relief and for such further directions as may be just and equitable.

XII.—IT WAS FURTHER ORDERED, ADJUDGED AND DECREED that in default of payment of the said sum as aforesaid by the defendant Railroad Company, or by any one claiming under it or for its account, or by the other parties defendants in the said Equity Cause No. 2514, or some of them, the said mortgage dated June 15th,

1881, shall be foreclosed and the said mortgaged premises, property and franchises, as well as all the property purchased or held by the Receiver herein, including any balance of cash, credits and income which may remain in his hands after application thereof, as herein provided, or has been or may hereafter be directed by the Court herein, to the payment of receivership obligations and charges and to the payment of claims which may be allowed by the Court herein against the same with priority over said Second Mortgage dated June 15th, 1881, shall be sold as hereinafter directed, and all the right, title, estate and equity of redemption of the defendant Railroad Company and of each and all of the parties to the said Equity Cause No. 2514, and of all persons claiming or to claim under them or either of them, of, in or to the said premises, property and franchises and every part and parcel thereof shall be forever barred and foreclosed, and that said sale shall be made upon the terms and in the manner following, to-wit:

The said premises and property, real, personal and mixed, rights, privileges, immunities and franchises, wherever situated, shall be sold as an entirety and without valuation, appraisement, redemption or extension, at public auction to the highest bidder therefor, at twelve o'clock noon, at the passenger depot of the said defendant, International and Great Northern Railroad Company, in the City of Palestine, in the County of Anderson, in the State of Texas, on a day to be named by the Master Commissioner herein appointed in his notice of sale; that before making said sale the said Master Commissioner shall publish a notice thereof once a week for at least four weeks prior to such sale in the following newspapers, namely: in one newspaper in the City of New York, in the County of New York, in the State of New York; in one newspaper in the City of Palestine, in the County of Anderson, in the State of Texas; in one newspaper in the City of Houston, in the County of Harris, in the State of Texas; in one newspaper in the City of Aus-

tin, in the County of Travis, in the State of Texas; and in one newspaper in the City of Dallas, in the County of Dallas, in the State of Texas; the particular newspaper to be selected by the Master Commissioner herein appointed, and to be newspapers printed, regularly issued and having a general circulation in said places respectively; and further, that the Master Commissioner, personally, or by some person to be designated by him to act in his name and by his authority, may adjourn the sale from time to time without further advertisement, but only on request of the said complainant The Farmers' Loan and Trust Company, Trustee, or its solicitors, or by order of the Court, or a Judge thereof.

The Master Commissioner shall receive no bid from any person until such person shall have deposited with him the sum of $100,000. Such deposit shall be returned in case the depositor's bid be not accepted; but if his bid be accepted, then such deposit shall be held by such Master Commissioner on account of the purchase price.

The purchaser, when the property is struck down to him, shall at once pay the Master Commissioner, on account of his purchase, a sufficient sum to make up with his deposit ten per centum of his accepted bid. The deposit required before bidding shall be paid in United States currency or in such certified draft, certificate or checque as may be satisfactory to the Master Commissioner, or in a certificate of The Farmers' Loan and Trust Company duly made payable to the order of said Master Commissioner. Said further payment shall be made either as aforesaid, or in the bonds and coupons secured by the said mortgage dated June 15th, 1881, taken at a valuation equal to the amount said bonds and coupons would be entitled to receive in cash out of the amount bid for said property. The certificate of the said The Farmers Loan and Trust Company that it holds bonds and coupons as therein described subject to the order of the party named therein, such certificate being by him transferred to the order of said Master Commissioner, shall be

accepted in lieu of such bonds and coupons. Should such further payment be not made, the property shall be forthwith resold, without further advertisement, the Court reserving the right to consider such resale made on account of said successful bidder or as an original sale; and in case of such resale, the deposit received from the successful bidder shall be applied on account of the purchase price. Such further portions of the purchase price shall be paid in money as the Court may from time to time direct, the Court reserving the right to resell the premises and property herein directed to be sold upon the failure of the purchaser or purchasers, his, its or their successors or assigns, to comply with any order of the Court in that regard, and in case of any such resale or the failure of the purchaser or purchasers, his, its or their assigns, to comply with the terms of the bid or the orders of the Court relative to such additional payments, the said money, bonds and coupons so paid in as aforesaid shall be forfeited as liquidated damages and shall be applied towards the expenses of any resale ordered, or towards making good any deficiency or loss in case the property at such resale shall bring less than at the prior sale. The balance of the purchase price may be paid either in money or in bonds or overdue coupons secured by the said mortgage dated June 15th, 1881, each said bond and coupon being received for such sum as the holder thereof would be entitled to receive under the distribution herein ordered and according to the priority herein adjudged. The certificate of the said The Farmers' Loan and Trust Company that it holds bonds and coupons as therein described subject to the order of the party named therein, said certificate being by him transferred to the order of said Master Commissioner, shall be accepted in lieu of such bonds and coupons.

Any party to this cause and any holder or holders of any of the bonds and coupons so outstanding under said mortgage dated June 15th, 1881, as aforesaid, may bid and purchase at such sale.

The said premises and property are subject to, and the Master Commissioner shall offer the same for sale subject to, the said mortgage dated November 1st, 1879, made by said defendant Railroad Company to John S. Kennedy and Samuel Sloan, as Trustees, and known as said Railroad Company's First Mortgage; and subject also to any unpaid indebtedness or liability contracted or incurred by said defendant Railroad Company in the operation of its railroad which the Court may hereafter order or decree herein to be prior or superior to the lien of the said mortgage dated June 15th, 1881, except such as shall be paid or satisfied out of the income of the property in the hands of the receiver herein under orders of the Court entered or to be entered herein; and subject also to such debts, claims, liens and demands of whatsoever nature heretofore incurred or created or which may hereafter be incurred or created by the Receiver herein under orders of the Court heretofore or hereafter entered herein, and which have not been or shall not hereafter be paid by said Receiver under orders of the Court heretofore or hereafter entered herein, or other parties in interest herein; or out of the proceeds of such sale as hereinafter directed. Certain specific portions of said property and premises, namely: The San Antonio Passenger Station, the Colorado Bridge, and certain equipment, are respectively subject to, and shall be by the said Master Commissioner sold subject to, the existing recorded mechanic's lien, the First Mortgage Colorado Bridge Bonds and the unsatisfied recorded equipment liens, specifically and respectively affecting the same.

The Master Commissioner, when ordered by this Court, shall publish at least once a week for the period of four weeks, in one or more newspapers published in each of the cities in which the notice of sale is hereinabove directed to be published, a notice requiring holders of any claims for such unpaid debts or liabilities to present the same for allowance, and any such claims which shall not be so presented or filed within the period of three months

after the first publication of such notice shall not be enforceable against said Receiver or against the property sold, or against the purchaser or his successors or assigns.

Any such purchaser or purchasers and his, its or their successors and assigns shall have the right to enter his or their appearance in this cause and he or they, or any of the parties to the said Equity Cause No. 2514, shall have the right to contest any claim, demand or allowance existing at the time of the sale and not then finally determined, and any claim or demand which may thereafter arise or be presented, which would be payable by such purchaser or his successors or assigns or which would be chargeable against the income in the hands of the Receiver or against the property purchased, and he or they may appeal from any decision relating to any such claim, demand or allowance.

IT WAS FURTHER ORDERED THAT William H. Flippen, Esq., of Dallas, Texas, be, and he hereby is, designated and appointed a Master Commissioner to make the sale hereby ordered and decreed and to execute and deliver a deed of conveyance and bill of sale of the property so to be sold to the purchaser or purchasers thereof upon the confirmation of such sale and completion of the payment of the entire bid as herein provided; the Court, however, reserving the right in term time or at Chambers to appoint another person such Master Commissioner with like powers, in case of the death or disability to act of the Master Commissioner hereby designated, or in case of his resignation or failure to act, or removal by the Court.

IT WAS FURTHER ORDERED AND DECREED that within thirty days from the confirmation of said sale, or such further time as the Court may allow, on application of the purchaser for good cause shown, the purchaser or purchasers, his, its or their successors and assigns, shall complete payment of the entire amount bid to the said Master Commissioner; and that on such pay-

ment the said purchaser or purchasers, his, its or their successors and assigns, shall be entitled to receive a deed of conveyance and bill of sale of the property purchased from the Master Commissioner, and from the other parties to this cause as herein provided, and to receive possession of the property so purchased from the parties holding possession of the same, and the Receiver shall deliver all of the property so purchased which may be in his possession to the said purchaser or purchasers, his, its or their successors and assigns, subject, however, to the said Mortgage dated November 1st, 1879, made by said defendant Railroad Company to John S. Kennedy and Samuel Sloan, as Trustees, and known as said Railroad Company's First Mortgage, and subject also to any unpaid indebtedness or liability contracted or incurred by said defendant Railroad Company in the operation of its railroad which the Court may hereafter order or decree herein to be prior or superior to the lien of said mortgage dated June 15th, 1881, except such as shall be paid or satisfied out of the income of the property in the hands of the Receiver herein, under orders of the Court entered or to be entered herein, and subject also to such debts, claims, liens and demands of whatsoever nature heretofore incurred or created or which may hereafter be incurred or created by the Receiver herein under orders of the Court heretofore or hereafter entered herein, and which have not been or shall not hereafter be paid by said Receiver under orders of the Court heretofore or hereafter entered herein, or other parties in interest herein or out of the proceeds of sale as hereinafter directed, and subject also, as to certain specific portions of said property and premises, namely, the San Antonio Passenger Station, the Colorado Bridge, and certain equipment, to the existing recorded mechanic's lien, the First Mortgage Colorado Bridge Bonds and the unsatisfied recorded equipment-liens, specifically and respectively affecting the same. And the Court reserves jurisdiction over said property, notwithstanding such deed or deeds or delivery

of possession, for the purpose of enforcing such payment.

IT WAS FURTHER ORDERED AND DECREED that the fund arising from such sale shall be deposited by said Master Commissioner in a United States depositary to be named by the Court and shall be paid out and applied only upon orders of the Court herein as follows:

1. To and for the payment of all proper expenses attendant upon said sale, including the expenses, outlays and compensation of the Master Commissioner to make said sale, as such expenses, outlays and compensation may be hereafter fixed and allowed;
2. To and for the payment of any Receiver's certificates which may be outstanding under the orders of the Court entered in the said Equity Cause No. 2514 or in said Consolidated Cause No. 2501, to the extent that the same shall not be paid out of income in the hands of the Receiver;
3. To and for the payment of the costs in said Equity Cause No. 2514 and the share of the costs in said Consolidated Cause No. 2501 of the said complainant, The Farmers' Loan and Trust Company, Trustee, and the other parties to its said bill as defendants thereunder, and to and for the charges, compensation, allowances and disbursements of the complainant, The Farmers' Loan and Trust Company, as Trustee, under the said mortgage dated June 15th, 1881, and its solicitors and counsel, and of the Receiver and his solicitors and counsel, and also to and for such other proper allowances, compensations and disbursements to the parties in said Equity Cause No. 2514 or their counsel and to the Special Master herein as the Court shall order. All of the payments to be made under this sub-division shall be hereafter fixed and allowed and taxed by this Court herein.
4. To and for the payment of the bonds and coupons

of the defendant Railroad Company secured by the said mortgage dated June 15th, 1881, with interest thereon, to the amount hereinbefore specified, together with interest thereon at the rate of six per centum per annum to the date of payment, or, if such fund be not sufficient to pay the same in full, then to the payment of the same pro rata; that each of the said bonds presented to the Master Commissioner shall, if the holder thereof shall so request, be stamped or endorsed in some way by said Master Commissioner, so as to show the amount that has been paid on account of the same, and on account of the coupon interest due thereon, and be returned so stamped and endorsed to the holder thereof; that in case of payment in full said bonds, with interest thereon, the same shall be delivered with payment in full stamped thereon, by the Master Commissioner, to the purchaser or purchasers at the sale, to be held as a muniment of title; and

5. If, after making all of the above payments, there shall be any surplus, the same shall be paid according to the further order of Court in that regard.

AND FURTHER, that in case there shall be any deficiency in the amount required to be paid in full of the several amounts directed and allowed to be paid, then the said Master Commissioner shall report to the Court the amount of the deficiency, and the complainant as Trustee, shall have judgment against the said defendant Railroad Company for the amount due, and shall have execution therefor, pursuant to the rules and practice of this court; and

IT WAS FURTHER ORDERED AND DECREED that the defendants International and Great Northern Railroad Company and Thomas J. Freeman, as Receiver of the International & Great Northern Railroad Company, and the complainant The Farmers Loan & Trust

Company, be, and they hereby are, directed to execute and deliver but under the direction of the Master Commissioner, conveyances executed by them respectively by way of confirmation and further assurance of title to the said purchaser or purchasers, his, its or their assigns, of all and singular the mortgaged property and premises, and every part and parcel thereof, of every kind and description, wherever situated, hereby directed to be sold by the Master Commissioner; and that the form of said conveyance and mode of execution thereof shall be settled and approved by the Master Commissioner or by the Court or a Judge thereof, if any question shall arise with reference thereto; and that in default of such conveyance or conveyances this decree shall operate as such; and that the purchaser or purchasers at any such sale, and his, its or their successors and assigns, shall have the right within six months after the completion of the sale and delivery of the deed of the Master Commissioner as herein provided to elect whether or not to assume or adopt any lease or contract made by the defendant Railroad Company, and such purchaser or purchasers, his, its or their successors and assigns shall not be held to have assumed any of such leases or contracts which he or they shall so elect not to assume; such election shall be shown by filing with the Clerk of this Court from time to time within said period a description of such leases or contracts which he or they shall so elect not to assume; and

IT WAS FURTHER ORDERED, ADJUDGED AND DECREED that all questions not hereby disposed of, including the discharge of the receiver and the settlement of his accounts, and including the disposition of all claims heretofore filed herein, or hereafter to be so filed in accordance with the provisions of this decree, are hereby reserved for future adjudication; and the Court reserves jurisdiction of this cause and of the property affected by this decree for the purpose of final disposition of all such

questions and matters; and any party to this proceeding and any claimant whose claims have been or shall be so filed herein may apply to the Court for further orders and directions at the foot of this decree. And the Court reserves jurisdiction, upon due hearing, and subject to full right on the part of the purchaser to contest, to charge the property in the hands of the purchaser with any liabilities which have been, or which hereafter may at any time be, adjudged against the receiver for or by reason of any act or omission of his in the administration of his trust as such Receiver. Nothing in this decree contained, and no sale of the property hereunder, shall be construed, or operate, to estop any creditor who has intervened or may hereafter intervene herein, from asserting a preference or preferred charge upon the property in the hands of the purchaser, by reason of any rights or equities which he may establish herein because of the payments of first mortgage interest in this cause or otherwise, and any and all such claims of preference or preferred charge shall be considered and adjudicated herein without prejudice by reason of said sale.

Dated Dallas, May 10th, 1910.

A. P. McCormick,
Circuit Judge, Fifth Circuit.
Edward R. Meek,
U. S. District Judge.

EXHIBIT "I."

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, AT DALLAS.

CONSOLIDATED CAUSE.

THE MERCANTILE TRUST COMPANY, TRUSTEE,
FARMERS LOAN & TRUST COMPANY, TRUSTEE,
GEORGE J. GOULD, ET AL.

Complainants,

vs. No. 2501.

INTERNATIONAL & GREAT NORTHERN RAILROAD COMPANY,

Defendant.

FARMERS LOAN & TRUST COMPANY, TRUSTEE,

Complainant,

vs. Equity No. 2514.

INTERNATIONAL & GREAT NORTHERN RAILROAD COMPANY, THE MERCANTILE TRUST COMPANY, TRUSTEE, and THOMAS J. FREEMAN, as Receiver for the International & Great Northern Railroad Company,

Defendants.

On this the 12th day of May, 1911, the above causes came on again to be heard on the petition of Farmers Loan & Trust Company, Trustee, the complainant in the decree of foreclosure entered herein May 10, 1910, for an order directing the Master Commissioner appointed by said decree to adjourn the sale advertised to take place under said decree on May 16, 1911, to June 13, 1911, and that the property set forth and described in said decree be sold on June 13, 1911, without further advertisement

than that heretofore made and now being made under the decree of May 10, 1910, as aforesaid, and

Thereupon came the complainants, Farmers Loan and Trust Company, Trustee, by its solicitors; The Mercantile Trust Company, Trustee, by its solicitors, International & Great Northern Railroad Company, by its solicitor, and Thomas J. Freeman, Receiver of the International & Great Northern Railroad Company, in person, and George J. Gould, et al., by their solicitors, and no objections to said postponement being made, but all parties so appearing consenting to said postponement;

It is therefore, ordered, adjudged and decreed by the Court: That the Master Commissioner heretofore appointed in this cause, personally, or by some person to be designated by him to act, in his name, and by his authority, shall adjourn the sale of the property, which he, by the decree of May 10, 1910, was directed to make and which has been advertised to take place on May 16, 1911, from said May 16, 1911, to June 13, 1911, and that no further advertisement of said sale shall be made than that which has already been made and is now being made under the decree of May 10, 1910, as aforesaid;

It is further ordered: That the said sale be made by the Master Commissioner on June 13, 1911.

Nothing herein contained shall be construed as having the effect of modifying, in any particular, the decree of May 10th, 1910, aforesaid.

A. P. McCormick,
United States Circuit Judge
For the Fifth Circuit.

EXHIBITS "I" AND "J-1."

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF TEXAS.

THE MERCANTILE TRUST COMPANY, TRUSTEE,
THE FARMERS' LOAN AND TRUST COMPANY, TRUSTEE,
GEORGE J. GOULD, ET ALS.,
MARSHALL CAR WHEEL & FOUNDRY CO. ET AL.,
Complainants

—VERSUS— CONSOLIDATED CAUSE No. 2501.

INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY,
Defendant.

THE FARMERS' LOAN AND TRUST COMPANY,
Complainant

—VERSUS— EQUITY CAUSE No. 2514.

INTERNATIONAL & GREAT NORTHERN RAILROAD COMPANY, THE MERCANTILE TRUST COMPANY, AND THOMAS J. FREEMAN AS RECEIVER OF THE INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY,
Defendants.

FINAL REPORT OF WILLIAM H. FLIPPEN, MASTER COMMISSIONER, SHOWING PAYMENT OF PURCHASE PRICE AND CONVEYANCE AND TRANSFER OF PROPERTY TO INTERNATIONAL AND GREAT NORTHERN RAILWAY COMPANY.

Now comes William H. Flippen, Master Commissioner, appointed by decree of this Court and entered herein on May 10, 1910, and reports as follows:

1. By reference to Report of Sale filed by the undersigned Master Commissioner on June 14, 1911, and duly

confirmed by this Honorable Court, it will appear that the Purchaser at that time delivered to the Master Commissioner, pursuant to the terms of the decree of sale, a certified check for the sum of $100,000 to qualify him as Bidder, and after the acceptance of his bid delivered in payment of ten per cent. of the purchase price as required by the decree a certificate of the Farmers Loan & Trust Company, Trustee, to the effect that it held to the credit of the Master Commissioner $990,000 par value of the bonds and appurtenant unpaid coupons of the International & Great Northern Railroad Company, secured by the mortgage of said Company to the Farmers Loan & Trust Company, Trustee, dated June 15, 1881.

2. From time to time thereafter the time for the completion of the payment of the purchase price for the property and franchises sold on June 13, 1911, was extended by order of this Court, the last extension expiring on September 15, 1911. On September 13, 1911, Frank C. Nicodemus, Jr., the Purchaser of said properties and franchises, desiring to complete the payment of the purchase price by delivering to the Master Commissioner in part payment thereof the bonds of the International & Great Northern Railroad Company, secured by its mortgage of June 15, 1881, to the Farmers Loan & Trust Company, as Trustee, aforesaid, it became necessary to ascertain the distributive value of said bonds and appurtenant unpaid coupons in the proceeds of sale at which the same with coupons thereto annexed could be accepted in payment of the purchase price under the terms of the decree of sale. To this end it became necessary for the Master Commissioner to ascertain the amount of expenses, disbursements and other allowances to be deducted under the terms of the decree of sale from the proceeds of sale before any distribution could be made on account of the bonds and coupons secured by said mortgage. Your Master Commissioner also undertook to ascertain approximately the cost in the several equity causes, consolidated under Cause No. 2501, and the several items of cost, ex-

penses and disbursements provided by the decree were arranged as follows:

(a) With respect to the expenses attendant upon the sale including compensation and expenses and allowances to the Master Commissioner, the International & Great Northern Railway Company, Assignee of the Purchaser, as hereinafter more fully set forth, entered into a stipulation which was satisfactory to the Master Commissioner, whereby said Railway Company agreed to pay or cause to be paid as a part of the said purchase price of property and franchises such further sum in cash as might thereafter be fixed and determined by this Honorable Court as and for the compensation, allowances, disbursements and expenses of the Special Master theretofore appointed in this cause and of the Master Commissioner appointed in aforesaid decree, which said stipulation and agreement is on file with the Master Commissioner.

(b) It was ascertained by your Master Commissioner that there were no outstanding Receiver's certificates issued under the orders of this Honorable Court for the payment of which provision was made in said decree of sale; although there were outstanding certain Receiver's Equipment obligations of an aggregate principal amount of $276,000 subject to which the property was sold and which were assumed by the Purchaser as a part of the purchase price in accordance with the provisions of the order of this Honorable Court authorizing the Receiver to create and issue said obligations.

(c) Your Master Commissioner ascertained as accurately as possible the amount of costs which had accrued in the several causes consolidated into Equity Cause No. 2501, and the amount of said costs as thus ascertained was deducted from the amount distributable by the Master Commissioner to the holders of said second mortgage bonds and coupons and International & Great Northern Railway Company, assignee of the Purchaser as hereinafter stated, stipulated and agreed that in the

event the amount of costs required by the foreclosure decree to be paid out of the fund arising from said sale should exceed the sum so ascertained it would upon the determination of said excess, pay the amount thereof upon the direction of the Court all of which will more fully appear from the original of said stipulation on file with the Master Commissioner.

(d) The purchaser at said sale delivered to the Master Commissioner a stipulation and agreement in writing duly executed by all of the parties of record to said causes and the Receiver by their respective solicitors, stipulating and fixing the amount of compensation and allowances to be made to the Farmers Loan & Trust Co. as Trustee, under the mortgage of June 15, 1881, and to other parties as contemplated by the provisions in this behalf contained in decree of May 10, 1910, and authorizing the Master Commissioner to pay the amounts so agreed upon to the respective parties entitled thereto from the proceeds of sale, which said stipulation and agreement is now filed with the Master Commissioner. The aggregate of the amounts so agreed upon for compensation, allowances and disbursements to the respective parties entitled thereto as aforesaid were deducted by the Master Commissioner from the proceeds of sale in arriving at the distributive value of the bonds and coupons aforesaid and the several amounts so stipulated and agreed upon have been paid to the respective parties entitled thereto under the terms of said agreement by the Master Commissioner as authorized under the terms of said stipulation.

(e) The decree of May 10th, 1910, found that there were outstanding and unpaid Coupons appertaining to bonds secured by the aforesaid mortgage of June 15th, 1881, which matured prior to March 1st, 1908, but which had not been presented for payment, of an aggregate principal amount of $1,212.50, on which there was accrued interest at the rate of six per cent. per annum to the date of said decree. In order to avoid delay in making the set-

tlement of the purchase price and difficulty in ascertaining the distributive value of the several bonds with coupons maturing March 1st, 1908, and subsequent thereto, the purchaser requested that said coupons maturing prior to March 1st, 1908, be eliminated from consideration in calculating the distributive value of said bonds with coupons maturing March 1st, 1908, and undertook and agreed to pay to the Master Commissioner the ascertained value of all of said $1,212.50 of coupons maturing prior to March 1st, 1908, on the basis of said decree of May 10th, 1910, which amount aggregating the sum of $1,568.00 has been paid to the Master Commissioner by the International & Great Northern Railway Company, assignee of the purchaser and is now held by the Master Commissioner subject to the orders of the Court.

(f) After deducting the sums hereinbefore mentioned and making due provision for expenses and allowances provided by said decree of sale as aforesaid and eliminating from consideration the value of said coupons maturing prior to March 1st, 1908, provided for by separate fund deposited with the Master Commissioner as aforesaid, it was ascertained that the balance of said purchase price available for distribution to the bonds of the International & Great Northern Railroad Company secured by its mortgage of June 15, 1881, and coupons thereunto belonging maturing on March 1st, 1908, and subsequent thereto, mentioned in said decree of sale, was $12,466,-130.45, and that the distributive value of each of said bonds with coupons maturing March 1st, 1908, and subsequent coupons attached, was $1,199.704,595.

3. On September 13th, 1911, Frank C. Nicodemus, Jr., the Purchaser of said property and franchises at said sale presented to the Special Master in partial payment of the purchase price of said property and franchises, bonds of the International & Great Northern Railroad Company secured by its mortgage of June 15th, 1881, to the Farmers Loan and Trust Company, Trustee, in aggregate par value of $9,346,500 of principal with coupons maturing

March 1st, 1908, and subsequent coupons thereto attached, which together with the bonds of an aggregate par value of $990,000 of principal with coupons maturing March 1st, 1908, and subsequent coupons attached, for which certificate to the order of the Master Commissioner was presented to him at the time of acceptance of said bid, made the total amount of said bonds presented to the Master Commissioner in payment of said bid $10,336,500 in aggregate par value of principal, leaving outstanding bonds for which provision must be made in cash of aggregate par value of $54,500 of which the distributive value on the above basis amounted to an aggregate sum of $65,383.89; and at the same time the Purchaser delivered the Master Commissioner in payment of the balance of the purchase price of said property and franchises, a certified check for the sum of $144,253.45, being the entire amount of the balance due.

The entire purchase price of $12,645,000 was thus paid by the purchaser as follows:

Amount paid by purchaser in cash on June 13th, 1911		$100,000.00
Amount paid in bonds of International and Great Northern Railroad Company, as follows:		
Delivered on June 13th, 1911	$990,000	
Delivered on September 13th, 1911	9,346,500	
Total bonds delivered	$10,336,500	
at distributive value of $1,199.704,595 per bond		12,400,746.55
Balance paid in cash on September 13th, 1911		144,253.45
		$12,646,000.00

4. The entire purchase price having thus been paid by the Purchaser, Frank C. Nicodemus, Jr., delivered to your Master Commissioner an assignment wherein and whereby he assigned, transferred and set over to the In-

ternational & Great Northern Railway Company, a corporation organized under the laws of the State of Texas, its successors and assigns, all his right, title and interest under said decree or by virtue of his said bid and purchase and payment of the entire purchase price bid, in and to all the railroads, property, rights, franchises, functions, immunities and appurtenances thereunto belonging, rolling stock, property and premises of every kind and description, sold at said sale, including his rights to receive conveyance and possession thereof; and wherein and whereby he did direct that the deed or deeds directed by the said decrees to be made to the purchaser or purchasers at said sale, or his, its or their successors or assigns, conveying and releasing said property, as in said decree provided, be made and delivered to said International & Great Northern Railway Company, its successors and assigns, all of which will more fully appear from the original of said assignment executed by said Frank C. Nicodemus, Jr., attached hereto as Exhibit "A" and made a part of this report.

5. The Master Commissioner thereupon executed and acknowledged in forty counterparts a deed for said property, franchises, rights, privileges and immunities sold under and described in said decree of May 10, 1910, and said deed having also been executed and acknowledged by The Farmers Loan and Trust Company, Trustee; The International and Great Northern Railroad Company; Thomas J. Freeman, as Receiver of The International & Great Northern Railroad Company; Frank C. Nicodemus, Jr., the purchaser, and International and Great Northern Railway Company, was delivered to the International and Great Northern Railway Company assignee of the purchaser pursuant to the provisions of said decree of May 10, 1910, and of the assignment of the purchaser aforesaid. Copy of said deed is executed and attached hereto as Exhibit "B" and made a part of this report.

6. The balance of funds in the hands of the Master Commissioner has been deposited to his order in the City

National Bank of Dallas, Texas, to await the further orders of the Court, the same being applicable to the outstanding bonds and coupons secured by the aforesaid Mortgage of June 15th, 1881, not presented to the Master Commissioner as hereinbefore stated.

7. The several stipulations and agreements herein mentioned are exhibited herewith and are held by the Master Commissioner for such final disposition as the Court may direct. Respectfully submitted.

WILLIAM H. FLIPPEN,
Master Commissioner.

Dallas, Texas, September 22, 1911.

EXHIBIT "A"

WITH REPORT OF MASTER COMMISSIONER, WILLIAM H. FLIPPEN,

Dated September 22, 1911.

FRANK C. NICODEMUS, JR.,

To

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.

ASSIGNMENT OF BID.

Dated August 28th, 1911.

KNOW ALL MEN BY THESE PRESENTS, That:

WHEREAS in a certain cause pending in the Circuit Court of the United States for the Northern District of Texas, wherein the Farmers Loan and Trust Company, trustee, is complainant and International and Great Northern Railroad Company and others are defendants, a decree of foreclosure and sale was entered by the said court on or about the 10th day of May, 1910; and

WHEREAS, by said decree of said Circuit Court of the United States for the Northern District of Texas in said cause therein pending, it was, among other things, adjudged and decreed that International and Great North-

ern Railroad Company pay or cause to be paid, within ten days after the entry of said decree, certain amounts therein found to be due under the Second Mortgage of International and Great Northern Railroad Company dated June 15, 1881, made to said The Farmers' Loan and Trust Company, as Trustee, and that, in default of such payment by said Railroad Company or by some one claiming under it or for its account, within the time fixed as aforesaid, the mortgaged premises and franchises should be sold, as provided in said foreclosure decree, by William H. Flippen, the Master Commissioner appointed by said decree, at public auction, to the highest bidder or bidders, at the passenger station of International and Great Northern Railroad Company in the City of Palestine, Anderson County, State of Texas, on a day or days to be fixed by the said Master Commissioner, after giving notice of said sale as in said decree provided; and

WHEREAS neither said International and Great Northern Railroad Company nor anyone claiming under it nor anyone for its account, did, within the time fixed or at any other time make payment of the sums so decreed to be payable, or any part thereof; and

WHEREAS in causes ancillary to said cause, between the same parties and pending respectively in the Circuit Courts of the United States for the Southern District of Texas, the Eastern District of Texas and the Western District of Texas, a decree was entered by each of said courts on the following dates respectively, to-wit, in the Circuit Court of the United States for the Southern District of Texas, on or about June 25, 1910; in the Circuit Court of the United States for the Eastern District of Texas; on or about June 27, 1910; and in the Circuit Court of the United States for the Western District of Texas, on or about June 29, 1910; by each of which said decrees it was, among other things, adjudged and decreed that the decree rendered and pronounced by the Circuit Court of the United States for the Northern District of

Texas be rendered and pronounced as the decree of said courts respectively in said ancillary causes; and;

WHEREAS the said Master Commissioner, in pursuance of said decrees, due notice having been given as therein prescribed and according to law, did duly sell, at public auction, at the passenger station of International and Great Northern Railroad Company in the City of Palestine, Anderson County, State of Texas, on the 13th day of June, 1911, all and singular the railroads, property, rights, franchises, functions, immunities and appurtenances to the same belonging, rolling stock, property and premises of every kind and description covered by and embraced in said Second Mortgage of International and Great Northern Railroad Company and in said decrees described, and thereby directed to be sold, to Frank C. Nicodemus, Jr., at and for the sum of twelve million six hundred and forty-five thousand dollars, he being the highest bidder for said property at said sale and having duly and seasonably qualified as a bidder thereat, as required by said decrees in that behalf; and

WHEREAS the said Master Commissioner did thereafter duly make and file his report of said sale, which report and the sale therein reported, have been, upon due notice and by orders of court entered in every of said causes, duly confirmed; and

WHEREAS the said Frank C. Nicodemus, Jr., has, in all respects to the date of these presents, complied with the provisions of said decrees of foreclosure and sale, and has made payment of the entire amount bid for the property sold; and

WHEREAS in said decree it is, among other things, provided that, on payment by the purchaser or purchasers, his, its or their successors or assigns, of the entire amount bid at the sale of said property, said purchaser or purchasers, his, its or their successors or assigns, shall be entitled to receive a deed of conveyance and bill of sale of the property purchased from the Master Commissioner and from other parties to said cause, as in said decrees

provided, and to receive possession of the property so purchased; and

WHEREAS International and Great Northern Railway Company, a corporation organized and existing under the laws of the State of Texas, is desirous of acquiring and is authorized to acquire all the right, title and interest of the purchaser at said foreclosure sale in and to the property sold thereat, including the right of the said purchaser to receive a deed or deeds, pursuant to said decrees, of the property purchased by him at said foreclosure sale;

NOW, THEREFORE, THESE PRESENTS WITNESS:

That the undersigned, Frank C. Nicodemus, Jr., in consideration of the premises and of the sum of One Dollar to him duly paid by International and Great Northern Railway Company, at or before the ensealing of these presents, the receipt whereof is hereby acknowledged, and of other good and valuable considerations, has sold, assigned, transferred and set over, and hereby does sell, assign, transfer, and set over, unto International and Great Northern Railway Company, its successors and assigns, all his right, title and interest under said decrees or by virtue of his said bid and purchase and payment of the entire purchase price bid, in and to all the railroads, property, rights, franchises, functions, immunities and appurtenances to the same belonging, rolling stock, property and premises of every kind and description, sold at said sale, including his right to receive conveyance and possession thereof.

TO HAVE AND TO HOLD the same unto the said International and Great Northern Railway Company, its successors and assigns, for its and their own use forever.

SUBJECT, however, to all the terms and reservations in said decrees set forth.

And said Frank C. Nicodemus, Jr., does hereby direct and request that the deed or deeds directed by the said decrees to be made to the purchaser or purchasers at said sale, or his, its or their successors or assigns, conveying and releasing said property as in said decrees provided,

be made and delivered to said International and Great Northern Railway Company, its successors and assigns.

And These Presents Further Witness, that International and Great Northern Railway Company hereby accepts the foregoing assignment, and covenants and agrees to pay, satisfy and discharge, and to indemnify and forever hold harmless said Frank C. Nicodemus, Jr., his executors or administrators, from and against any and all loss, damages, expenses and liabilities which may have been incurred or which hereafter may be incurred by said Frank C. Nicodemus, Jr., or his executors or administrators, by reason of his said bid and the acceptance thereof (other than the payment of the purchase price bid), or by reason of any act or thing required, by said decrees or said orders confirming said sale, to be performed by the purchaser thereat (other than as aforesaid).

In witness whereof, the undersigned, Frank C. Nicodemus, Jr., has hereunto set his hand and affixed his seal, and International and Great Northern Railway Company has caused these presents to be executed by its President or a Vice-President, and its corporate seal to be hereunto affixed, attested by its Secretary or an Assistant Secretary, this 28th day of August, 1911.

Frank C. Nicodemus, Jr.,
As Purchaser.

International and Great Northern
Railway Company,
By Thomas J. Freeman,
President.

213

"EXHIBIT B."

WITH REPORT OF MASTER COMMISSIONER, WILLIAM H. FLIPPEN.

Dated September 22, 1911.

WILLIAM H. FLIPPEN, MASTER COMMISSIONER, AND OTHERS,

To

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY

DEED

Under Decrees Foreclosing Second Mortgage of International and Great Northern Railroad Company.

Dated August 31st, 1911.

(Same as Exhibit L hereinafter, which see.)

Exhibit B

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF TEXAS.

THE MERCANTILE TRUST COMPANY, TRUSTEE,
THE FARMERS' LOAN AND TRUST COMPANY, TRUSTEE,
GEORGE J. GOULD, ET ALS.,
MARSHALL CAR WHEEL & FOUNDRY CO. ET AL.,
Complainants,

VERSUS

CONSOLIDATED CAUSE No. 2501.

INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY,
Defendant.

THE FARMERS' LOAN AND TRUST COMPANY,
Complainant,

VERSUS

EQUITY CAUSE No. 2514.

INTERNATIONAL & GREAT NORTHERN RAILROAD COMPANY, THE MERCANTILE TRUST COMPANY, AND THOMAS J. FREEMAN, AS RECEIVER OF THE INTERNATIONAL & GREAT NORTHERN RAILROAD COMPANY,
Defendants.

DECREE CONFIRMING FINAL REPORT OF WILLIAM H. FLIPPEN, MASTER COMMISSIONER,

AND ACCOUNT AND REPORT OF THOMAS J. FREEMAN, RECEIVER.

On this day came William H. Flippen, Master Commissioner, appointed by decree entered in this cause on May 10th, 1910, and filed his final report and exhibits "A" and "B" therewith showing the payment of the entire purchase price of the properties and franchises of the International & Great Northern Railroad Company sold under said decree and the delivery of the deed therefor to the International & Great Northern Railway Company, assignee of the purchaser at said sale.

And then came also Thomas J. Freeman, Receiver of the International & Great Northern Railroad Company heretofore appointed by order of this Court entered in this cause and filed his final account and report as such Receiver.

And then came also International & Great Northern Railway Company, grantee of said railroads, properties and franchises and entered its appearance as party to this cause by Wilson & Dabney, its solicitors, and filed its motion in writing for a confirmation of the aforesaid report of said Master Commissioner and the aforesaid account and report of said Receiver and also filed a stipulation, agreement and consent in writing of the Farmers Loan & Trust Company, Trustee, by its solicitors, The International & Great Northern Railroad Company by its solicitors, The Mercantile Trust Company, Trustee, by its solicitors, Thomas J. Freeman as Receiver by his solicitor, Frank C. Nicodemus, Jr., by his solicitor and International & Great Northern Railway Company by its solicitors and George J. Gould et al. by their solicitor, accepting and approving said report of said Master Commissioner and accepting and approving said account and report of said Receiver, and consenting that the same be forthwith confirmed without being required to lie or remain in the Clerk's office for exceptions, and waiving the provisions of any rules of Court or decree in that behalf.

And it appearing to the Court from the final report of the Master Commissioner aforesaid that the entire purchase price bid for the railroads, properties, and franchises of the International & Great Northern Railroad Company sold on June 13th, 1911, as heretofore reported to the Court and confirmed, has been duly paid in full by the purchaser at said sale on September 13th, 1911, and that all the rights of the purchaser were duly assigned by instrument in writing filed with the Master Commissioner to the International & Great Northern Railway Company, a corporation organized under the laws of the State of Texas, and that a deed for said railroads, properties and franchises has been duly executed and acknowledged by said MasterCommissioner and by all other parties required to execute and acknowledge same by the terms of said decree of May 10th, 1910, as in said decree provided, and that said deed so executed and acknowledged has been duly delivered to the International & Great Northern Railway Company, assignee of the purchaser aforesaid;

And it further appearing to the Court from the report of Thomas J. Freeman, Receiver, this day filed as aforesaid that on request of the International & Great Northern Railway Company grantee of said deed the said Thomas J. Freeman, Receiver, did on September 16th, 1911, deliver to the International & Great Northern Railway Company, grantee as aforesaid, full possession of all of the railroads, properties and franchises, including money on hand and current assets formerly owned by the International & Great Northern Railroad Company or said Receiver, and then in the possession, custody or control of said Receiver;

And it further appearing to the Court that the final accounts of the said Thomas J. Freeman, Receiver, are in proper form it is therefore, on motion of the International & Great Northern Railway Company and by consent of the various parties of record to this cause as evidenced by the stipulation, agreement and consent in writ-

ing this day filed herein as aforesaid, adjudged, ordered and decreed as follows:

1. That the final report of William H. Flippen, Master Commissioner showing the payment in full of the purchase price for the railroads, properties and franchises of the International & Great Northern Railroad Company sold on June 13th, 1911, and the conveyance and transfer of same to the International & Great Northern Railway Company, assignee of the purchaser, which report has been this day filed as aforesaid, be and the same is in all respects approved and confirmed, and the action of the said Master Commissioner in accepting the settlement for the railroads, properties and franchises aforesaid, and executing, acknowledging and delivering to International & Great Northern Railway Company, assignee of the purchaser, a deed of conveyance of said railroads, properties and franchises as in said report fully and detailed set forth is hereby in all respects approved and confirmed.

2. That the report of Thomas J. Freeman, Receiver, this day filed showing the delivery of possession of the railroads, properties and franchises in his possession or under his control, is in all respects confirmed, and the action of the said Thomas J. Freeman, Receiver, in delivering possession of the said railroads, properties and franchises formerly owned by the International & Great Northern Railroad Company or said Receiver, and then in his possession, custody or control, to the International & Great Northern Railway Company on September 16th, 1911, as set out in detail in said report, is in all respects approved and confirmed, and it is hereby ordered and adjudged that the said International & Great Northern Railway Company, grantee as aforesaid, shall take and hold said properties, released and discharged from the possession and custody of said Receiver and of this Court from and after the 16th day of September, 1911.

3. That the final accounts of Thomas J. Freeman, Re-

ceiver of this Court as aforesaid, this day filed, be and the same are hereby accepted, approved and confirmed.

4. And it now appearing to the Court that the duties of said Thomas J. Freeman, as a Receiver of this Court in this cause, have been fully performed and that proper and final accounts have been rendered by him of all property or monies coming into his control as such Receiver, and that said accounts have been duly confirmed, it is now adjudged, ordered and decreed that said Thomas J. Freeman, Receiver as aforesaid, be and he is hereby discharged as Receiver of this Court in this cause, and the said Thomas J. Freeman and any surety on any bond given by him as such Receiver are hereby discharged from further liability on or account of any such bond; and all of the railroads, properties and franchises of the International & Great Northern Railroad Company or said Receiver formerly in the possession, custody or control of said Receiver, are hereby finally discharged from the possession, custody and control of said Receiver and of this Court.

A. P. McCormick,
United States Circuit Judge.

Dated at Dallas, Texas, September 25th, 1911.

EXHIBIT "K."

ARTICLES OF INCORPORATION

OF

INTERNATIONAL AND GREAT NORTHERN RAILWAY COMPANY.

(Same as Exhibit to Original Answer.)

EXHIBIT "L."

WILLIAM H. FLIPPEN, MASTER COMMISSIONER, AND OTHERS, TO INTERNATIONAL AND GREAT NORTHERN

DEED

Under Decrees Foreclosing Second Mortgage of International and Great Northern Railroad Company.
Dated August 31, 1911.

INDENTURE made this 31st day of August, A. D. 1911, between

WILLIAM H. FLIPPEN, of Dallas, Texas, as Master Commissioner appointed by the decree entered in the causes hereinafter mentioned, by the Circuit Courts of the United States for the Northern District of Texas, the Southern District of Texas, the Eastern District of Texas, and the Western District of Texas, party of the first part;

INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY, a corporation organized and existing under the laws of the State of Texas, party of the second part;

THOMAS J. FREEMAN, as Receiver of International and Great Northern Railroad Company, appointed by the aforesaid Circuit Courts of the United States in the causes hereinafter mentioned, party of the third part;

THE FARMERS' LOAN AND TRUST COMPANY, a corporation organized and existing under the laws of the State of New York, as trustee under a mortgage or deed of trust, hereinafter mentioned, executed by International and Great Northern Railroad Company, bearing date June 15, 1881, party of the fourth part;

FRANK C. NICODEMUS, JR. (unmarried), of New York City, New York, party of the fifth part; and

INTERNATIONAL AND GREAT NORTHERN RAILWAY COMPANY, a corporation organized and existing under the laws of the State of Texas, party of the sixth part:

WHEREAS International and Great Northern Railroad Company, party hereto of the second part, was duly or-

ganized and existing under the laws of the State of Texas, and was duly authorized under the laws of said State to own, hold and operate the railroads and to own and hold the other properties (real and personal) hereinafter particularly described; and

WHEREAS said International and Great Northern Railroad Company, party hereto of the second part, on or about the 15th day of June, 1881, executed and delivered a mortgage or deed of trust (hereinafter called the Second Mortgage) bearing date June 15, 1881, whereby it conveyed and transferred to The Farmers' Loan and Trust Company, party hereto of the fourth part, as trustee, its railroads, property and franchises, in said mortgage described, to secure certain bonds of said Railroad Company (hereinafter called the Second Mortgage Bonds), of which there were issued and outstanding on May 10, 1910, bonds in the aggregate principal amount of $10,391,000; and

WHEREAS, on or about April 20th, 1908, said the Farmers' Loan and Trust Company, as trustee as aforesaid, filed its bill in equity in the Circuit Court of the United States for the Northern District of Texas, against said International and Great Northern Railroad Company and others, and prayed, among other things, for the foreclosure of the Second Mortgage, and such proceedings were thereafter had in said cause that on the 10th day of May, 1910, a decree of foreclosure and sale was entered by said Circuit Court of the United States for the Northern District of Texas wherein and whereby it was adjudged and decreed, among other things, that said International and Great Northern Railroad Company, party hereto of the second part, pay or cause to be paid, within ten days after the entry of said decree, the amounts therein found to be due upon the Second Mortgage, and that, in default of such payment by said International and Great Northern Railroad Company or by someone claiming under it or for its account, within the time fixed as aforesaid the said mortgaged premises and franchises

should be sold, as provided in said foreclosure decree; and

WHEREAS similar and ancillary causes had been brought and were pending between the same parties, in the Circuit Courts of the United States for the Southern District of Texas, the Eastern District of Texas and the Western District of Texas, in each of which Districts portions of the mortgaged premises, property and franchises were situated, and said decree entered by the Circuit Court of the United States for the Northern District of Texas on or about May 10, 1910, was subsequently adopted, rendered and pronounced as the decree of said other courts in said similar and ancillary causes therein pending, by decrees rendered by said Courts respectively on the following dates, namely, by the Circuit Court of the United States for the Southern District of Texas, on or about June 25, 1910; by the Circuit Court of the United States for the Eastern District of Texas, on or about June 27, 1910; and by the Circuit Court of the United States for the Western District of Texas, on or about June 29, 1910; to which said several suits and to the proceedings and record thereof in each of said Courts, including said Circuit Court of the United States for the Northern District of Texas, reference is hereby made; and

WHEREAS, by orders of said Circuit Courts of the United States for the Northern District of Texas, for the Southern District of Texas, for the Eastern District of Texas and for the Western District of Texas, in said causes therein pending, Thomas J. Freeman, party hereto of the third part, was, prior to the entry of said decrees of foreclosure, appointed Receiver of all the railroads, property and franchises covered by and embraced in the Second Mortgage; and

WHEREAS neither said International and Great Northern Railroad Company nor anyone claiming under it nor anyone for its account did, within the time fixed as afore-

said or at any other time, make payment of the sums decreed to be payable, or of any part thereof; and

WHEREAS William H. Flippen, party hereto of the first part, was in and by said decree of the Circuit Court of the United States for the Northern District of Texas, and in and by said ancillary decrees of the United States Circuit Courts for the Southern District of Texas, for the Eastern District of Texas, and for the Western District of Texas, appointed Master Commissioner, to execute said decrees and make the sale therein provided to be made, and to execute and deliver a deed of conveyance and bill of sale of the property decreed to be sold to the purchaser or purchasers thereof, or his or their successors or assigns, upon the confirmation of such sale and completion of the payment of the entire purchase price, as in said decrees provided; and

WHEREAS said William H. Flippen, Master Commissioner as aforesaid, gave due public notice, in pursuance of said decrees and in accordance with law, of the time and place of the sale under said decrees and of the manner and terms under which said sale was to be conducted, and duly complied with all of the provisions of said decrees relating to said sale, and in pursuance of said decrees, at the place specified therein, to-wit, at the passenger depot of International and Great Northern Railroad Company in the City of Palestine in the County of Anderson, in the State of Texas, on the premises to be sold, did on the 13th day of June, 1911, sell at public auction to Frank C. Nicodemus, Jr., party hereto of the fifth part, being the highest bidder at said sale and having duly qualified as a bidder thereat in the manner provided in said decrees. all and singular the railroads, property, rights, franchises, functions, immunities and appurtenances to the same belonging, rolling stock, property and premises of every kind and description, covered by or embraced in the Second Mortgage, as adjudged by said decrees and thereby directed to be sold, at and for the sum of Twelve Million, Six Hundred and Forty-five Thousand Dollars ($12,645,000); and

WHEREAS, afterwards, said William H. Flippen, as Master Commissioner as aforesaid, did duly make and file his report of said sale, and by decree entered on or about June 14, 1911, by said Circuit Court of the United States for the Northern District of Texas, in said cause therein pending, the said report of sale was in all things ratified, approved and confirmed, and said sale to Frank C. Nicodemus, Jr., was confirmed, and made absolute and the said Frank C. Nicodemus, Jr., was adjudicated the purchaser of all the property, premises and franchises sold at said sale, subject, however, to all the terms of said decree of foreclosure entered by said Court on or about May 10, 1910, and subject also to the due performance by said purchaser, his successors and assigns, of all the obligations in said decree described; and

WHEREAS said Circuit Court of the United States for the Southern District of Texas, by decree entered in said cause therein pending on the 1st day of July, 1911, said Circuit Court of the United States for the Eastern District of Texas, by decree entered in said cause therein pending on the 7th day of July, 1911, and said Circuit Court of the United States for the Western District of Texas, by decree entered in said cause therein pending on the 11th day of August, 1911, respectively, adopted said decree of said Circuit Court of the United States for the Northern District of Texas confirming said sale, and in all things ratified, approved and confirmed said report of sale and confirmed and made absolute said sale to said Frank C. Nicodemus, and

WHEREAS the said Frank C. Nicodemus, Jr., party hereto of the fifth part, has in all respects complied with the provisions of said decrees of foreclosure and sale with reference to the payment of the amount of the bid made by him as aforesaid at said sale, and has paid or made settlement of the amount of his said bid as provided in said decrees; and

WHEREAS the said Frank C. Nicodemus, Jr., has duly assigned, transferred and set over unto International

and Great Northern Railway Company, party hereto of the sixth part, all of his right, title and interest, as said purchaser, in and to the property sold to him as aforesaid, including his right to receive deeds of conveyance and bills of sale thereof, as prescribed in the aforesaid decrees:

NOW, THEREFORE, THIS INDENTURE WITNESSETH:

That the said William H. Flippen, as Master Commissioner, party hereto of the first part, in order to carry into effect the said sale made by him and in pursuance of the aforesaid decrees and in conformity with law, and in consideration of the premises and of the payment and settlement, as aforesaid, of the amount bid by the purchaser at said sale, to-wit, the sum of twelve million six hundred and forty-five thousand dollars, the receipt whereof is hereby acknowledged, and in further consideration of the obligations, undertakings and agreements hereinafter expressed and required by the terms of said decrees and by this Indenture to be performed, assumed, undertaken and discharged by the purchaser or purchasers at said sale, his or their successors and assigns, and which International and Great Northern Railway Company, party hereto of the sixth part, hereby assumes, has granted, bargained, sold, aliened, remised, released, conveyed, confirmed, assigned, transferred and set over, and by these presents does grant, bargain, sell, alien, remise, release, convey, confirm, assign, transfer and set over, unto International and Great Northern Railway Company, party hereto of the sixth part, and to its successors and assigns, in fee simple and absolutely, all and singular the railroads, property, rights, franchises, functions, immunities and appurtenances to the same belonging, rolling stock, property and premises of every kind and description, covered by or embraced in the Second Mortgage of International and Great Northern Railroad Company, dated June 15, 1881, as adjudged by said decree and thereby directed to be sold, and particularly the following-described property, namely:

ALL and singular the lands, tenements and heredita-

ments of the International and Great Northern Railroad Company, whether owned at the date of the execution of the Second Mortgage of said company—namely, June 15, 1881—or thereafter acquired by it, including its lines of railroad in the State of Texas extending from the Town of Longview in the County of Gregg, in said State, through said county and through the Counties of Rusk, Smith, Cherokee, Anderson, Leon, Robertson, Milam, Williamson, Travis, Hays, Comal, Bexar, Medina, Frio, La Salle, Encinal and Webb, to Laredo in said last-mentioned County; and from the town of Mineola, in Wood County, to Troupe, in Smith County; and from the City of Palestine, in Anderson County, through the Counties of Houston, Trinity, Walker and Montgomery to Houston, in Harris County; and from the town of Spring, in Harris County, through the Counties of Montgomery, Waller, Grimes, Brazos, Robertson, Falls, McLennan, Limestone, Hill, Navarro, Ellis and Johnson to the City of Fort Worth, Tarrant County; with branches and branch lines from the town of Overton to the town of Henderson, in Rusk County, from the town of Round Rock to Georgetown, in Williamson County, from the town of Phelps to the town of Huntsville, in Walker County, from the City of Houston, in Harris County, to the town of Columbia, in Brazoria County, from Navasota, in Grimes County, to Madisonville, in Madison County, from Calvert Junction to Calvert in Robertson County, and from Waco Junction to East Waco, in McLennan County; also the railway and railway tracks and property appurtenant thereto, and certain tracts of land in and adjacent to the City of Houston, in Harris County, known as the Houston Belt Terminals; a total distance of about eleven hundred and six (1106) miles of completed railroad; also the trackage rights of said International and Great Northern Railroad Company from Houston, in Harris County, to Galveston, in Galveston County, Texas, over the railroad of the Galveston, Houston and Henderson Railroad Company of 1882, accorded

to it by an agreement between said last-named Railroad Company and said International and Great Northern Railroad Company dated November 19, 189[illegible]; also all and singular the said International and Great Northern Railroad Company's railroads, tracks, rights-of-way, main lines, branch lines, superstructures, depots, depot grounds, station houses, engine houses, car houses, freight houses, wood houses, sheds, watering places, workshops, machine shops, bridges, viaducts, culverts, fences and fixtures, together with all its leases, leasehold interests, leased or hired lands, leased or hired railroads and all its locomotives, tenders, cars, carriages, coaches, trucks, and other rolling stock, its machinery, tools, weighing scales, turntables, rails, wood, coal, oil, fuel, equipment, furniture and material of every name, nature and description, together with all of its corporate rights, privileges, immunities and franchises, whether held at the time of the execution of said Second Mortgage of said company—namely, on June 15, 1881—or thereafter acquired by it (including the franchise to be a corporation), and all the tolls, fares, freights, rents, income, issues and profits thereof, and all the reversion and reversions, remainder and remainders thereof, as well as all property purchased or held by the Receiver in said causes, including any balance of cash, credits and income which may remain in his hands after application thereof as in said decree of the Circuit Court of the United States for the Northern District of Texas in said cause therein pending provided, or, as has been or may hereafter be directed by said Court in said cause, to the payment of receivership obligations and charges, and to the payment of claims which may be allowed by said Court in said cause against the same, with priority over said Second Mortgage dated June 15, 1881; excepting, however, all land grants, lands, land certificates, town lots and town sites owned or controlled by said International and Great Northern Railroad Company at the date of the execution of said Second Mortgage, namely, on

June 15, 1881, or at any time prior to said date, which were not on the first day of November, 1879, or thereafter up to the said 15th day of June, 1881, actually occupied and in use by the said Railroad Company and necessary to the operation and maintenance of its lines of railroad; and excepting further, any portions of said premises and property which may have been released from the lien and operation of said Second Mortgage dated June 15, 1881, and the releases for which have been duly filed for record in the proper counties.

TO HAVE AND TO HOLD all and singular the above-mentioned and described railroads, property, rights, franchises, functions, immunities and appurtenances to the same belonging, rolling stock, property and premises of every kind and description, hereinbefore mentioned and conveyed, or intended to be conveyed, unto said International and Great Northern Railway Company, party hereto of the sixth part, being a corporation organized and existing under and pursuant to the laws of the State of Texas, and to its successors and assigns forever.

SUBJECT, however, to the mortgage dated November 1, 1879, made by International and Great Northern Railroad Company to John S. Kennedy and Samuel Sloan, as trustees, and known as said Railroad Company's First Mortgage, and subject, also, to any unpaid indebtedness or liability contracted or incurred by said Railroad Company in the operation of its railroad which said Circuit Court of the United States for the Northern District of Texas may hereafter order or decree in said cause therein pending to be prior or superior to the lien of said Second Mortgage of said International and Great Northern Railroad Company, dated June 15, 1881, except such as shall be paid or satisfied out of the income of the property in the hands of the Receiver in said cause, under orders of said Court entered or to be entered in said cause, and subject, also, to such debts, claims, liens and demands of whatsoever nature heretofore incurred or created, or which may hereafter be incurred or created, by the Re-

ceiver in said cause under orders of said Court heretofore or hereafter entered in said cause and which have not been or shall not hereafter be paid by the Receiver, under orders of said Court heretofore or hereafter entered in said cause, or by other parties in said cause, or out of the proceeds of sale as directed in said decrees, and SUBJECT also, as to certain specific portions of said property and premises—namely, the San Antonio Passenger Station, the Colorado Bridge, and certain equipment—to the existing recorded mechanic's lien, the First Mortgage Colorado Bridge Bonds and the unsatisfied recorded equipment liens, specifically and respectively affecting the same; and SUBJECT, also, to all of the terms and reservations of each of the said decrees of foreclosure and sale and of the decrees of Court confirming said sales, above mentioned, whether in this Indenture expressly referred to or not.

AND THIS INDENTURE FURTHER WITNESSETH:

That International and Great Northern Railroad Company, party hereto of the second part, for and in consideration of the sum of one dollar, lawful money of the United States, the receipt of which is hereby acknowledged, and pursuant to the said decrees and by way of confirmation and further assurance of title to the said International and Great Northern Railway Company, party hereto of the sixth part, of all and singular the property and premises, and every part and parcel thereof, of every kind and description, wherever situated, covered by or embraced in said Second Mortgage of International and Great Northern Railroad Company, party hereto of the second part, dated June 15, 1881, as adjudged by said decrees, and thereby directed to be sold, has granted, bargained, sold, aliened, remised, released, conveyed, confirmed, assigned, transferred and set over, and by these presents does grant, bargain, sell, alien, remise, release, convey, confirm, assign, transfer and set over unto International and Great Northern Railway Company, party hereto of the sixth part and to its suc-

cessors and assigns forever, all the said railroads, property, rights, franchises, functions, immunities and appurtenances to the same belonging, rolling stock, property and premises of every kind and description, covered by and embraced in said Second Mortgage of International and Great Northern Railroad Company, dated June 15th, 1881, as adjudged in said decrees and thereby directed to be sold.

TO HAVE AND TO HOLD all and singular the said railroads, property, rights, franchises, functions, immunities and appurtenances to the same belonging, rolling stock, property and premises (real and personal) unto International and Great Northern Railway Company, the party of the sixth part hereto, its successors and assigns forever.

AND THIS INDENTURE FURTHER WITNESSETH:

That Thomas J. Freeman, as Receiver as aforesaid, party hereto of the third part, for and in consideration of the premises and of the sum of one dollar, lawful money of the United States to him in hand paid, the receipt whereof is acknowledged, and pursuant to said decrees and by way of confirmation and further assurance of title to said International and Great Northern Railway Company, party hereto of the sixth part, of all and singular the property and premises, and every part and parcel thereof, of every kind and description, wherever situated, covered by or embraced in said Second Mortgage of International and Great Northern Railroad Company, dated June 15, 1881, as adjudged by said decrees, and thereby directed to be sold, has conveyed, released and confirmed, assigned, and by these presents does convey, release and confirm, unto International and Great Northern Railway Company, party hereto of the sixth part, and to its successors and assigns forever, all the said railroads, property, rights, franchises, functions, immunities and appurtenances to the same belonging, rolling stock, property and premises of every kind and description covered

by and embraced in said Second Mortgage, as adjudged in said decrees and thereby directed to be sold, and specifically all right, title and interest of said Receiver in and to all rolling stock and equipment acquired by said Receiver under and in pursuance of an order of the Circuit Court of the United States for the Northern District of Texas, entered on November 4, 1908, in the above-mentioned cause therein pending.

TO HAVE AND TO HOLD all and singular the said railroads, property, rights, franchises, functions, immunities and appurtenances thereunto belonging, rolling stock, property and premises (real and personal) unto the said party of the sixth part hereto, its successors and assigns forever.

SUBJECT, however, as to said rolling stock and equipment to the outstanding equipment notes of said Receiver issued by him pursuant to the aforesaid order of said Court; and International and Great Northern Railway Company hereby, for itself, its successors and assigns, covenants and agrees to and with said Receiver, party hereto of the second part, to assume payment of all unpaid equipment notes issued by said Receiver pursuant to the terms of the order of said Court above mentioned, dated November 4, 1908, and outstanding at the date of the delivery of this Indenture, and to perform all of the obligations of said Receiver under the agreement referred to in said order of court.

AND THIS INDENTURE FURTHER WITNESSETH:

That The Farmers' Loan and Trust Company, as trustee under said Second Mortgage of International and Great Northern Railroad Company, dated June 15, 1881, described in the said decrees, party hereto of the fourth part, in consideration of the premises and of the payment of the amount of the bid as aforesaid by the said purchaser at the said Master Commissioner's sale and of the assignment to the party of the sixth part of all the right, title and interest of said purchaser in and to the property sold at said sale, and in pursuance of said decrees, and

by way of confirmation and further assurance of title to the said party of the sixth part of all and singular the property and premises and every part and parcel thereof, of every kind and description, wherever situated, covered by or embraced in said Second Mortgage of International and Great Northern Railroad Company, dated June 15, 1881, as adjudged by said decrees and thereby directed to be sold, has transferred and released, and does by these presents transfer and release, to the said International and Great Northern Railway Company, party hereto of the sixth part, its successors and assigns forever, all the right, title and interest of said party of the fourth part under said Second Mortgage of International and Great Northern Railroad Company, dated June 15, 1881, and all its other right, title and interest, in and to any and all of the said railroads, property, rights, franchises, functions, immunities and appurtenances to the same belonging, rolling stock, property and premises of every kind and description covered by and embraced in said Second Mortgage as adjudged in said decrees and by said decrees directed to be sold.

TO HAVE AND TO HOLD all and singular the said railroads, property, rights, franchises, functions, immunities and appurtenances thereunto belonging, rolling stock, property and premises unto said party of the sixth part hereto, its successors and assigns forever.

AND THIS INDENTURE FURTHER WITNESSETH:

That said Frank C. Nicodemus, Jr., party hereto of the fifth part, the purchaser at said sale thereof of the property sold under the said decrees of foreclosure and hereinbefore by this Indenture conveyed by the said Master Commissioner to International and Great Northern Railway Company, the party of the sixth part, having for a valuable consideration, the receipt of which is hereby acknowledged, assigned, transferred and set over, as hereinbefore recited, unto the party of the sixth part, all of his right, title and interest in and to the property so sold, including his right to receive the conveyance thereof, and

all his other rights under said decrees in respect of said property or by virtue of his said bid therefor and purchase thereof, does, in consideration of the sum of one dollar, lawful money of the United States, the receipt of which is acknowledged, hereby join in the execution of this Indenture for the purpose of releasing and confirming, and he does hereby release and confirm, unto said International and Great Northern Railway Company, party hereto of the sixth part, its successors and assigns forever, all of his right, title and interest in and to the property sold at said sale and purchased by him, as aforesaid, and by this Indenture conveyed, to the party of the sixth part and each and every part thereof.

To have and to hold unto the party of the sixth part its successors and assigns forever.

Said International and Great Northern Railway Company hereby, for itself, its successors and assigns, covenants and agrees to and with said Frank C. Nicodemus, Jr., party hereto of the fifth part, to perform, satisfy and discharge each and all of the terms of the decrees of foreclosure and sale in this Indenture recited, on the part of the purchaser at the sale thereunder to be performed, satisfied and discharged (other than the payment of the purchase price bid which has been made by said Nicodemus), and as his assignee, to enter its appearance in said causes, and to indemnify and forever hold harmless said Frank C. Nicodemus, Jr., party hereto of the fifth part, his executors and administrators, from and against any and all loss, damages, expenses and liabilities whatsoever which may have been incurred or which hereafter may be incurred by said Frank C. Nicodemus, Jr., or his executors or administrators, by reason of the bid of said Frank C. Nicodemus, Jr., at the above-mentioned sale and of the acceptance of said bid, or by reason of any acts or things required by said decrees or orders of court to be assumed or performed by said Frank C. Nicodemus, Jr., as such purchaser or by it, said Railway Company, as his assignee.

No personal covenant or liability shall be implied against the parties of the first, third, fourth or fifth parts to this Indenture, or any of them, by reason of the execution of this deed or of any recital or covenant herein contained.

In order to facilitate the recording of this Indenture, forty originals thereof have been executed, acknowledged and delivered by the respective parties, all or any one or more of which may be recorded, and each of which, when executed, acknowledged and delivered, shall be deemed an original, and all collectively one instrument.

IN WITNESS WHEREOF, each of the said parties hereto of the first, third and fifth parts has hereunto set his hand and seal, and each of the parties of the second, fourth and sixth parts has caused these presents to be signed by its President or a Vice-President, and its corporate seal to be hereunto affixed and attested by its Secretary or an Assistant Secretary, the day and year first above written.

WILLIAM H. FLIPPEN,
(SEAL.) As Master Commissioner.

INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY,
by
FRANK J. GOULD,
(Corporate Seal.) Vice-President.
Attest:
H. B. HENSON,
Assistant Secretary.

THOMAS J. FREEMAN,
As Receiver.

THE FARMERS' LOAN AND TRUST COMPANY,
by
SAM SLOAN,
(Corporate Seal.) Vice-President.
Attest:
A. V. HEELY,
Secretary.

FRANK C. NICODEMUS, JR.,
(SEAL.) As Purchaser.

INTERNATIONAL AND GREAT NORTHERN
RAILWAY COMPANY,
by
(Corporate Seal.) GEORGE H. TAYLOR,
Attest: Vice-President.
H. B. HENSON,
Assistant Secretary.

EXHIBITS "M" AND "N."

The Chairman stated that under the terms of decree of sale under which the property and franchises of the International and Great Northern Railroad Company were purchased by this Company, the purchaser or his assignee had six months from completion of the sale and delivery of the deed within which to elect whether it would assume leases and contracts of the old Company, and to evidence its election by filing notice with the Clerk of the United States Circuit Court for the Northern District of Texas, at Dallas, Texas, that the President had prepared a list of leases and contracts which it was thought desirable for this Company to elect not to assume, though many of these leases and contracts could be renewed on other terms to the advantage of the Company, and suggested that the Board take action to authorize the filing of the necessary notice that this Company elected not to assume said leases and contracts, a list of which was presented to the Board. On consideration whereof, the following resolution was presented, and on motion duly seconded, was unanimously adopted:

Resolved, that this company, as the assignee of the purchaser at the sale under the decree of foreclosure entered by the United States Circuit Court for the Northern District of Texas on or about May 10, 1910, in a certain cause therein pending wherein The Farmers' Loan and

Trust Company, trustee, is complainant, and International and Great Northern Railroad Company and others are defendants, and the owner of all the railroads, property and franchises sold at said sale and conveyed to this company by deed of the Master Commissioner appointed by said decree, and others, which said deed was delivered to this Company on or about September 16, 1911, does hereby elect, pursuant to the provisions of said decree, not to assume the leases or contracts, or alleged leases or contracts, which are described as follows, to-wit:

* * * * * *

(The same as listed in the next document below.)

* * * * * *

and that the proper officers of this company be, and they are hereby, authorized and directed to file with the Clerk of the United States Circuit Court for the Northern District of Texas, in the cause above mentioned, a notice of the election of this Company not to assume the above-mentioned leases or contracts, or alleged leases or contracts, as provided by said decree of foreclosure and sale entered on May 10th, 1910, such notice being in such form as may be prepared or approved by counsel for this company, and to give such notice and take such further action as may be necessary or proper, and as said counsel may advise, in order to make effective the election of this company as above expressed.

The Board considering the statement of the Chairman to the effect that many of these leases might be renewed by this company on terms satisfactory to it; after full discussion the following resolution was presented and on motion duly seconded was unanimously adopted.

Resolved, That the matter of renewing any leases and contracts included in the list of leases and contracts which this Company has elected not to assume, as set out in the resolution this day adopted, be and the same is hereby referred to the Chairman of the Board and President of this Company with power to act, and to renew in the name and on behalf of this Company such of said

leases and contracts as the said Chairman of the Board and President of this Company may determine to be to the best interest of this Company upon such terms and conditions and in such forms as the Chairman of the Board and President of this Company may determine, and to execute or cause to be executed under the corporate seal of this Company any leases or contracts so determined upon by them, provided, however, that none of said leases or contracts be made for periods exceeding twenty-five years without the approval of the Board of Directors or Executive Committee of this Company.

EXHIBIT "N."

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF TEXAS.

THE MERCANTILE TRUST COMPANY, TRUSTEE, THE FARMERS' LOAN AND TRUST COMPANY, TRUSTEE, GEORGE J. GOULD, ET ALS., MARSHALL CAR WHEEL & FOUNDRY CO., ET AL.,

Complainants,

—VERSUS— CONSOLIDATED CAUSE No. 2501.

INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY,

Defendant.

THE FARMERS' LOAN AND TRUST COMPANY, TRUSTEE,

Complainant,

—VERSUS— EQUITY CAUSE No. 2514.

INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY, THE MERCANTILE TRUST COMPANY AND THOMAS J. FREEMAN, AS RECEIVER OF THE INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY,

Defendants.

In the above-entitled and numbered proceeding now

comes International and Great Northern Railway Company, the assignee of Frank C. Nicodemus, Jr., the purchaser of the properties and franchises of International and Great Northern Railroad Company sold by virtue of the decree of foreclosure and sale in said receivership proceedings of date May 10, 1910, and through him the owner of the properties and franchises of the International and Great Northern Railroad Company sold at said sale, and, in accordance with said decree of sale, of date May 10, 1910, rendered in the above-entitled and numbered proceedings, files in this court in this proceeding within six months after the completion of the sale and delivery of the deed of the Master Commissioner, which said deed was delivered on September 16, 1911, this its election not to assume or adopt the following leases and contracts, or alleged leases and contracts, made or claimed to be made by the International and Great Northern Railroad Company, the defendant railroad company in the above proceedings, or by any other corporation under which it holds or whose rights it has acquired by consolidation or otherwise, or by any receiver of any of said corporations; and, filing this election not to assume or adopt or be bound by any lease or contract herein described made by the International and Great Northern Railroad Company, or by any other corporation under which it holds or whose rights it has acquired by consolidation or otherwise, or by any receiver of any of said corporations, the said International and Great Northern Railway Company states that it does not admit in any instance that any such contract or lease was in fact made by the International & Great Northern Railroad Company or other person or corporation, or, if made, that it was made with the formalities required by law, or is valid and enforceable against the International and Great Northern Railroad Company or other party therein, or that there are not valid and sufficient defenses thereto; but states that in the event such contract or lease was made by the International and Great Northern Railroad Company, or

other person or corporation, the Railway Company filing this election hereby expressly files its election not to assume or adopt any such lease or contract, or alleged lease or contract, and not to be bound thereby.

The leases and contracts and alleged leases and contracts which the International and Great Northern Railway Company hereby elects not to assume or adopt are the following, which are stated in substance and effect and with approximate accuracy, all dates to be considered as stated on or about, it not being practicable to give a description thereof more than sufficient to identify the alleged leases or contracts which are not assumed:

All the leases following, either made or claimed to have been made by the International and Great Northern Railway Company, the sold-out corporation:

Lease No. 498. Lessee, Nicholson & Jannin; property leased, a small tract of land at San Antonio for a storage house; date of lease, November 19, 1900; term, for a period of twenty-five years, with privilege of renewal; assigned April 26, 1905, to Laura P. Jannin and F. Johnson & Co.

Lease No. 508. The Longview Ice, Light & Bottling Co., of a tract of land at Longview, for an ice manufacturing plant; lease dated on or about March 23, 1901, and running for a period of fifty years, with privilege of renewal.

Lease No. 535-915, to Wm. Basse Hardware Co., of a hardware warehouse site at San Antonio, Texas; dated February 15, 1902, and running for a period of ten years, with privilege of renewal for an equal term.

Lease No. 558, to the Houston Rice Milling Company, of a site for a rice mill at Houston, Texas; dated April 1, 1902, running for ninety-nine years, said lease being also No. 1310.

Lease No. 563, to Armour Packing Co., of location for cold storage plant at San Antonio, Texas; dated January 15, 1900, running for twenty-five years, with the privilege of renewal. This lease was assigned November 8,

1908, to J. Ogden Armour, and assigned by J. Ogden Armour to Armour & Company of New Jersey on May 29, 1909.

Lease No. 592, to J. B. Mayfield, of a site for a wholesale warehouse at Tyler; dated August 25, 1902, for a term of twenty-five years, with privilege of renewal. On January 1, 1907, this lease was assigned to Human Brown Grocery Company, which, on the 17th of July, 1905, assigned the lease to John Jacob Brown of New York, who sub-leased the land on January 1, 1907, to the Mayfield Grocery Company. John Jacob Brown then assigned the lease to Mrs. J. B. Brown.

Lease No. 602, to Swift & Company, of a site for a cold storage plant at San Antonio, Texas; dated October 1, 1902, running for a period of twenty years, with privilege of renewal. This lease was assigned on November 18, 1908, to Swift & Company, a Delaware corporation.

Leases Nos. 615, 693 and 1418. All of these leases are to the same property under different conditions, being lease to the Moore-Star Mayfield Company at Palestine, dated January 20, 1899, and running for a period of ten years, with privilege of renewal. This lease was transferred to Star, Hartnett & Edmonston on January 20, 1903, and Star, Hardnett & Edmonston transferred same to the Ezell Grocery Company about January 20, 1906, and the Ezell Grocery Company assigned the lease to the Moore Grocery Company about January 13, 1909.

Lease No. 621, to F. W. Madden, of site for oil mill at Taylor; dated July 30, 1898, running for a period of twenty-five years, which was extended to a period of forty-five years, dating from July 30, 1898.

Lease No. 665, to National Coffee & Manufacturing Co., of a site for a coffee plant at Houston, Texas; dated March 21, 1903, and running for a period of twenty-five years.

Lease No. 693 (see 615, 1418), to Ezell Grocery Company at Palestine, of site for a warehouse at Palestine;

dated January 20, 1903, running for a term of six years, with privilege of renewal.

Lease No. 899, to Navasota Compress Company, of site for a compress at Navasota, Texas; dated September 22, 1902, running for ninety-nine years.

Lease No. 921, to Western Grocery Company, of warehouse site at San Antonio; dated February 1, 1905, for twenty-five years, with privilege of renewal.

Lease No. 928, to Cardz Milling Company at Austin, Texas. Lease of a mill site; dated February 14, 1905, running for ninety years, with privilege of renewal; said lease was assigned by Cardz Milling Company to Henry Cardz October 30, 1906.

Lease No. 690, to J. W. Shipman, of warehouse site at Jacksonville; dated May 6, 1905, running for a period of ten years, with privilege of renewal.

Lease No. 1019, to Industrial Cotton Oil Company, of site for oil mill at Hearne; dated May 24, 1905, for ten years, with privilege of renewal.

Lease No. 1028, to Texas Company, of site for oil tanks at Houston, Texas; dated July 31, 1905, running for a period of twenty years.

Lease No. 1051, to Sames-Moore & Co., of warehouse site at Laredo; dated June 1, 1905, running for twenty-five years, with privilege of renewal.

Lease No. 1071, to Pintsch Gas Company, of site for a gas plant at San Antonio; dated October 31, 1901, good for twenty-five years, with privilege of renewal.

Lease No. 1092, to Star Grocery Company, of warehouse site at Jacksonville; dated March 1, 1906, and good for twenty-five years.

Lease No. 1128, to the Texas Company, of site for oil tanks at San Antonio; dated October 31, 1907, and good for twenty-five years.

Lease No. 1116, to Henry Ash, of warehouse site at Palestine; dated January 10, 1899, good for ten years, with privilege of renewal.

Lease No. 1127, to Taylor Can & Pickle Company, of

site for canning factory at Tyler, Texas, dated December 30, 1906, running for twenty years, with privilege of renewal.

Lease No. 1116, to Walter Tipps, of warehouse site at Austin; dated September 5, 1906, running for twenty-five years.

Lease No. 1169, to Farmers Union Gin Company, of site for a gin plant at Round Rock; dated December 2, 1906, for ten years, with privilege of renewal for five years.

Lease No. 1170-1261, to the American Coffee Company, of site for a coffee roaster and for storage of commodities in coffee business at Houston, running for a term of eighteen years. This lease was assigned to W. H. Rogers on July 29, 1908. Said lease marked canceled.

Lease No. 1189, to Wm. Volke & Company, of site for factory and warehouse at Houston, Texas; dated January 1, 1907, and running for thirty years.

Lease No. 1205 (see 592), to Mayfield Grocery Company, of site for warehouse at Tyler; dated January 1, 1907, running twenty years, with privilege of renewal, being the same property as Lease No. 592 above described.

Lease No. 1209, to H. E. Piper, of site for ice and electric light plant at Hearne, Texas; dated January 17, 1907, and running for twelve years.

Lease No. 1216, to Henderson Lumber Planing Mill, of site for a planing mill at Henderson, Texas; dated April 28, 1907, and running for a term of twenty-six years.

Lease No. 1302, to Otto Wahrmund, of site for saloon at Austin, Texas; dated December 14, 1907, for a period of ten years.

Lease No. 1310, to the Houston Rice Milling Company, of site for rice mill at Houston, Texas; dated August 9, 1907, for a period of ninety-four years.

Lease No. 558, to the Houston Rice Milling Company, of site for rice mill at Houston, Texas; dated April 1, 1902, for ninety-nine years.

Lease No. 1313, to Sames-Moore & Company, of site for brick yard at Laredo; dated July 19, 1907, for a period of ten years.

Lease No. 1329, to Derby Brothers, of site for brick yard at Laredo; dated August 20, 1907, for twelve years. This lease was assigned to Derby Brick Manufacturing Company.

Lease No. 1339, to Sames-Moore & Company, of site for brick yard at Laredo; dated October 29, 1907, for a period of ten years.

Lease No. 2252 (see 1092), to Star Grocery Company, of site at Jacksonville, Texas, for a wholesale grocery business, running for a term of twenty-five years; dated 1st day of March, 1906.

Verbal lease, made several years since, with the Mart Compress Company for site on which to erect cotton compress at Mart. Said compress company has refused to sign the written lease when presented to it, and has now been holding said property for a considerably longer period than one year without having any written lease authorizing it to do so.

Verbal agreement for spur track made with Mart Compress Company, some time since, the said compress company having refused to sign the written agreement for spur track when presented to it. Said spur track to be used in connection with the compress of the Mart Compress Company erected on land of railway at Mart, Texas.

Any agreement or agreements claimed to have been made by the Internaational and Great Northern Railroad Company, or by the Houston and Great Northern Railroad Company, or by the International Railroad Company, or by any of the companies composing the International and Great Northern Railroad Company, or by any other corporation under which it holds or whose rights it has acquired by consolidation or otherwise, or by any receiver of any of said companies, or by any person purporting to act for them or any of them, whereby said companies, or any of them, or any receiver, is

claimed to have made any agreement with reference to establishing or maintaining the general offices, public offices or principal offices, machine shops, roundhouses, or any other structures at Palestine, Texas. The assign of the purchaser of the franchises and property of the International and Great Northern Railroad Company, to wit, International and Great Northern Railway Company, denies that any such contract or agreement was ever made; but in the event any such contract or agreement was made, the Railway Company, filing this election, hereby expressly elects not to assume or adopt same, but on the contrary said Railway Company hereby repudiates same, and elects not to assume same and not to be bound thereby.

The contract entitled "Joint Track Contract between the International & Great Northern Railroad Company and the Missouri, Kansas & Texas Railway Company of Texas," dated December 21, 1905, granting to the Missouri, Kansas & Texas Railway Company of Texas certain trackage rights over that part of the line of the International and Great Northern Railroad Company extending from the City of Austin in Travis County to San Marcos in Hays County, including the bridge of the International and Great Northern Railroad Company across the Colorado River, as well as all other bridges constituting parts of the line of railroad of the said International and Great Northern Railroad Company between the Cities of Austin and San Marcos, for the purpose of running and operating the trains, engines and cars, loaded and empty, of the Missouri, Kansas & Texas Railway Company of Texas thereover, upon certain terms and conditions named in said written contract; said contract being signed on behalf of the International and Great Northern Railroad Company by George J. Gould, its President, and on behalf of the Missouri, Kansas & Texas Railway Company of Texas by Henry C. Rouse, its President.

It is expressly understood that the said International

and Great Northern Railway Company, by filing this notice of its election not to assume or adopt the leases and contracts, or alleged leases and contracts, above set forth, does not mean that any lease or contract not by it above listed is by it adopted or assumed, but that the said Railway Company may, from time to time, within the period allowed by the order of sale before named, file in this court and in this proceeding a description of other leases or contracts which it may elect not to assume.

Said International and Great Northern Railway Company also elects not to assume the following leases and contracts:

Lease No. 915 (see 535), to Wm. Basse Hardware Company, of a site for a warehouse at San Antonio, dated February 15, 1905, and running for a period of seven years, with privilege of renewal.

Lease No. 1246, to Rusk County Planing Mill Company, of a tract of land for a planing mill at Henderson; dated on or about March 20, 1907, and extending for a period of ten years.

Lease No. 1257, to the Pruitt Commission Company, of a warehouse site at San Antonio; dated December 1, 1906, and running for a term of ten years.

Contract No. 2224, between the International and Great Northern Railroad Company and the Gulf Colorado and Santa Fe Railway Company, for use of tracks of the International and Great Northern Railroad Company between Houston and Conroe by the Santa Fe Railroad Company, and for use of tracks of the Santa Fe Railway Company between a point just north of Navasota River Bottom and Conroe; said contract being executed on behalf of the International and Great Northern Railroad Company by L. Trice and on behalf of the Gulf Colorado and Santa Fe Railway Company by L. J. Polk, on the 20th day of August, 1901.

Contract between the International and Great Northern Railroad Company and the Western Union Telegraph

Company; dated September 16, 1882, and executed by the Western Union Telegraph Company by John Van Horn, Vice-President, and by the Missouri Pacific Railway Company as the duly authorized representative of the International and Great Northern Railroad Company, the Galveston, Houston and Henderson Railway Company, and the Missouri, Kansas and Texas Railway Company, and the St. Louis, Iron Mountain and Southern Railway Company; and a supplement thereto, adopting the contract as executed by the Western Union Telegraph Company and the Missouri Pacific Railway Company, being signed by the St. Louis, Iron Mountain and Southern Railway Company and the Missouri, Kansas and Texas Railway Company and by the International and Great Northern Railroad Company, and by the Galveston, Houston and Henderson Railway Company; said contract providing for use of the wires of the Western Union Telegraph Company on the line of the International & Great Northern Railroad Company, and of other roads mentioned therein, and providing for other matters in relation to the telegraph wires and lines along said railroad and the other railroads named in said contract; all of which matters are set out fully in the contract referred to.

INTERNATIONAL AND GREAT NORTHERN
RAILWAY COMPANY
by THOMAS J. FREEMAN,
Its President.

WILSON & DABNEY
Attys.

(SEAL)

Attest:

H. B. HENSON,
Assistant Secretary.

EXHIBIT "O."

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF TEXAS.

THE MERCANTILE TRUST COMPANY, TRUSTEE, THE FARMERS' LOAN AND TRUST COMPANY, TRUSTEE, GEORGE J. GOULD, ET AL.,
Complainants,

VERSUS

CONSOLIDATED CAUSE No. 2501.

INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY,
Defendant.

THE FARMERS' LOAN AND TRUST COMPANY, TRUSTEE,
Complainant,

VERSUS

EQUITY CAUSE No. 2514.

INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY, THE MERCANTILE TRUST COMPANY AND THOMAS J. FREEMAN, AS RECEIVER OF THE INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY,
Defendants.

January 30, 1912.

To the Judge of the County Court of Anderson County and to the Commissioners of Anderson County, Texas:

PLEASE TAKE NOTICE that International and Great Northern Railway Company is the assign of the purchaser at the sale under the decree of foreclosure entered by the United States Circuit Court for the Northern District of Texas on or about May 10, 1910, in a certain cause therein pending wherein The Farmers' Loan and Trust Company, Trustee, is complainant and International and Great Northern Railroad Company and others are defendants, and is the owner of all the railroads, property and franchises sold at said sale and conveyed to this Com-

pany by deed of the Master Commissioner appointed by said decree, and others, which said deed was delivered to this Company on or about September 16, 1911, and that this Company is advised that claim is made to the effect that a contract or agreement was heretofore made by International and Great Northern Railroad Company or by Houston and Great Northern Railroad Company, or by some other corporation or corporations, or by some receiver or receivers of some corporation or corporations, whereby it was agreed that the general offices, public offices or principal offices, machine shops, roundhouses or other structures, should be established or maintained at Palestine, Texas.

The International and Great Northern Railway Company hereby denies that any such contract or agreement was ever made; and, in the event any such contract or agreement was made, International and Great Northern Railway Company hereby expressly elects not to assume or adopt the same, but, on the contrary, repudiates the same and elects not to be bound thereby.

Pursuant to the above-mentioned decree of foreclosure International and Great Northern Railway Company filed on December 13, 1911, with the Clerk of the United States Circuit Court for the Northern District of Texas, at Dallas, Texas, in the cause above mentioned, a notice of the election of said company not to assume certain described contracts or leases, and certain alleged contracts or leases, including the alleged contract above mentioned.

INTERNATIONAL & GREAT NORTHERN
RAILWAY COMPANY,
By THOMAS J. FREEMAN
President.

Attest:
A. R. HOWARD
Secretary.
(SEAL)

EXHIBIT "P."

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF TEXAS.

THE MERCANTILE TRUST COMPANY, TRUSTEE, THE FARMERS' LOAN AND TRUST COMPANY, TRUSTEE, GEO. J. GOULD, ET AL.,
Complainants,

VERSUS

CONSOLIDATED CAUSE No. 2501.

INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY,
Defendant.

THE FARMERS' LOAN AND TRUST COMPANY, TRUSTEE,
Complainant,

VERSUS

EQUITY CAUSE No. 2514.

INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY, THE MERCANTILE TRUST COMPANY AND THOMAS J. FREEMAN, AS RECEIVER OF THE INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY,
Defendants.

January 30th, 1912.

To the Mayor and City Council of the City of Palestine, Texas:

Then followed the notice the same as that addressed to the County.

EXHIBIT "Q."

AT A CIRCUIT COURT OF THE UNITED STATES OF AMERICA, IN AND FOR THE FIFTH CIRCUIT IN THE WESTERN DISTRICT OF TEXAS, HELD AT THE COURT HOUSE IN THE CITY OF AUSTIN.

JOHN A. STEWART AND WM. H. OSBORNE, TRUSTEES,
Complainants,

vs.

IN EQUITY.
No. 138.

THE INTERNATIONAL RAILROAD COMPANY; THE INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY, JOHNS S. BARNES AND THOMAS W. PEARSALL, TRUSTEES, ETC., MOSES TAYLOR AND WILLIAM E. DODGE, TRUSTEES, ETC.,
Defendants.

This cause coming on to be heard at this term of the Court upon the bill of complaint of the said complainants, the exhibits, answers and proofs, solicitors for all parties now consenting in open court that this cause may now be heard and determined;

Now the Court after hearing the counsel of the said parties, and the evidence, and having considered thereof, and having had due deliberation of and concerning the same, it is thereupon, on this 15 day of April ordered adjudged and decreed, and this Court by virtue of the power and authority in it vested, doth order, adjudge and decree as follows, to-wit: that all the material facts set forth in said Bill of Complaint are true.

First. That the mortgage or deed of trust bearing date the first day of April, one thousand eight hundred and seventy one, set up in the bill of complaint and appearing thereby, and by the proofs in this case, to have been executed by the defendant, The International Railroad Company, as party of the first part thereof to John A. Stewart and William H. Osborne as trustees, parties

of the second part thereof, was a valid conveyance by way of mortgage of the property therein described, to the said trustees, who are the complainants in this cause; was duly recorded in the several counties in the State of Texas in which the property covered by the said mortgage or deed of trust is situated, as alleged in said bill of complaint.

Second. It is further ordered adjudged and decreed, that there were issued and are now outstanding of the bonds secured by the said mortgage as follows: Four thousand two hundred and twenty four bonds, for one thousand dollars each, dated the first day of April, one thousand eight hundred and seventy one, and payable in United States gold coin on the first day of April, one thousand nine hundred and eleven, and bearing interest at the rate of seven per centum per annum, payable semi-annually in gold coin.

Third. It is further ordered adjudged and decreed, that the defendant, The International and Great Northern Railroad Company, is the successor and assignee of the said mortgagor, the International Railroad Company, and has assumed the obligations of the said International Railroad Company, including the payment of the principal and interest of all the said bonds hereinbefore mentioned.

Fourth. It is further ordered adjudged and decreed, that there are due to the complainants in this cause, and to the holders of the bonds or coupons secured by the mortgage or deed of trust, the following sums by way of interest and principal of said bonds and coupons: 1. Unpaid coupons upon eighty of said bonds; which coupons matured April 1st, 1875, and interest thereon to April 1, 1879. 2. Unpaid coupons upon 3184 of said bonds, which coupons matured April 1, 1875, less the sum of $19.60 paid on account of each of said coupons, amounting to $62,406.40 and interest thereon to April 1, 1879.

3. Unpaid coupons on 3264 of said bonds, which cou-

pons matured October 1, 1875, and interest thereon to April 1, 1879.

4. Unpaid coupons on 3264 of said bonds, which coupons matured April 1, 1876, and interest thereon to April 1, 1879.
5. Unpaid coupons on 3264 of said bonds, which coupons matured October 1, 1876, and interest thereon to April 1, 1879.
6. Unpaid coupons on 3264 of said bonds, which coupons matured April 1, 1887, and interest thereon to April 1, 1879.
7. Unpaid coupons on 4224 of said bonds, which coupons matured October 1, 1877, and interest thereon to April 1, 1879.
8. Unpaid coupons on 4224 of said bonds, which coupons matured April 1, 1878, and interest thereon to April 1, 1879.
9. Unpaid coupons on 4224 of said bonds, which coupons matured October 1, 1878, and interest thereon to April 1, 1879.
10. Unpaid coupons on all of said bonds which coupons matured April 1, 1879.
12. Principal money named in the said bonds amounting to the sum of Four millions two hundred and twenty four thousand dollars, ($4,224,000) payable in gold coin of the United States, which principal, upon default in the payment of interest in accordance with the terms of the mortgage, became due and payable on the first day of April, 1875, making due in the aggregate, for principal and interest, on the first day of April, 1879, upon the said bonds from the defendant, the International Railroad Company and its successor the International and Great Northern Railroad Company, to the complainants as trustees, the sum of Five millions, four hundred and fifty seven thousand, six hundred and seventy eight dollars and twenty cents, ($5,457,678.20) in gold coin of the

United States not including, however, the said sum of $62,406.40, heretofore paid as interest to certain holders of certificates or scrip, issued for certain unpaid coupons, which interest is properly deductable by the said trustees from the amount of interest, that would otherwise be due and payable to the parties respectively who received the said sum.

and that the said defendants, the International Railroad Company and the International and Great Northern Railroad Company, are severally chargeable with, and the complainants are entitled to collect from the said companies and from the said mortgaged premises herein detailed and directed to be sold, interest on the sum of five millions, four hundred and fifty seven thousand, six hundred and seventy eight dollars and twenty cents, ($5,457,678.20) hereinbefore mentioned from the first day of April, 1879, together with the charges, expenses, costs and allowances herein mentioned and provided for; and also the amount of lawful compensation and commissions to the complainants as trustees, and to the Receiver in this cause, including the charges of attorneys, solicitors and counsel employed by such trustees and said receiver, to be ascertained as hereinafter directed, and also including the expenses of executing this decree.

Fifth. It is further ordered, adjudged and decreed that the railroad equipment and property, described in and intended to embraced in the said mortgage or deed of trust, included all and singular, said International Railroad Company's railway: its Jefferson branch, whenever built, and its main trunk; its right of way and track, together with all superstructures, depots, depot-grounds, stations, station house, engine houses, car houses, freight houses, wood houses, sheds, watering places, work shops, machine shops, bridges, tools, machinery, side tracks, turnouts, turntables, weighing scales, fixtures, locomotives, tenders, rolling stock, fuel, equipments, and all corporate rights, privileges and franchises of the said In-

ternational Railroad Company including the franchise of the Company to be a corporation, which the said International Railroad Company possessed on the first day of April, 1871, or which it afterwards acquired and which are necessary, material and useful in connection with the ownership, use or operation of the aforesaid railroad.

Sixth. It is further ordered, adjudged and decreed, by this Court, that the defendants in this action, and each and every one of them, and all persons claiming or who may claim from or under them, or either of them, subsequent to the filing of the Bill of Complaint herein, by debt, judgment or decree, or otherwise be, and they hereby are forever barred and foreclosed of and from all equity of redemption, right, estate, demand, lien, title, interest and claim of, in and to the said mortgage premises herein described and ordered to be sold, and every part and parcel thereof, except as herein stated, unless within twenty days from the date of the entry of this decree, the defendant, the International and Great Northern Railroad Company, or some one or more of the other defendants, shall in redemption of said property, pay into this Court the said sum of five millions, four hundred and fifty seven thousand six hundred and seventy eight dollars and twenty cents ($5,457,678.20) in gold coin of the United States, with interest thereon from April 1, 1879, together with the amount of liabilities incurred by the Receiver, heretofore appointed in this cause, in the management and protection of the property in his hands, as such receiver, and also all the costs, fees, allowances and compensation herein provided for, and costs and disbursements incurred in and about the sale, hereinafter directed, up to the time of such payment, but the party so redeeming shall be allowed for any sum or sums which may hereafter and before said redemption be paid on account of said principal or interest.

That if no such payment be made, all and singular, the said premises and property and all other property of the said Railway Company covered by and included in the

said mortgage to the complainants, and not herein specially excepted, be sold for the purpose of satisfying or collecting the said several sums, and each and every part thereof, and as hereinafter directed, at public auction, at the Court house of Travis County, in the City of Austin, in the State of Texas, under the direction of Burr G. Duval, Esqr., Master, to whom it is referred for that purpose, and that a prior notice of at least sixty days be given of the time, place and terms of said sale, and of the specific property (as nearly accurate as practicable) to be sold, and that such notice shall be published in two newspapers of good circulation in the City of Austin, and in one or more newspapers in the City of New York.

Seventh. And it is further ordered adjudged and decreed:

1. That the said mortgaged property herein directed to be sold, be sold in one parcel and as one property, at one and the same sale, the same being, in the opinion of the Court, incapable of being sold in separate parcels, without material injury to the value thereof.

2. That the said mortgaged premises shall not be sold at such sale for any sum less than five hundred thousand dollars, ($500,000.) in gold coin of the United States, and that if no bid of that amount be offered, the said Master shall adjourn the sale from time to time until the further order of this Court.

3. That of the whole of the purchase money, not less than twenty five thousand dollars shall be paid in gold coin, at the time of the sale, and on the delivery of the deed so much of the total purchase money shall be paid as shall be necessary to pay and discharge any obligations, liabilities or indebtedness of the said receiver, and there shall also be paid so much of said purchase money, as shall be necessary to pay and discharge all unpaid taxes, upon the said mortgaged premises, and all the costs, fees, allowances, compensations and commissions herein provided for, as well as all the expenses of said sale, and the said Master shall cause a statement of the

amount of money required for the said purpose, to be prepared as nearly accurate as practicable, and shall have the total amount thereof announced at the said sale and submit such statement for inspection.

4. That for the remainder of the purchase money, above the said sum of Twenty five thousand dollars, the said Master may receive, except as above stated, any of the past due coupons and any of the bonds secured by the aforesaid mortgage, set forth in the bill of complaint, such coupons and bonds being received for such sum as the holder thereof would be entitled to receive under the distribution herein ordered and according to the priorities herein adjudged.

5. That the said Master forthwith after such sale make a report thereof to this Court, and after the confirmation of said sale by the Court, shall execute a deed to the purchaser or purchasers of the said mortgaged property, on their complying with the conditions on which said sale is made, and that such sale be valid and effectual forever.

Eighth. It is further ordered adjudged and decreed: that after the confirmation of the sale and delivery of the deed, the purchaser or purchasers of said property so to be sold, be let into the possession, use and enjoyment thereof and that any of the parties to this action, who may be in possession of the premises or property or any part thereof, and any person who, since the commencement of this action, has come into possession thereof, or of any part thereof, under the said defendants, or either of them, and the receiver of this court, who may be in possession or have control of the same or any part thereof, under or by virtue of any order of this Court, heretofore made, or hereafter to be made in this action prior to the sale, shall, after the passing of his accounts, deliver and surrender possession to such purchaser or purchasers, on the production of the said Master's deed, or other proper evidence of the sale and purchase of said franchises premises and property.

Ninth. And it is further ordered adjudged and decreed, that such purchaser or purchasers shall thereupon be fully vested with and shall have, hold, possess and enjoy the said franchises, property and premises so sold in pursuance of this decree, with all the rights and privileges pertaining thereto, as fully and completely as the said defendant, the International Railroad Company, was at the date of said mortgage, or the said defendant, the International Railroad Company, or the International and Great Northern Railroad Company, its successor, has at any time since been invested with, or has held, possessed or enjoyed.

Tenth. And it is further ordered, adjudged and decreed, that the said Master, after retaining from the proceeds of the sale hereby directed to be made, the amount of his own fees and the expenses of executing this decree, shall pay out of the said net proceeds of such sale as follows; that is to say:

To the solicitors of the complainants in this cause their costs and disbursements to be taxed and such sums as shall be allowed in addition to costs, including therein such sum as shall be allowed complainants herein for their commissions, compensation and services in and about their trust.

To the solicitors of the complainants such counsel fees and expenses as the complainants or either of them may incur or become liable for in executing this decree, and the said Master is hereby ordered to ascertain upon notice to and hearing of the respective parties and upon proofs taken, and report, at least ten days before the sale of the said property to this Court what would be a reasonable allowance to the complainants for their services, expenses and outlay, including attorneys and counsel fees in regard to their trust, and also the proper compensation, to the said receiver and his solicitors, attorneys and counsel, and that the complainants and the said receiver file a statement of the said claims with the said Master, within thirty days after the entry of this decree,

or be precluded from the benefit thereof, and that the amount specified in the Master's report when confirmed by the Court be added to the amount with which the said International Railroad Company and the International and Great Northern Railroad Company and the said mortgaged property are chargeable.

Eleventh. And it is further ordered, adjudged and decreed, that the said Master shall then pay and discharge all unpaid taxes upon the premises so sold which have accrued prior to the day of such sale.

Twelfth. And it is further ordered, adjudged and decreed, that the said Master shall then next pay and discharge all obligations which may have been incurred by the said receiver under the orders of the Court herein, with the accrued interest thereon; and with the remaining amount, if any, of the proceeds of the said sale, the said Master shall then, for the further satisfaction of the bonds, coupons and balance of interest secured by the Complainant's deed of trust, in the nature of a mortgage, pay, in gold coin of the United States or its equivalent, to the several and respective holders of the bonds issued under the said first mortgage, and outstanding and unpaid, and to the holders of the remaining unpaid coupons, the principal amount of said bonds and coupons, together with interest due on the said coupons from the time they respectively became due and payable, until payment in full, if the said balance shall be sufficient therefor; and if not, then such payment shall be made ratably, in proportion to the principal, amount of said bonds and coupons, provided that such holders shall surrender to the said Master such bonds and coupons, if paid in full, to be cancelled and, if not paid in full, the said Master shall indorse on said bonds and coupons a suitable receipt for the amount in fact paid.

If there shall be any surplus money remaining of the aforesaid proceeds of sale, after the payment in full of the several amounts hereinbefore directed and allowed to be paid, then the said Master shall bring the same into

court with his report of sale, to abide the further order of this Court touching the same. And the said Master shall take and bring into Court, with his report, proper receipts and vouchers for all his payments and expenses.

Thirteenth. And it is further ordered, adjudged and decreed that if there shall be any deficiency in the amount required to be paid, in full of the amounts hereinbefore recited and allowed to be paid, then the said Master shall specify the aggregate amount of such deficiency in his report for sale.

Fourteenth. The description of the real estate and other property to be sold under and by virtue of this judgment so far as the same has been ascertained from the first mortgage and bill of complaint and proofs and exhibits herein is as follows:

All and singular the said International Railroad Company's railway; its Jefferson branch, whenever built, and its main trunk; its right of way and track, together with all superstructures, depots, depot grounds, stations, station houses, engine houses, car houses, freight houses, wood houses, sheds, watering places, workshops, machine shops, bridges, tools, machinery, side tracks, turnouts, turntables, weighing scales, fixtures, locomotives, tenders, rolling stock, fuel, equipments, and all corporate rights, privileges and franchises of the said International Railroad Company, together with all and singular the reversion and reversions, remainder and remainders, tolls, rents, incomes, issues and profits thereof including the franchise of the Company to be a corporation, which the said International Railroad Company possessed on the first day of April, 1871, or which it afterwards acquired and which are necessary, material and useful in connection with the ownership, use or operation of the aforesaid railroad, including listed rolling stock.

Fifteenth: It is further ordered, adjudged and decreed, that said master keep all monies and securities received from said property, including the bonds and coupons aforesaid on deposit in the City Bank of Houston

at Houston subject to his own order as such Master in this cause, such monies however to be drawn by him only for the purposes of this decree and by checks countersigned by the Judge of the United States District Court for the Western District of Texas; that no payment be made out of the surplus income of said road or the proceeds of the sale except upon and pursuant to such orders as this Court may hereafter make for that purpose; that the said master shall make report to this court of all he shall do under and by virtue of this decree and which he is not hereinbefore required to report specially, with all convenient speed; and as to such bonds and coupons as he shall receive on account of the amount paid on said sale, if the same be not paid in full, he is to endorse upon the same the amount at which they are received by him.

Sixteenth: It is also hereby referred to the said master to pass the accounts of the receiver herein before appointed in this cause up to the day of sale.

Seventeenth: And it is further ordered, adjudged and decreed that within fifteen days after the making of such sale the said receiver file his account with the said master, and give notice of the filing to the solicitors for the parties who have appeared in this cause, and thereupon, upon any party filing objections to such account the said master do proceed to audit and adjust said account and the objections thereto and to report his audit and the accounts as adjusted by him to this court; that on obtaining a confirmation of the said report, if it appear by the same as confirmed, that any balance of money is in the hands of the receiver, or that he is chargeable in favor of the complainants or others entitled to any money under this decree with any balance of money, then he shall forthwith upon the confirmation of such report pay such balance into such City Bank of Houston, subject to the order of the said master, to be by him drawn in the same manner as hereinbefore provided as to the proceeds of the said sale, and to be by said master appro-

priated and distributed in the same manner and for the same purposes as the cash proceeds of such sale.

Eighteenth. And it is further ordered, adjudged and decreed, that any of the parties to this action may become a purchaser of said mortgaged premises at the said sale.

Nineteenth. And it is further ordered, adjudged and decreed, that if any party to this action may apply to this court for such other and further directions as may be necessary to carry this decree into effect, and it is hereby referred to the said master to pass the accounts of the said receiver and report thereon and for that purpose the said receiver is directed to attend before him at such time and place as may be designated by said master by his order or summons for that purpose to file his account under oath and produce his books, papers and vouchers, and either party may except to the master's report upon the matters hereby referred to him and may bring such exceptions to hearing upon due notice and so far as the computations, audits and allowances made by the master shall be passed upon by the Court, the same shall take effect as if now incorporated in and passed upon by this court, except that for the purpose of appeal growing out of the matters so reserved the time of appeal shall run from the date of confirmation of the report and all further directions and equities are reserved.

(Signed) W. B. Woods,
U. S. Circuit Judge,
T. H. Duval,
U. S. District Judge.

April 15, 1879.

EXHIBIT "R."

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, AT AUSTIN.

John A. Stewart and
William H. Osborn, Trustees,
Complainants,

vs. No. 138 IN EQUITY.

The International Railroad Company and Others,
Defendants.

DECREE CONFIRMING MASTER'S REPORT OF SALE.

And now on this day, the fourth, it being the first Monday of August, Anno Domini One Thousand Eight Hundred and Seventy-nine, all the parties to this suit coming into Court by their solicitors and consenting in open Court that the Report of the Special Master, Burr G. Duval, Esqr., heretofore appointed herein, filed in this Court on the 1st day of August, 1879, be confirmed, without further delay, being a report by the said Special Master of the sale made by him of the International Railroad and its franchises, roads, lands, rolling stock, equipment and other property belonging to the International Railroad Company on the 31st day of July, A. D. 1879, in pursuance of the direction contained, together with other matters in the final decree heretofore rendered in this cause on the 15th day of April, A. D. 1879, and the report of the said Master being duly inspected and examined by the Court and the manner in which the sale was conducted by him having been enquired into by the Court;

And it appearing to the Court that the publication of the notices for said sale was made in accordance with the terms of the deed of trust, on which said final decree was based, and in accordance with the directions contained in the said decree and that said sale was had at the time and place designated in said decree and was, in all

respects, conducted fairly and in accordance with the directions of the said final decree and with the laws of the State of Texas, applicable to the same, and that said property was, after being duly cried, struck off to John S. Kennedy and Samuel Sloan, Trustees, who were the highest and best bidders for the same, for the following sum of money, to-wit: Five Hundred Thousand Dollars in gold coin of the United States and upon the following terms and conditions, to-wit: Twenty-five Thousand dollars in gold coin of the United States, then and there payable in cash, the remaining sum of Four Hundred and Seventy-five Thousand dollars in gold coin of the United States to be paid on the delivery of the Special Master's deed, at the option of said John S. Kennedy and Samuel Sloan, Trustees, the purchasers aforesaid, either in like gold coin or in the bonds and past due coupons, secured by the mortgage on which said final decree was based, to be received for such sums as the holders thereof are entitled to receive under said final decree.

And it appearing to the Court that said sum of Twenty-five Thousand Dollars in gold coin of the United States was paid to said Master by said John S. Kennedy and Samuel Sloan, Trustees, at the time and place of said sale, and is now in the hands of said Master;

And it further appearing to the Court that the Receiver of said property was, at the time of said sale, and still is, in possession of funds sufficient to pay all his obligations, liabilities and indebtedness, and all the said taxes, costs, fees, allowances, compensations, commissions and expenditures and that said funds are properly applicable thereto;

It is, therefore,

ORDERED, ADJUDGED AND DECREED

I. That the sale so made be and the same is hereby confirmed.

II. That R. Somers Hayes, Esqr., the receiver appointed in this cause, do pay out of the funds in his hands, to the said Special Master a sum of Twelve hun-

dred dollars ($1200.00) in full for his fees as agreed upon by the parties hereto, and a further sum—hereafter to be ascertained and passed upon by this Court, for the expenses of said Master in carrying out the directions contained in the final decree in this cause, entered on the 15th day of April, 1879.

And the said Receiver is further directed to pay out of the funds in his hands any other expenses connected with this cause, not heretofore provided for, after the same shall have been passed upon and approved by the Master.

III. That the said Master shall, upon the payment to him by the said bidders, of the said remaining sum of Four Hundred and Seventy-five Thousand dollars, in gold coin of the United States, or in bonds and past due coupons in due proportion, as aforesaid, to the sums which the holders thereof are entitled to receive under said final decree, execute a conveyance, under seal in his name, as Special Master, to said John S. Kennedy and Samuel Sloan, Trustees, and such persons as may be associated with them, if any, their heirs and assigns, reciting in the same the final decree under which said sale was made, and also reciting therein this decree, confirming said sale and granting to and vesting in them, by the said conveyance, all property so purchased and also vesting in them, their heirs and assigns, the road-bed, tracks, franchises, and chartered powers and privileges of the said International Rail Road Company and of the International and Great Northern Rail Road Company, so far as the latter succeeded to the title of said International Rail Road Company granted to them by virtue of their charter, or by any other laws of the State of Texas or of the United States and also vesting in them, their heirs, and assigns, the true ownership of said Road, with all the powers, rights, franchises, privileges and benefits of said International Rail Road Company and International and Great Northern Railroad Company therein, in the same manner and to the same extent as

if the purchasers, above named, and their associates had been the original corporators of the said company and vesting them with the power to operate, construct, complete, repair and work the said Railroad upon the same terms and under the same conditions and restrictions as are imposed by charters of the said Railroad Companies and by the General Laws of the State of Texas, affecting the same.

IV. That the said conveyance of the said Master shall contain, in accordance with the laws of the State of Texas, a provision to the effect that the sale of said roadbed, tracks, franchises and chartered rights, above set forth, shall not pass or convey to the purchasers above named anv right or claim to recover from the former stockholders of the said companies any sums which may remain due upon their subscriptions of stock, but that the said stockholders shall continue liable to pay the same in discharge and liquidation of the debts due by the said companies.

V. That the conveyance of the said Master, so executed by him, in accordance with this decree, shall be witnessed by two competent subscribing witnesses, in the manner required by the laws of the State of Texas, and that, after being so witnessed, the same shall be duly acknowledged for record by the said Master in accordance with the laws of the State of Texas, and thereupon delivered by him, the said Master, to the said purchasers above named, to serve them as the evidence of their title to the said property so conveyed to them.

VI. It is further ordered that, after the said Master shall have executed and delivered to the said purchasers, John S. Kennedy and Samuel Sloan, Trustees, the said deed of conveyance provided herein, and when the said purchasers above named, shall be let into the possession and enjoyment of said property, so conveyed, the said Receiver, after the approval by the said Master of his accounts, shall pay over and account to the said purchasers, for so much of the net earnings of said road as may

remain in his hands after paying and discharging all the costs and charges of every kind against said property, which are justly, under the final decree, and other orders of this Court, chargeable against said property in the hands of the Receiver.

(Signed) T. H. DUVAL,

U. S. District Judge and Acting Circuit Judge.

August 4th, 1879.

EXHIBIT "S."

DEED

OF

BURR G. DUVAL, SPECIAL MASTER, TO JOHN S. KENNEDY AND SAMUEL SLOAN, TRUSTEES.

Conveying the International Railroad,

Dated October 14th, 1879.

In the Circuit Court of the United States for the Western District of Texas, at Austin.

In Chancery.

KNOW ALL MEN BY THESE PRESENTS, That,

WHEREAS, in a certain foreclosure suit between John A. Stuart and William H. Osborn, trustees, complainants, and the International Railroad Company, the International and Great Northern Railroad Company, John S. Barnes and Thomas W. Pearsall, trustees, and Moses Taylor and William E. Dodge, trustees, defendants, the said complainants lately in a Circuit Court of the United States in and for the Fifth Circuit and Western District of Texas, in equity, obtained a decree in their favor on the fifteenth day of April, in the year one thousand eight hundred and seventy-nine, whereby Burr G. Duval, a special master of the said Court, was directed, as such special master, to sell all the property hereinafter mentioned at public auction, at the court house of Travis

County, in the city of Austin and State of Texas, to the highest bidder, for the purpose of satisfying certain claims set forth in said decree, together with certain costs and expenses therein mentioned.

And whereas, The said Burr G. Duval, as special master aforesaid, in obedience to the said decree, did, on the 31st day of July, in the year aforesaid, sell the property hereinafter described, being the same property hereinbefore mentioned, at public auction at the said court house of Travis County, in the city of Austin and State of Texas, having first given notice of the time, place and terms of said sale, and of the specific property (as nearly accurate as possible), to be sold, by publishing such notice for the time required by the said decree, in two newspapers of good circulation, in the city of Austin, to-wit, the "Sunday Leader" and the "Democratic Statesman," and in one newspaper in the city of New York, also of good circulation, to-wit: "The New York Commercial Advertiser," at which sale the said property was struck off and sold to John S. Kennedy and Samuel Sloan, trustees, for the sum of five hundred thousand dollars; they, the said John S. Kennedy and Samuel Sloan, trustees, being the highest bidders, and that sum being the highest sum bidden for the same, and that said John S. Kennedy and Samuel Sloan, trustees, having paid to the said Burr G. Duval, special master, at the time of striking off the sale, and before he accepted their bid, the sum of $25,000 in gold coin.

And whereas, The said Burr G. Duval, as such master aforesaid, did, forthwith after such sale, make a report thereon to the said Circuit Court on the first day of August, in the year aforesaid, and an order was duly made by and entered in the said Court on the fourth day of August aforesaid, confirming the said sale.

Now, therefore, The said Burr G. Duval, as special master aforesaid, for and in consideration of the sum of five hundred thousand dollars to him paid, the receipt whereof is hereby acknowledged, hath granted, bargained,

sold and conveyed, and by these presents doth grant, bargain, sell and convey unto the said John S. Kennedy and Samuel Sloan, as trustees, and to the survivor of them, in fee simple absolute, all and singular the International Railroad Company's railway; its Jefferson branch, whenever built, and its main trunk; its right of way and track, together with all the superstructures, depots, depot-grounds, stations, station-houses, engine-houses, car-houses, freight-houses, wood-houses, sheds, watering-places, workshops, machine-shops, bridges, tools, machinery, side-tracks, turnouts, turntables, weighing-scales, fixtures, locomotives, tenders, rolling stock, fuel, equipments, and all corporate rights, privileges and franchises of the said International Railroad Company, together with all and singular the reversion and reversions, remainder and remainders, tolls, rents, incomes, issues and profits thereof, including the franchise of the Company to be a corporation, which the said International Railroad Company possessed on the first day of April, 1871, or which it afterwards acquired, and which are necessary, material and useful in connection with the ownership, use or operation of the aforesaid railroad, including:

(NOTE: Contained in the deed is a description of rolling stock, by numbers, which is omitted from this copy.)

Which premises are now in the possession and use of and claimed by the said International and Great Northern Railroad Company.

And also all the road-bed, tracks, franchises and chartered powers and privileges of the said International Railroad Company and of the International and Great Northern Railroad Company, so far as the latter succeeds to the title of said International Railroad Company, granted to them by virtue of their charters or by any other laws of the State of Texas or of the United States.

And also all other property of the said railroad company, if any, covered by and included in the mortgage mentioned in the said decree, and all the estate, powers,

right, title, interest, franchises, privileges, benefits, property, possession, claim and demand whatsoever, as well in law as in equity, of the said International Railroad Company and the International and Great Northern Railroad Company, of, in and to the premises aforesaid, and each and every part thereof, with the appurtenances.

To have and to hold unto the said John S. Kennedy and Samuel Sloan, as trustees, and to the survivor of them, in fee simple absolute forever, as fully as the said International Railroad Company and International and Great Northern Railroad Company, both or either of them were seized of or entitled to, at or before the entry of the decree aforesaid, and in the same manner and to the same extent as if the said John S. Kennedy and Samuel Sloan, trustees, had been the original corporators of the said International Railroad Company, with full power to operate, construct, complete, repair and work the said railroad upon the same terms and under the same conditions and restrictions as are imposed by the charters of the said railroad companies, and by the general laws of the State of Texas affecting the same, and as fully and absolutely as the said Burr G. Duval, master, can, may or ought to, by virtue of the said decree, grant, bargain, sell, release, assign, convey and confirm the same.

But this instrument shall not pass or convey to the said John S. Kennedy and Samuel Sloan, trustees, any right or claim to recover from the former stockholders of the said companies any sums which may remain due upon their subscriptions of stock, but the said stockholders shall continue liable to pay the same in discharge and liquidation of the debts due by the said companies, and no covenant is to be implied from this deed, except that the said Burr G. Duval, as special master aforesaid, has not made any prior conveyance of the property herein mentioned, or any part thereof.

In witness whereof, the said Burr G. Duval, special master in the Circuit Court as aforesaid, hath hereunto

set his hand and seal this fourteenth day of October, one thousand eight hundred and seventy-nine.

BURR G. DUVAL,
Special Master.

EXHIBIT "T."

FINAL DECREE.

At a Circuit Court of the United States of America in and for the Fifth Circuit, in the Western District of Texas, Held at the Court House in the City of Austin.

JOHN S. BARNES and
THOMAS W. PEARSALL, TRUSTEES,
Complainants,
vs. IN EQUITY No. 132.
THE INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY,
Defendants.

This cause coming on to be heard at this term of the Court upon the Bill of Complaint of the said Complainants, in the presence of the counsel for the Complainants, and it appearing to the Court that the Defendant, The International and Great Northern Rail Road Company, has heretofore, to-wit on the third day of April, A. D. 1878, been duly served with process of subpœna and that on the second day of July, A. D. 1878, a formal order, taking said Bill for confessed was entered against the said Defendant for failing to plead, demur or answer to said Bill within the time limited by law, and that said order has never been set aside but still remains in full force; and it further appearing that on the 21st day of July, A. D. 1879, an order was granted, referring the said Complainant's Bill and Exhibits to Burr G. Duval, Esqr., Special Master, for a report and the said report has been duly made and filed in said cause, and it ap-

pearing to the Court, from the reading of the Complainant's Bill and exhibits and the report of the Special Master thereon, that the material facts set forth in the Bill are true,

It is Ordered, adjudged and decreed:

First: That the mortgage, or deed of trust, bearing date the fifteenth day of January, One Thousand Eight Hundred and Seventy-four, set up in the Bill of Complaint, and appearing thereby, and by the proofs in this case to have been executed by the International Rail Road Company to John S. Barnes and Thomas W. Pearsall, as Trustees, was a valid conveyance, by way of mortgage, of the property therein described to the said Trustees, who are the Complainants in this cause; and that it was duly recorded in the several Counties in the State of Texas, in which the property covered by the said mortgage or deed of Trust is situated, as alleged in said Bill of Complaint.

Second: That the mortgage or deed of Trust, bearing date the Fifteenth day of January, One Thousand Eight Hundred and Seventy-four, set up in the Bill of Complaint, and appearing thereby and by the proofs in this case, to have been executed by the Houston and Great Northern Rail Road Company to John S. Barnes and Thomas W. Pearsall, as Trustees, was a valid conveyance by way of mortgage of the property therein described to the said Trustees or the complainants in this cause; and the same was duly recorded in the several counties in the State of Texas in which the property covered by the said mortgage or deed of Trust is situated, as alleged in said bill of complaint.

Third: That there were issued and are now outstanding of the Bonds secured by the said mortgages as follows: Twenty-four hundred and forty-eight (2448) bonds for One Thousand dollars ($1000.) each, secured by the first mentioned mortgage; and Three Thousand and Sixty-two (3062) bonds for One Thousand dollars ($1000.) and including the first day of August. 1874, to the first

each, secured by the mortgage secondly above mentioned; all the said bonds bearing inerest at the rate of Eight (8) per centum, payable semi-annually on the first days of February and August.

Fourth: That the Defendant, the International and Great Northern Rail Road Company is the successor and assignee of each and both of the said mortgagors, the International Rail Road Company and The Houston & Great Northern Rail Road Company, and has assumed the obligation of each and both of the said Companies, including the payment of the principal and interest of all the bonds hereinbefore mentioned.

Fifth: That there are due to the Complainants in this cause, and to the holders of the bonds and coupons secured by the said mortgages or deeds of trust, the sum of Eight Millions Two Hundred and Ninety-seven Thousand Two Hundred and Twenty-six and 97/100 Dollars ($8,297,226.97) that is to say:

1. The principal of all said bonds amounting in the aggregate to ($5,510,000) Five Millions Five Hundred and Ten Thousand Dollars.

2. The interest coupons on all of the said bonds, from day of August, 1879; the interest on all of said bonds, since the first day of February, 1874, having been unpaid, which interest amounts in the aggregate to the sum of Two million four hundred and twenty-four thousand, four hundred dollars ($2,424,400.00).

3. The interest on said overdue and unpaid coupons from the time when they respectively fell due to the first day of August, 1879, which amounts in the aggregate to $424,270.00; but upon account of which there has been heretofore paid to certain holders of certificates of scrip, issued for a portion of such unpaid coupons $50,779.40 which should bear interest from November, 1876, which payment and interest aggregate the sum of $61,443.07, leaving the whole amount of interest on said coupons remaining unpaid $362,826.93.

Sixth: That by the mortgage or deed of trust first

above mentioned, the said International Railroad Company did grant, bargain, sell, transfer and convey unto the said Jno. S. Barnes and Thomas W. Pearsall, in trust, all and singular the said International Rail Road Company's railway, its Jefferson branch whenever built, and main trunk extending from the Red River to its terminus at or near Laredo on the Rio Grande, its right of way and track, together with all the superstructures, depot, depot grounds, station houses, engine houses, car houses, freight houses, wood houses, sheds, watering places, work shops, machine shops, bridges, tools, machinery, side-tracks, turnouts, turntables, weighing scales, fixtures, locomotives, tenders, rolling-stock, fuel, equipments and all corporate rights, privileges and franchises of said company, whether then held or thereafter to be acquired, together with all and singular, the reversion and reversions, remainder and remainders, tolls, rents, issues, incomes and profits thereof; but the lands, other than those necessary for right of way, depot and shop grounds were not thereby conveyed, nor intended so to be.

Seventh: That by the mortgage or deed of trust, secondly above mentioned, the said Houston and Great Northern Rail Road Company did grant, bargain, sell, transfer, convey and confirm unto the said John S. Barnes and Thomas W. Pearsall, in trust, all and singular the said Company's Railway, built or to be built, its main line, beginning at the Brazos River, passing through the City of Houston, connecting with the Memphis and El Paso Rail Road near Clarksville and passing as near the towns of Montgomery, Huntsville, Crockett, Rusk and Tyler as might be deemed expedient to the Red River, in said State, a distance of about three hundred and fifty (350) miles, and its branches and extensions, including its Huntsville Branch Road, Eight miles in length, together with all right of way, depot and shop grounds, tenements, hereditaments, franchises, and rights, including and meaning to include all the property, real and personal, except the lands other than those necessary for

right of way, depot and shop grounds, then acquired or thereafter to be acquired by said Company in said State of Texas.

Eighth: That by the terms of each of the said Mortgages or deeds of trust, hereinbefore mentioned, there was covered and conveyed an undivided half interest in certain rolling stock and other property, so that by virtue of the two mortgages, or deeds of trust, aforesaid, taken together, the whole and undivided interest in said rolling stock and other property was conveyed to the Complainants as trustees.

Ninth: That the said International Railroad Company and the Houston and Great Northern Rail Road Company and the International and Great Northern Rail Road Company, and each of them, have failed to pay the interest on all of the said bonds, at the time, when the same became due and payable according to the tenor thereof, and that such default, at the time of the commencement of this suit, had continued for more than ninety days after payment thereof had been demanded; and that the holders of a majority of all the outstanding, unconverted and uncancelled bonds of the issue provided for in said mortgage, did, before the commencement of this suit, elect that the principal of all the bonds, secured by each of said mortgages, should be and become immediately due and payable and that the whole principal of said bonds did become due and payable before the commencement of this suit.

Tenth: It is hereby ordered, adjudged and decreed, that, all and singular, the said premises and property and all other property of the said Rail Road Company, covered by and included in the said mortgages to the Complainants, and not herein specially excepted, be sold, for the purpose of satisfying or collecting the said several sums and each and every part thereof, and as hereinafter directed, at public auction at the Court House of Travis County, in the City of Austin, in the State of Texas, under the direction of Burr G. Duval, Esquire, Master, to

whom it is referred for that purpose, and that a prior notice of at least Sixty days be given of the time, place and terms of said sale and of the property to be sold, and that said notice shall be published in two newspapers of good circulation in the City of Austin, Texas, and in one or more newspapers in the City of New York, once in each week during said period of Sixty days.

Eleventh: That the entire premises and property, whether real or personal, conveyed and covered, as hereinbefore stated, by the mortgage or deed of trust, executed by the International Rail Road Company, be sold in one parcel and as one property, at one and the same sale, including the undivided half interest in rolling stock and other personal property hereinbefore mentioned, the same being in the opinion of the Court, incapable of being sold in separate parcels without material injury to the value thereof.

Twelfth: That the entire premises and property, whether real or personal, conveyed and covered, as hereinbefore stated, by the mortgage or deed of trust executed by the Houston and Great Northern Rail Road Company be sold in one parcel and as one property at one and the same sale, including the undivided half interest in rolling stock and other personal property hereinbefore mentioned, the same being in the opinion of the Court, incapable of being sold in separate parcels without material injury to the value thereof.

Thirteenth: That all the property herein directed to be sold, being subject to the prior lien of certain other mortgages, executed by the said Rail Road Companies previously to the execution of the mortgages or deeds of trust for the foreclosure of which this suit was brought, the same shall be sold subject to the sale which was made of such property, by decree of this Court, on the thirty-first day of July, 1879.

Fourteenth: That ten per cent of the whole purchase money shall be paid in lawful money of the United States at the time of sale and said Master shall not, at said sale,

refuse a bid for a less amount than the debt, but he shall sell to the highest bidder without reserve; and on the delivery of the deed, for the remainder of the purchase money above the ten per cent required to be paid in cash, the said Master may receive any of the past due coupons and any of the bonds, secured by the mortgages or deeds of trust executed to the Complainants, as set forth in the bill of complaint; such coupons and bonds being received for such sum as the holder thereof would be entitled to receive under the distribution herein ordered and according to the priorities herein adjudged.

Fifteenth: That the said Master, forthwith, after such sale, make a report thereof to this Court and after the confirmation of said sale by the Court, shall execute a deed to the purchaser or purchasers of the said mortgaged property on their complying with the conditions on which said sale is made and that said sale be valid and effectual forever.

Sixteenth: It appearing to the Court that the Receiver, heretofore appointed herein, is in possession of funds sufficient to pay all his obligations, liabilities, and indebtedness as such Receiver, and all taxes that may be due and unpaid and all costs, fees, allowances, compensation, commissions and expenditures, and that said funds are properly applicable thereto, it is therefore ORDERED

That R. Somers Hayes, Esquire, Receiver herein, do pay out of the funds in his hands

1. To the Complainants, for their services, expenses and outlay, including attorney and counsel fees in regard to their trust, the sum of Thirteen Thousand five hundred Dollars ($13,500.00) being Thirty-five hundred dollars ($3500.00) for counsel fees and Ten Thousand dollars ($10,000.00) for complainants' compensation as Trustees.

II. That for the said Receiver's own compensation he be authorized to retain, out of the funds in his hands, the sum of One Thousand dollars ($1000) per month, from the date of his appointment as such Receiver herein, up

to the date of his appointment as Receiver in the causes now pending in this Court, wherein John A. Stewart and Wm. H. Osborne, Trustees, are Complainants, and the International Rail Road Company and others are defendants and Moses Taylor and William E. Dodge are Complainants, as Trustees, and the Houston and Great Northern Rail Road Company and others are Defendants, said causes being numbered respectively 138 and 137, and no longer.

III. That the said Receiver do pay to the said Burr G. Duval, Special Master herein, the sum of Six hundred dollars ($600.00) in full of his fees as said Master herein, which said compensation has been agreed to by all parties at interest, and a further sum hereafter to be ascertained and passed upon by this Court, for the expenses and disbursements of said Master, in and about this cause and his proceedings therein.

IV. And the said Receiver is further directed to pay out of the funds in his hands any other incidental expenses connected with the proceedings in this cause, not herein provided for, after the same shall have been passed upon and approved by the said Master.

Seventeenth: And with the proceeds of said sale, the said Master shall then, for the further satisfaction of the bonds and coupons secured by the Complainants' deed of trust, in the nature of a mortgage, pay, in lawful money of the United States, to the several respective holders of the bonds issued under the said first mortgages and outstanding and unpaid, and to the holders of the remaining unpaid coupons, the principal amount of said bonds and coupons, together with the interest due on the said coupons from the time they respectively became due and payable, until payment in full, if the said balance shall be sufficient therefor; and if not, then such payments shall be made ratably in proportion to the principal amount of said bonds, coupons and balance of interest, provided that said holders shall surrender to the said Master such bonds and coupons, if paid in full, to

be cancelled, and, if not paid in full, the said Master shall endorse on said bonds and coupons a suitable receipt for the amount in fact paid.

If there shall be any surplus money remaining of the aforesaid proceeds of sale, after the payment in full of the several amounts, hereinbefore directed and allowed to be paid, then the said Master shall bring the same into Court with his report of sale, to abide the further order of this Court, touching the same, and the said Master shall take and bring into Court with his report, proper receipts and vouchers for all his payments and expenses.

Eighteenth: That if there shall be any deficiency in the amount required to be paid, in full of the amounts hereinbefore recited and allowed to be paid, then the said Master shall specify the aggregate amounts of such deficiency in his report of sale.

Nineteenth: That the said Master shall keep all monies and securities received for the said property, including the bonds and coupons aforesaid, on deposit in some safe and suitable depository, subject to his own order as such Master in this cause, such monies, however, to be drawn by him only for the purposes of this decree, and by checks, countersigned by the Judge of the United States District Court for the Western District of Texas; that no payment be made out of the surplus income of said Road or the proceeds of sale, other than those hereinbefore provided for, except upon and pursuant to such orders as this court may hereafter make for that purpose, and that the said Master shall make report to this Court of all he shall do under and by virtue of this decree, and which he is not hereinbefore required to report specifically, with all convenient speed; and as to such bonds and coupons as he shall receive on account of the amount paid on said sale, if the same be not paid in full, he is to endorse upon the same the amount at which they are received by him or authorize some fit and suitable person to do so for him.

Twentieth: That it is also hereby referred to the said

Master to pass the accounts of the Receiver hereinbefore appointed in this cause, up to the day of sale.

Twenty-first: That within fifteen days after the making of such sale, the said Receiver file his account with the said Master and give notice of filing to the solicitors for the parties, who have appeared in this cause and that, thereupon, upon any party filing objections to said account, the said Master do proceed to audit and adjust the said account and the objections thereto, and to report his audit and the account, as adjusted by him, to this court; that on obtaining a confirmation of said report, if it appear by the same, as confirmed, that any balance of money is in the hands of the Receiver, or that he is chargeable, in favor of the Complainants or others, entitled to any money under this decree, with any balance of money, then he shall forthwith, upon confirmation of such report, pay such balance into the City Bank of Houston, Texas, subject to the order of said Master to be by him drawn in the same manner as hereinbefore provided, as to the proceeds of said sale, and to be, by said Master, appropriated and distributed in the same manner and for the same purposes as the cash proceeds of such sale.

Twenty-second: That any of the parties to this action may become a purchaser of said mortgaged premises at the said sale.

Twenty-third: That every party to this action may apply to this Court for such other or further direction as may be necessary to carry this decree into effect. And it is hereby referred to the said Master to pass the account of the said Receiver and report thereon, and for that purpose the said Receiver is directed to attend before him, at such time and place as may be designated by said Master, by his order or summons for that purpose, to file his account under oath and produce his books, papers and vouchers, and either party may except to the Master's report upon the matters hereby referred to him and may bring such exceptions to hearing upon due notice, and so far as the computations, audits and allow-

ances made by the Master shall be passed upon by the Court, the same shall take effect as if now incorporated in and passed upon by this Court, except that for the purpose of appeal, growing out of the matters so reserved, the time of appeal shall run from the date of the confirmation of the report.

And all further directions and equities are reserved.

(Sgnd) T. H. DUVAL,
U. S. Dist. Judge and Acting Circuit Judge.

August 4th, 1879.

EXHIBIT "U."

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

JOHN S. BARNES and
THOMAS W. PEARSALL, TRUSTEES,
Complainants,

vs. No. 132. IN EQUITY.

THE INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY,
Defendants.

DECREE CONFIRMING MASTER'S REPORT OF SALE.

And now on this day, the Complainants in this cause coming into Court, by their solicitors, Hancock, West & North, and moving the Court to confirm the report of the Special Master, Burr G. Duval, filed herein on the 13th day of October, A. D. 1879, being a report by said Special Master of the sale, by him made, of the entire premises and property, whether real or personal, conveyed and covered by the mortgages or deeds of trust executed by the International Railroad Company and by the Houston & Great Northern Railroad Company to the

said Complainants, in pursuance of the directions contained, together with other matters in the final decree heretofore rendered in this cause, on the fourth day of August, 1879, and the report of the said Master, being duly examined by the Court and the manner in which the sale was conducted by him having been enquired into by the Court:

And it appearing to the Court that the publication of the notices of said sale was made in accordance with the terms of the Deed of Trust on which said final decree was based and in accordance with the directions contained in the said decree, and that said sale was had at the time and place designated in said decree, and was in all respects conducted fairly and in accordance with the directions of the said final decree and with the laws of the State of Texas applicable to the same, and that said property was, after being duly cried, struck off to John S. Kennedy and Samuel Sloan, as Trustees, who were the highest and best bidders for the same, for the following sum of money, to-wit: Ten dollars in cash, which said sum was then and there paid to said Master in full by the said purchasers and is now in his, the said Master's, hands:

It is therefore

ORDERED, ADJUDGED AND DECREED

I. That the sale, so made, be, and the same is hereby confirmed.

II. That the said Special Master do execute a conveyance under seal, in his name, as Special Master, to said John S. Kennedy and Samuel Sloan, as Trustees, and such persons as may be associated with them, if any, and to the survivor of them, in fee simple absolute, forever, reciting in the same the final decree under which said sale was made, and also reciting therein this decree, confirming said sale and granting to and vesting in them, by the said conveyance, all the property so purchased and also vesting in them and the survivor of them, in fee simple absolute forever, the road-bed, tracks, fran-

chises and chartered powers and privileges, of the said International Railroad Company, the said Houston & Great Northern Railroad Company, and of the International & Great Northern Railroad Company, so far as the latter succeeded to the title of the two former corporations, granted to them by virtue of their charters or by any other laws of the State of Texas or of the United States, and also vesting in them, and the survivor of them, in fee simple absolute, the true ownership of said roads, with all the powers, rights, franchises, privileges, and benefits of said International Railroad Company, said Houston & Great Northern R. R. Company and said International & Great Northern Railroad Company, therein, in the same manner and to the same extent as if the purchasers above named had been the original corporators of the said Companies and vesting them with the powers to operate, construct, complete, repair and work the said Railroads upon the same terms and under the same conditions and restrictions as are imposed by the charters of the said Railroad Companies and by the General Laws of the State of Texas affecting the same.

III. That the said conveyance of the said Master shall contain, in accordance with the laws of the State of Texas, a provision, to the effect that the sale of said road-bed, tracks, franchises and chartered rights, above set forth, shall not pass or convey to the purchasers above named, any right or claim to receive from the former stockholders of the said Companies any sums which may remain due upon their subscription of stock, but that the said stockholders shall continue liable to pay the same, in discharge and liquidation of the debts due by the said Companies.

IV. That the conveyance of the said Master, so executed by him, in accordance with this decree, shall be witnessed by two competent subscribing witnesses in the manner required by the laws of the State of Texas, and that after being so witnessed, the same shall be duly acknowledged for record by the said Master in accordance

with the laws of the State of Texas and thereupon delivered by him, the said Master, to the said purchasers above named, to serve them as the evidence of their title to the said property so conveyed to them.

(Signed) T. H. DUVAL,
U. S. Dist. Judge, Sitting as Circuit Court Judge.
October 14th, 1879.

EXHIBIT "V."

DEED

OF

BURR G. DUVAL, SPECIAL MASTER, TO JOHN S. KENNEDY AND SAMUEL SLOAN, TRUSTEES.

Conveying the International and the Houston and Great Northern Railroads.

Dated October 14th, 1879.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, AT AUSTIN.

IN CHANCERY.

KNOW ALL MEN BY THESE PRESENTS, that,

WHEREAS, In a certain foreclosure suit between John S. Barnes and Thomas W. Pearsall, trustees, complainants, and the International and Great Northern Railroad Company, defendants, the said complainants lately in a Circuit Court of the United States, in and for the Fifth Circuit in the Western District of Texas, in equity, obtained a decree in their favor on the fourth day of August, in the year one thousand eight hundred and seventy-nine, whereby Burr G. Duval, as a special master of the said Court, was directed, as such special master, to sell all the property hereinafter mentioned at public auction, at the court house of Travis County, in the city of Austin and State of Texas, to the highest bidder, for the

purpose of satisfying certain claims set forth in said decree, together with certain costs and expenses therein mentioned.

AND WHEREAS, The said Burr G. Duval, as special master aforesaid, in obedience to the said decree, did, on the thirteenth day of October, in the year aforesaid, sell the property hereinafter described, being the same property hereinbefore mentioned, in two parcels, as directed by the said decree, at public auction at the said court house of Travis County, in the city of Austin and State of Texas, having first given notice of the time, place and terms of said sale, and of the property to be sold, by publishing such notice for the time required by the said decree, in two newspapers of good circulation, in the city of Austin, to-wit: the "Democratic Statesman" and the "Sunday Leader," and in one newspaper in the City of New York, also of good circulation, to-wit: "The New York Commercial Advertiser," at which sale both parcels of such property were struck off and sold to John S. Kennedy and Samuel Sloan, trustees, for the sum of five dollars for each parcel, making ten dollars in all; they, the said John S. Kennedy and Samuel Sloan, Trustees, being the highest bidders, and that sum being the highest sum bidden for the same, and the said John S. Kennedy and Samuel Sloan, trustees, having paid to the said Burr G. Duval, special master, at the time of striking off the sale, and before he accepted their bid, the said sum of ten dollars.

AND WHEREAS, The said Burr G. Duval, as such master aforesaid, did, forthwith after such sale, make a report thereof to the said Circuit Court on the thirteenth day of October, in the year aforesaid, and an order was duly made and entered in the said Court on the fourteenth day of October, 1879, confirming the said sale.

NOW, THEREFORE, The said Burr G. Duval, as special master aforesaid, for and in consideration of the sum of ten dollars to him paid, the receipt whereof is hereby acknowledged, hath granted, bargained, sold and con-

veyed, and by these presents doth grant, bargain, sell and convey, unto the said John S. Kennedy and Samuel Sloan, as trustees, and to the survivor of them, in fee simple absolute, all and singular the railway of the International Railway Company, its Jefferson branch, whenever built, and main trunk, extending from the Red River to its terminus at or near Laredo on the Rio Grande, its right-of-way and track, together with all the superstructures, depots, depot grounds, station-houses, engine-houses, car-houses, freight houses, wood-houses, sheds, watering places, workshops, machine shops, bridges, tools, machinery, sidetracks, turnouts, turntables, weighing-scales, fixtures, locomotives, tenders, rolling stock, fuel, equipments, and all corporate rights, privileges and franchises of the said International Railroad Company, together with all and singular the reversion and reversions, remainder and remainders, tolls, rents, incomes, issues and profits thereof (not including, however, lands other than those necessary for a right-of-way, depot and shop grounds), and also all and singular the railway of the Houston and Great Northern Railroad Company, built and to be built, its main line, beginning at the Brazos River, passing through the city of Houston, connecting with the Memphis and El Paso Railroad near Clarksville, and passing as near the towns of Montgomery, Huntsville, Crockett, Rusk and Tyler as was deemed expedient, to the Red River in said State of Texas, a distance of about three hundred and fifty miles, and its branches and extensions, including its Huntsville branch road, eight miles in length, together with all right-of-way, depot and shop grounds, tenements, hereditaments, franchises and rights, rolling stock and other property mentioned in the said decree, including and meaning to include all the property, real and personal, at any time acquired by said Company in the State of Texas (except lands other than those necessary for right-of-way, depot

and shop grounds, the same being not hereby conveyed, nor intended so to be); and also, 40 engines, 20 passenger cars, 5 combination cars, 322 freight box cars, 6 baggage, mail and express cars, 2 baggage cars, 377 freight platform cars, 39 service cars, 97 stock cars, 4 caboose cars, 9 boarding cars, 1 car derrick and 1 car pile-driver, and all the roadbed, tracks, franchises and chartered powers and privileges of the said International Railroad Company, the Houston and Great Northern Railroad Company, and the International and Great Northern Railroad Company, granted to them by virtue of their charters, or by any other laws of the State of Texas or of the United States; and all the estate, powers, right, title, interest, franchises, privileges, benefits, property, possession, claim and demand whatsoever, as well in law as in equity, of the said International Railroad Company, the said Houston and Great Northern Railroad Company, and the said International and Great Northern Railroad Company, of, in and to the premises aforesaid, and each and every part thereof, with the appurtenances.

To have and to hold, unto the said John S. Kennedy and Samuel Sloan, as trustees, and to the survivor of them forever, in fee simple absolute, as fully as the said International Railroad Company, the said Houston and Great Northern Railroad Company, and the said International and Great Northern Railroad Company, all or any of them, were seized of or entitled to, at or before the entry of the decree aforesaid, and in the same manner and to the same extent as if the said John S. Kennedy and Samuel Sloan, trustees, had been the original corporators of the three companies aforesaid, with full power to operate, construct, complete, repair and work the said railroads, upon the same terms and under the same conditions and restrictions as are imposed by the charters of the said railroad companies, and by the general laws of the State of Texas affecting the same, and

as fully and absolutely as the said Burr G. Duval, master, can, may or ought to, by virtue of the said decree, grant, bargain, sell, release, assign, convey and confirm the same, subject, however, to the sale of the same property already made on the 31st day of July, 1879, under two decrees of the said Circuit Court, the one decree being in the suit brought by Moses Taylor and William E. Dodge, trustees, complainants, against the Houston and Great Northern Railroad Company and others, defendants, and the other in the suit brought by John A. Stewart and William H. Osborne, trustees, against the International Railroad Company and others, defendants, and subject to the deeds executed pursuant to such sales.

But this instrument shall not pass or convey to the said John S. Kennedy and Samuel Sloan, trustees, any right or claim to recover from the former stockholders of the said companies any sums which may remain due upon their subscriptions of stock, but the said stockholders shall continue liable to pay the same in discharge and liquidation of the debts due by the said companies; and no covenant is to be implied from this deed.

In witness whereof, the said Burr G. Duval, special master in the Circuit Court, as aforesaid, hath hereunto set his hand and seal this fourteenth day of October, one thousand eight hundred and seventy-nine.

BURR G. DUVAL,
Special Master.

EXHIBIT "W."

IN EQUITY.

AT A CIRCUIT COURT OF THE UNITED STATES OF AMERICA, IN AND FOR THE FIFTH CIRCUIT, IN THE WESTERN DISTRICT OF TEXAS, HELD AT THE COURT HOUSE IN THE CITY OF AUSTIN.

April 15, 1879.

MOSES TAYLOR and
WILLIAM E. DODGE, TRUSTEES,
Complainants,

vs. No. 137. IN EQUITY.

THE HOUSTON AND GREAT NORTHERN RAIL ROAD COMPANY,
THE INTERNATIONAL AND GREAT NORTHERN RAIL ROAD COMPANY,
JOHN A. STEWART AND WILLIAM H. OSBORN, TRUSTEES, ETC.;
R. SOMERS HAYES, RECEIVER;
JOHN S. BARNES AND THOMAS W. PEARSALL, TRUSTEES, ETC.,
Defendants.

This cause coming on to be heard at this term of the Court upon the bill of complaint of the said Complainants, the exhibits, answers and proofs, solicitors for all parties now consenting in open court that this cause may now be heard and determined.

Now the Court, after hearing the counsel of the said parties, and the evidence and having considered thereof, and having had due deliberation of and concerning the same, it is thereupon, on this 15th day of April, ordered, adjudged and decreed, and this court, by virtue of the power and authority in it vested, doth order, adjudge and decree as follows, to-wit: that all the material facts set forth in said bill of complaint are true.

1. It is further ordered, adjudged and decreed that the

defendant, the International and Great Northern Rail-Road Company is the successor and assignee of the said Mortgagor, the Houston and Great Northern Rail Road Company, and has assumed the obligations of the said Houston and Great Northern Rail Road Company, including the payment of the principal and interest of all the bonds hereinafter mentioned.

2. That there was on the first day of April, Eighteen hundred and seventy-nine, due, owing and unpaid, on the bonds mentioned and described in the bill of complaint in this cause and intended to be secured by the mortgage described therein, the sum of five millions four hundred and four thousand eight hundred and twenty-seven dollars and seventy-five cents ($5,404,827.75). That is to say:

The principal of four thousand and eighty-four bonds, made by the Houston and Great Northern Railroad Company, for the sum of One thousand dollars each, bearing date the fifteenth day of February, one thousand eight hundred and seventy two and payable to bearer on the first day of January nineteen hundred, at the office of said Company in the city of New York, In United States Gold coin, with interest at the rate of seven per cent per annum, payable semi-annually on the first days of July and January in each year, in gold, free from all deductions for taxes, until the principal sum be paid, all of which bonds were disposed of by said defendants and are now held by divers owners thereof.

3. That the interest on all of the said bonds was paid in full up to the first day of January one thousand eight hundred and seventy five, and that the interest on all of said bonds since then remains unpaid, which unpaid interest from the date last named till the first day of April eighteen hundred and seventy nine amounts in the aggregate to the sum of one million two hundred and fourteen thousand nine hundred and ninety dollars ($1,214,990).

4. That the interest on said overdue and unpaid coupons from the times they respectively fell due is in the

aggregate one hundred and sixty thousand one hundred and two dollars and eighty cents, ($160,102.80), but that of said interest on unpaid coupons there has been heretofore paid to certain holders of certificates or scrip issued for said unpaid coupons, interest amounting to fifty four thousand two hundred and sixty five dollars and five cents ($54,265.05) which has been deducted from the aggregate of interest on said unpaid coupons, thus leaving the whole amount of interest on said coupons remaining unpaid, one hundred and five thousand eight hundred and thirty seven dollars and seventy five cents ($105,837.75) and that there is due in the aggregate of principal of said bonds, the coupons on said bonds, and of interest on the said coupons, unpaid on the first day of April, 1879, the sum of five millions four hundred and four thousand, eight hundred and twenty seven dollars and seventy five cents, ($5,404,827.75) which interest on coupons, so as aforesaid heretofore paid is properly deductible by the said trustees from the amount of interest that would otherwise be due and payable to the parties, respectively, who received said interest on said coupons.

5. That said deed of trust, in the nature of a mortgage, mentioned and particularly described in the said Bill of Complaint, was duly executed by the said, the Houston and Great Northern Railroad Company to the said complainants, Moses Taylor and William E. Dodge, trustees, and duly proved, certified and recorded as in the said bill of complaint alleged and that the said Houston and Great Northern Railroad Company did thereby grant, bargain, sell, transfer, convey and confirm unto the said complainants, in trust as joint tenants and not as tenants in common, and to the survivor of them and to their successor or successors and to their assigns, all and singular the said last mentioned Company's railway, built and to be built, its main line, beginning at the Brazos River, passing through the city of Houston, connecting with the Memphis and El Paso Railroad near Clarksville, and passing as near the towns of Montgomery, Huntsville,

Crockett, Rusk and Tyler as was deemed expedient, to Red River, in the State of Texas a distance of about three hundred and fifty miles, its branches and extensions, together with all right of way, depot and shop grounds, tenements, hereditaments, franchises and rights, including and meaning to include all the property, real and personal, except the lands therein excepted, acquired and which might thereafter be acquired by the said company, in the State of Texas, all lands other than those necessary for right of way, depot and shop grounds, being not thereby conveyed nor intended so to be, which premises are now in the possession and use of and claimed by the said The International and Great Northern Railroad Company.

6. That by the terms of the said deed of trust, in the nature of a mortgage, and included therein and covered thereby, there were and are certain rolling stock and other personal property, more particularly described as follows: Listed.

7. That both the said the Houston and Great Northern Railroad Company and its successor and assigns, the said International and Great Northern Railroad Company and each of them have failed to pay the interest on said bonds and that default has continued more than ninety days after demand and that by such default the principal money mentioned in and secured by the said bonds, hath become, and is due and payable in United States gold coin.

8. That the defendants in this action, and each and every one of them, and all persons claiming or who may claim from or under them, or either of them subsequent to the filing of the bill of complaint herein by debt, judgment or decree or otherwise be and they hereby are forever barred and foreclosed of and from all equity of redemption, right, estate, demand, lien, title, interest and claim of, in and to the said mortgaged premises herein described and ordered to be sold, and every part and parcel thereof, except as herein stated, unless within twenty

days from the date of the entry of this decree, the defendant the International and Great Northern Railroad Company, or some one or more of the other defendants, shall, in redemption of such property, pay into this court the sum of five millions four hundred and four thousand eight hundred and twenty seven dollars and seventy five cents ($5,404,827.75), in gold coin of the United States, with interest thereon from April 1, 1879, together with the amount of liabilities incurred by the Receiver heretofore appointed in this cause, in the management and protection of the property in his hands, as such receiver, and also all the costs, fees, allowances and compensation herein provided for, and costs and disbursements, incurred in and about the sale hereinafter directed, up to the time of such payment; But the party so redeeming shall be allowed for any sum or sums which may hereafter & before said redemption be paid on account of such principal or interest. That if no such payment be made all and singular, the said premises and property and all other property of the said Railroad Company, covered by and included in the said mortgage to the complainants, and not herein specially excepted, be sold for the purpose of satisfying or collecting the same sum, and as hereinafter directed, at public auction, at the court house of Travis County, in the City of Austin, in the State of Texas, and that a prior notice of at least sixty days be given of the time, place and terms of said sale, and of the specific property, (as nearly accurate as practicable) to be sold, and that such notice shall be published in two newspapers of good circulation in the said City of Austin and in one or more newspapers in the city of New York, and that said sale be made by Burr G. Duval, Esquire, who has heretofore been appointed master herein and who is hereby appointed and made a special master for the purpose of making such sale; and that all of said property be sold in one parcel and as one property at one and the same sale, (the same being, in the opinion of the court, incapable of being sold in separate parcels,

without material injury to the value thereof) to the highest bidder, to raise and satisfy the said principal of the said bonds and the interest so as aforesaid due thereon, and the interest hereafter to grow due thereon, together with the expenses and disbursements and the compensation of the said complainants, as trustees, as aforesaid, to be ascertained by the said master, hereby appointed for that purpose, together with the costs of complainants in this cause, to be taxed and the costs and expenses of making said sale. And as to the terms of said sale, it is hereby further ordered, adjudged and decreed, that the master, who shall make said sale, shall not at said sale, strike off or sell the said property until it shall produce at least the sum of five hundred thousand dollars in gold coin of the United States, and that if no bid of that amount be offered, the said master shall adjourn the sale from time to time until the further order of this Court, and that he require the payment on account of said sale at the time of striking off the same and before he shall accept the bid of the purchaser or purchasers thereat, the sum of at least twenty five thousand dollars in gold coin, to be accounted for by said master as part of the proceeds of the said sale, and on the delivery of the deed so much of the total purchase money shall be paid as shall be necessary to pay and discharge any obligations, liabilities or indebtedness of the said Receiver, and there shall also be paid so much of said purchase money as shall be necessary to pay and discharge all unpaid taxes upon the said mortgaged premises and all the costs, fees, allowances, compensation and commissions herein provided for, as well as all the expenses of said sale, and the said master shall cause a statement of the amount of money required for the said purpose, to be prepared as nearly accurate as practicable and shall have the total amount thereof announced at the said sale and submit such statement for inspection.

9. That for the remainder of the purchase money above the said sum of Twenty five thousand dollars, the

said master may receive, except as above stated, any of the past due coupons, and any of the bonds secured by the aforesaid mortgage, set forth in the Bill of Complaint, such coupons and bonds being received for such sum as the holders thereof would be entitled to receive under the distribution herein ordered and according to the priorities herein adjudged.

10. That the said master forthwith after such sale, make a report thereof to this court, and after the confirmation of said sale by the court, shall execute a deed to the purchaser or purchasers of the said mortgaged property, on their complying with the conditions on which said sale is made, and that sale be valid and effectual forever.

11. It is further ordered, adjudged and decreed that after confirmation of the sale, and delivery of the deed, the purchaser or purchasers of said property so to be sold be let into the possession, use and enjoyment thereof, and that any other parties to this action who may be in possession of the premises or property or any part thereof, and any person, who, since the commencement of this action, has come into the possession thereof or any part thereof, under the said defendants or either of them, and the receiver of this court who may be in possession or have control of the same or any part thereof under or by virtue of any order of this court, heretofore made or hereafter to be made in this action prior to the sale, shall, after the passing of his accounts, deliver and surrender possession to such purchaser or purchasers, on the production of the said master's deed or other proper evidence of sale and purchase of said franchises, premises and property.

12. And it is further ordered, adjudged and decreed that such purchaser or purchasers shall thereupon be fully vested with and shall have, hold, possess and enjoy said franchises, property and premises, so sold in pursuance of this decree, with all the rights and privileges pertaining thereto, as fully and completely as the said

defendants, the Houston and Great Northern Railroad Company was at the date of the said mortgage or the said defendant, the Houston and Great Northern Railroad Company or the International and Great Northern Railroad Company, its successor, has at any time since been invested with or has held, possessed or enjoyed.

13. And it is further ordered, adjudged and decreed that the said Master, after retaining from the proceeds of the sale hereby directed to be made, the amount of his own fees and expenses in executing this decree, shall pay out of the net proceeds of such sale as follows:

That is to say:

To the solicitors of the complainants in this cause their costs and disbursements to be taxed and such sums as shall be allowed in addition to costs, including therein such sum as shall be allowed to complainants herein for their commissions, compensations and services in and about their trust.

To the solicitors of the Complainants such counsel fees and expenses as the complainants or either of them may incur or become liable for in executing this decree and the said Master is hereby ordered to ascertain upon notice to and hearing of the respective parties and upon proof taken, and report, at least ten days before the sale of said property to this Court, what would be a reasonable allowance to the complainants for their services, expenses and outlay, including attorneys and counsel fees in regard to their trust, and also the proper compensation to the said Receiver and his solicitors, attorneys and counsel; and the complainants and the said receiver file a statement of the said claims with the said master within thirty days after the entry of this decree or be precluded from the benefit thereof, and that the amount specified in the master's report when confirmed by the court, be added to the amount with which the said Houston and Great Northern Railroad Company and the International and Great Northern Railroad Company and the said mortgage property are chargeable.

14. And it is further ordered, adjudged and decreed that the said master shall then pay and discharge all unpaid taxes upon the premises so sold which have accrued prior to the day of the said sale.

15. And it is further ordered, adjudged and decreed that the said master shall then next pay and discharge all obligations, which may have been incurred by the said receiver under the order of the court herein, with the accrued interest thereon, and with the remaining amount, if any, of the proceeds of said sale, the master shall then for the further satisfaction of the bonds and coupons secured by the complainants deed of trust in the nature of a mortgage, pay in gold coin of the United States or its equivalent, to the several and respective holders of the bonds issued under the said first mortgage and outstanding and unpaid and to the holders of the remaining unpaid coupons, the principal amount of said bonds and coupons together with interest due on said coupons from the time they respectively became due and payable until payment in full, if the said balance shall be sufficient therefor, and if not then such payments shall be made ratably in proportion to the amount of the said bonds, coupons and balance of interest, provided that such holders shall surrender to the said master such bonds and coupons if paid in full to be cancelled, and if not paid in full the said master shall endorse on said bonds and coupons a suitable receipt for the amount in fact paid. If there shall be any surplus money remaining of the aforesaid proceeds of the sale, after the payment in full of the several amounts hereinbefore directed and allowed to be paid, then the said master shall bring the same into court with his report of the sale to abide the further order of this court touching the same, and the said master shall take and bring into court with his report proper receipts and vouchers for all payments and expenses.

16. And it is further ordered, adjudged and decreed that if there shall be any deficiency in the amount required to be paid in full of the amounts hereinbefore recited and

allowed to be paid, then the said master shall specify the aggregate amount of such deficiency in his report of sale.

17. It is further ordered, adjudged and decreed that the said master shall keep all monies and securities received for the said property, including the bonds and coupons aforesaid, on deposit in the City Bank of Houston subject to his own order as such master in this cause, such monies, however, to be drawn by him only for the purpose of this decree and by checks countersigned by the Judge of the United States District Court for the Western District of Texas; that no payment be made out of the surplus income of said road or the proceeds of the sale except upon and pursuant to such order as this court may hereafter make for that purpose, and that the said master shall make report to this Court of all he shall do under and by virtue of this decree and which he is not hereinbefore required to report specially with all convenient speed and as to such bonds or coupons as he shall receive on account of the amount paid on said sale, if the same be not paid in full he is to endorse upon the same the amount at which they are received by him.

18. It is also hereby referred to the said master to pass the accounts of the receiver hereinbefore appointed in this cause up to the day of sale.

19. And it is further ordered, adjudged and decreed that it be and it is hereby referred to the said B. G. Duval, Esquire, as special master appointed by this court for that purpose, to ascertain and report to this court with all convenient speed, who are the lawful holders and owners of said bonds and coupons and the amount due each holder thereof respectively; to state and report an account for the income of the said mortgaged premises since the first day of April One thousand eight hundred and seventy eight; and the expenses and cost of operating the said mortgaged premises, during the same time and what amount of said income, if any, is applicable to the payment of the aforesaid interest coupons and bonds due and the interest to grow due upon the bonds so as

aforesaid secured by the said deed of trust in the nature of a mortgage.

20. And it is further ordered, adjudged and decreed that within fifteen days after the making of such sale the said receiver file his account with the said master and give notice of the filing to the solicitors for the parties who have appeared in this cause, and thereupon, upon any party filing objection to such account, the said master to proceed to audit and adjust said account and the objections thereto and to report his audit and the accounts as adjusted by him to this Court; that on obtaining a confirmation of said report, if it appear by the same as confirmed, that any balance of money in the hands of the receiver, or that he is chargeable in favor of the complainants or others, entitled to any money under this decree, with any balance of money, then he shall forthwith, upon confirmation of such report pay such balance into said City Bank of Houston, subject to the order of said master to be by him drawn in the same manner as hereinbefore provided as the proceeds of said sale and to be by said master appropriated and distributed in the same manner and for the same purposes as the cash proceeds of such sale.

21. And it is further ordered, adjudged and decreed that any of the parties to this action may become the purchaser of said mortgaged premises at the said sale.

22. And it is further ordered, adjudged and decreed that any party to this action may apply to this court for such other or further direction as may be necessary to carry this decree into effect and it is hereby referred to the said master to pass the said accounts of the said receiver and to report thereon and for that purpose the said receiver is directed to attend before him at such time and place as may be designated by said master by his order or summons for that purpose, to file his account under oath and produce his books, papers, vouchers and either party may except to the master's report upon the matters hereby referred to him and may bring such ex-

ceptions to hearing upon due notice and so far as the computation, audits and allowances made by the Master shall be passed upon by the Court the same shall take effect as if now incorporated in and passed upon by this court, except that for the purpose of appeal growing out of matters so reserved, the time of appeal shall run from the date of the confirmation of the report, and all further directions and equities are reserved.

(Sgnd) W. B. Wood,
U. S. Circuit Judge.
T. H. Duval,
U. S. Dist. Judge.

April 15, 1879.

EXHIBIT "X."

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS AT AUSTIN:

Moses Taylor and
Wm. E. Dodge, Trustees,
Complainants,

vs. No. 137.
IN EQUITY.

The Houston & Great Northern Railroad Company and others,
Defendants.

DECREE CONFIRMING MASTER'S REPORT OF SALE.

And now on this day, to-wit, the Fourth, it being the first Monday in August, A. D. One Thousand Eight Hundred and Seventy nine, all the parties to this suit coming into Court by their solicitors and consenting in open Court that the Report of the Special Master, Burr G. Duval, Esqr., heretofore appointed herein, filed in this Court on the 1st day of August, 1879, be confirmed, with-

out further delay, being a report by the said Special Master of the sale made by him of the Houston and Great Northern Railroad and its franchises, road, lands, rolling stock, equipment and other property belonging to the Houston and Great Northern Railroad Company on the 31st day of July, A. D. 1879, in pursuance of the directions contained, together with other matters in the final decree heretofore rendered in the cause on the 17th day of April, A. D. 1879, and the reports of the said Master being duly inspected and examined by the Court and the manner in which the sale was conducted by him having been enquired into by the Court;

And it appearing to the Court that the publication of the notices for said sale was made in accordance with the terms of the deed of trust, on which said final decree was based, and in accordance with the directions contained in the said decree and that said sale was had at the time and place designated in said decree and was, in all respects, conducted fairly and in accordance with the directions of the said final decree, and with the laws of the State of Texas, applicable to the same, and that said property was, after being duly cried, struck off to John S. Kennedy and Samuel Sloan, Trustees, who were the highest and best bidders for the same, for the following sum of money, to-wit: Five Hundred Thousand Dollars in gold coin of the United States and upon the following terms and conditions, to-wit, Twenty five Thousand dollars in gold coin of the United States, then and there payable in cash, the remaining sum of Four Hundred and Seventy five Thousand dollars in gold coin of the United States to be paid on the delivery of the Special Master's deed, at the option of said John S. Kennedy and Samuel Sloan, Trustees, the purchasers aforesaid, either in like gold coin or in the bonds and past due coupons, secured by the mortgage on which said final decree was based, to be received for such sums as the holders thereof are entitled to receive under said final decree.

And it appearing to the Court that said sum of Twenty-

five Thousand Dollars in gold coin of the United States was paid to said Master by said John S. Kennedy and Samuel Sloan, Trustees, at the time and place of said sale, and is now in the hands of said Master;

And it further appearing to the Court that the Receiver of said property was, at the time of said sale, and still is, in possession of funds sufficient to pay all his obligations, liabilities and indebtedness, and all the said Taxes, costs, fees, allowances compensations, commissions and expenses, and that said funds are properly applicable thereto;

It is, therefore

ORDERED, ADJUDGED and DECREED

I. That the sale so made be and the same is hereby confirmed.

II. That R. Somers Hayes, Esqr., the Receiver appointed in this cause, do pay, out of the funds in his hands, to the said Special Master a sum of Twelve hundred dollars ($1200.00) in full for his fees, as agreed upon by the parties hereto, and a further sum—hereafter to be ascertained and passed upon by this Court, for the expenses of said Master in carrying out the directions contained in the final decree in this cause, entered on the 15th day of April, 1879.

And the said Receiver is further directed to pay out of the funds in his hands any other expenses connected with this cause, not heretofore provided for, after the same shall have been passed upon and approved by the Master.

III. That the said Master shall, upon the payment to him by the said bidders, of the said remaining sum of Four Hundred and Seventy-five Thousand dollars, in gold coin of the United States, or in bonds and past due coupons in due proportion, as aforesaid, to the sums which the holders thereof are entitled to receive under said final decree, execute a conveyance, under seal in his name, as Special Master, to said John S. Kennedy and Samuel Sloan, Trustees, and such persons as may be associated with them, if any, their heirs and assigns, reciting in the same the final decree under which said sale was

made, and also reciting therein this decree, confirming said sale, and granting to and vesting in them, by the said conveyance, all property so purchased, and also vesting in them, their heirs and assigns, the road-bed, tracks, franchises and chartered powers and privileges of the said Houston and Great Northern Railroad Company and of the International and Great Northern Railroad Company, so far as the latter succeeded to the title of said Houston and Great Northern Railroad Company granted to them by virtue of their charter, or by any other laws of the State of Texas or of the United States and also vesting in them, their heirs and assigns, the true ownership of said Road, with all the powers, rights, franchises, privileges and benefits of said Houston and Great Northern Railroad Company and International and Great Northern Railroad Company therein, in the same manner and to the same extent as if the purchasers, above named, and their associates had been the original corporators of the said Company and vesting them with the power to operate, construct, complete, repair and work the said Railroad upon the same terms and under the same conditions and restrictions as are imposed by charters of the said Railroad Companies and by the General Laws of the State of Texas, affecting the same.

IV. That the said conveyance of the said Master shall contain, in accordance with the laws of the State of Texas, a provision to the effect that the sale of said Road-bed, tracks, franchises and chartered rights, above set forth, shall not pass or convey to the purchasers above named any right or claim to recover from the former stockholders of the said companies any sums which may remain due upon their subscriptions of stock, but that the said stock holders shall continue liable to pay the same in discharge and liquidation of the debts due by the said companies.

V. That the conveyance of the said Master, so executed by him, in accordance with this decree, shall be witnessed by two competent subscribing witnesses, in the manner required by the laws of the State of Texas, and

that, after being so witnessed, the same shall be duly acknowledged for record by the said Master in accordance with the laws of the State of Texas and thereupon delivered by him, the said Master, to the said purchasers above named, to serve them as the evidence of their title to the said property, so conveyed to them.

VI. It is further ordered that, after the said Master shall have executed and delivered to the said purchasers, John S. Kennedy and Samuel Sloan, Trustees, the said deed of conveyance provided herein, and when the said purchasers above named, shall be let into the possession and enjoyment of said property, so conveyed, the said Receiver, after the approval, by the said Master of his accounts, shall pay over and account to the said purchasers, for so much of the net earnings of said road as may remain in his hands after paying and discharging all the costs and charges of every kind against said property, which are justly, under the final decree, and other orders of this Court, chargeable against said property in the hands of the Receiver.

(Signed) T. H. DUVAL,
U. S. District Judge, and act'g Circuit Judge.

August 4th, 1879.

EXHIBIT "Y."

DEED
of
BURR G. DUVAL, SPECIAL MASTER, TO JOHN S. KENNEDY AND SAMUEL SLOAN, TRUSTEES,
Conveying the Houston and Great Northern Railroad.
Dated October 14th, 1879.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, AT AUSTIN.
IN CHANCERY.

KNOW ALL MEN BY THESE PRESENTS, That, WHEREAS, In a certain foreclosure suit between

Moses Taylor and William E. Dodge, Trustees, complainants, and the Houston and Great Northern Railroad Company, the International and Great Northern Railroad Company, John A. Stewart and William H. Osborn, trustees, R. Somers Hayes, receiver, and John S. Barnes and Thomas W. Pearsall, trustees, defendants, the said complainants lately in a Circuit Court of the United States in and for the Fifth Circuit and Western District of Texas, in equity, obtained a decree in their favor on the fifteenth day of April, in the year one thousand eight hundred and seventy-nine, whereby Burr G. Duval, a special master of said Court, was directed, as such special master, to sell all the property hereinafter mentioned at public auction, at the court-house of Travis County, in the city of Austin and State of Texas, to the highest bidder, for the purpose of satisfying certain claims set forth in said decree, together with certain costs and expenses therein mentioned.

AND WHEREAS, The said Burr G. Duval, as special master aforesaid, in obedience to the said decree, did, on the 31st day of July, in the year aforesaid, sell the property hereinafter described, being the same property hereinbefore mentioned, at public auction at the said court house of Travis County, in the city of Austin and State of Texas, having first given notice of the time, place and terms of said sale, and of the specific property (as nearly accurate as possible), to be sold, by publishing such notice for the time required by the said decree, in two newspapers of good circulation, in the city of Austin, to-wit, the "Sunday Leader" and the "Democrat Statesman"; and in one paper in the city of New York, also of good circulation, to-wit: "The New York Commercial Advertiser," at which sale the said property was struck off and sold to John S. Kennedy and Samuel Sloan, trustees, for the sum of five hundred thousand dollars; they, the said John S. Kennedy and Samuel Sloan, trustees, being the highest bidders, and that sum being the highest sum bidden for the same, and the said John S. Kennedy and Samuel Sloan, trustees, having paid to the said Burr G. Duval,

special master, at the time of striking off the sale, and before he accepted their bid, the sum of $25,000 in gold coin.

AND WHEREAS, The said Burr G. Duval, as such master aforesaid, did, forthwith after such sale, make a report thereof to the said Circuit Court on the first day of August, in the year aforesaid, and an order was duly made by and entered in the said Court on the fourth day of August aforesaid, confirming the said sale.

NOW, THEREFORE, The said Burr G. Duval, as special master aforesaid, for and in consideration of the sum of five hundred thousand dollars to him paid, the receipt whereof is hereby acknowledged, hath granted, bargained, sold and conveyed, and by these presents doth grant, bargain, sell and convey unto the said John S. Kennedy and Samuel Sloan, as trustees, and to the survivor of them, in fee simple absolute, all and singular the railway of the Houston and Great Northern Railroad Company, built and to be built, its main line, beginning at the Brazos River, passing through the city of Houston, connecting with the Memphis and El Paso Railroad near Clarksville, and passing as near the towns of Montgomery, Huntsville, Crockett, Rusk and Tyler as was deemed expedient, to the Red River in the State of Texas, a distance of about three hundred and fifty miles, its branches and extensions, together with all right of way, depot and shop grounds, tenements, hereditaments, franchises and rights, including and meaning to include all the property real and personal, at any time acquired by the said Company in the State of Texas (except lands other than those necessary for right of way, depot and shop grounds, the same being not hereby conveyed nor intended to be), which premises are now in the possession and use of and claimed by the said The International and Great Northern Railroad Company, and also certain rolling stock and other personal property, more particularly described as follows:

(NOTE: Contained in the deed is a description of rolling stock by numbers, which is omitted from this copy.)

And also all the road-bed, tracks, franchises and chartered powers and privileges of the said Houston and Great Northern Railroad Company and of the International and Great Northern Railroad Company, so far as the latter succeeds to the title of said Houston and Great Northern Railroad Company, granted to them by virtue of their charters, or by any other laws of the State of Texas or of the United States.

And also all other property of the said railroad companies, if any, covered by and included in the mortgage mentioned in the said decree, and all the estate, powers, right, title, interest, franchises, privileges, benefits, property, possession, claim and demand whatsoever, as well in law as in equity, of the said Houston and Great Northern Railroad Company and the International and Great Northern Railroad Company of, in and to the premises aforesaid and each and every part thereof, with the appurtenances.

TO HAVE AND TO HOLD unto the said John S. Kennedy and Samuel Sloan, as trustees, and to the survivor of them, in fee simple absolute forever, as fully as the said Houston and Great Northern Railroad Company and the International and Great Northern Railroad Company, both or either of them, were seized of or entitled to at or before the entry of the decree aforesaid, and in the same manner and to the same extent as if the said John S. Kennedy and Samuel Sloan, trustees, had been the original corporators of the said Houston and Great Northern Railroad Company, with full power to operate, construct, complete, repair and work said railroad upon the same terms and under the same conditions and restrictions as are imposed by the charters of the said railroad companies, and by the general laws of the State of Texas affecting the same, and as fully and absolutely as the said Burr G. Duval, master, can, may or ought to, by virtue of the said decree, grant, bargain, sell, release, assign, convey and confirm the same.

But this instrument shall not pass or convey to the said

John S. Kennedy and Samuel Sloan, trustees, any right or claim to recover from the former stockholders of the said companies any sums which may remain due upon their subscriptions of stock, but the said stockholders shall continue liable to pay the same in discharge and liquidation of the debts due by the said companies, and no covenant is to be implied from this deed, except that the said Burr G. Duval, as special master aforesaid, has not made any prior conveyance of the property herein mentioned or any part thereof.

In witness whereof the said Burr G. Duval, special master in the Circuit Court as aforesaid, hath hereunto set his hand and seal this fourteenth day of October, one thousand eight hundred and seventy-nine.

BURR G. DUVAL,
Special Master, &c.

Deed signed in presence of
GEO. SEALY,
JOHN B. ACOSTA.

EXHIBIT "Z."

MAP.

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF TEXAS.

THE MERCANTILE TRUST COMPANY, TRUSTEE, THE FARMERS' LOAN AND TRUST COMPANY, TRUSTEE, GEORGE J. GOULD, ET ALS., MARSHALL CAR WHEEL & FOUNDRY CO. ET AL.,

Complainants,

—VERSUS— CONSOLIDATED CAUSE No. 2501.

INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY,

Defendant.

THE FARMERS' LOAN AND TRUST COMPANY, TRUSTEE,

Complainant,

—VERSUS— EQUITY CAUSE No. 2514.

INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY, THE MERCANTILE TRUST COMPANY AND THOMAS J. FREEMAN, AS RECEIVER OF THE INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY,

Defendants.

Decree confirming final report of William H. Flippen, Master Commissioner, and account and report of Thomas J. Freeman, Receiver.

(This exhibit is the same as Exhibit J-1, heretofore printed, which see.)

PLAINTIFFS' FIRST SUPPLEMENTAL PETITION.

IN THE DISTRICT COURT OF CHEROKEE COUNTY, TEXAS.

ANDERSON COUNTY ET AL

vs. No. ——

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.

To the Honorable Judge of the District Court of Cherokee County, Texas:

Now come the plaintiffs, and, by leave of the court, file this their first supplemental petition herein, viz:

1.

For replication to the plea to the jurisdiction and to the plea in abatement contained in defendant's First Amended Original Answer, plaintiffs say:

(1). The plaintiffs deny all the allegations in Section 1 contained, save that the Mercantile Trust Company filed, on Feb. 25, 1908, in the Circuit Court of the United States for the Northern District of Texas, the Bill of Complaint, as shown by the copy attached to defendant's First Amended Original Answer and marked Exhibit "A."

(2). The plaintiffs admit that the suit mentioned in section 1 was docketed and transferred as alleged in Section 2 of said plea to the jurisdiction and plea in abatement, and admit that Exhibit "B" is a true copy of the order of appointment of the Receiver, but deny that said suit is still pending.

(3). The plaintiffs admit the allegations contained in Section 3 of said plea to the jurisdiction and plea in abatement, save that plaintiffs have no knowledge or information of the truth of the matters alleged in the Bill set out in Exhibit "C" sufficient to form a belief as to their truth.

(4). The plaintiffs admit the allegations contained in

Section 4 of said plea to the jurisdiction and plea in abatement.

(5). The plaintiffs admit the allegations contained in Section 5 of said plea.

(6). The plaintiffs admit the allegations contained in Section 6 of said plea.

(7). The plaintiffs admit the allegations contained in Section 7 of said plea.

(8). The plaintiffs admit the allegations contained in Section 8 of said plea.

(9). The plaintiffs admit the allegations contained in Section 9 of said plea, save that plaintiffs have no knowledge or information of the truth of the matters alleged in the Supplemental Bill or as to any authorization of the mortgages therein mentioned, sufficient to form a belief as to their truth.

(10). The plaintiffs deny all the allegations contained in Section 10 of said plea save and except that the Circuit Court therein mentioned duly rendered and entered the decree of foreclosure of which a copy is attached to defendant's first amended original answer and is marked Exhibit "H".

(11). The plaintiffs admit the allegations contained in Section 11 of said plea to the jurisdiction and plea in abatement.

(12). The plaintiffs admit the allegations contained in Section 12 of said plea.

(13). The plaintiffs admit the allegations contained in Section 13 of said plea.

(14). The plaintiffs admit the allegations contained in Section 14 of said plea.

(15). The plaintiffs deny the allegations contained in Section 15 of said plea, save they admit the incorporation of defendant under the Charter of which a copy is attached to defendant's first amended original answer and marked Exhibit "K".

(16). The plaintiffs admit the allegations contained in Section 16 of said plea, save and except the allegation

that defendant has operated its properties in accordance with the laws of Texas, which latter allegation is expressly denied.

(17). The plaintiffs believe the allegations of Section 17 of said plea to be true and hence admit same.

(18). The plaintiffs deny the allegations contained in Section 18 of said plea.

(19). The plaintiffs deny the allegations contained in Section 19 of said plea.

(19). The plaintiffs deny the allegations contained in Section 19 of said plea.

(20). The plaintiffs deny the allegations contained in Section 20 of said plea.

(21). The plaintiffs deny the allegations contained in Section 21 of said plea, with the following exceptions:

a. The plaintiffs admit that defendant's board of directors adopted the resolution of which a copy is attached as Exhibit "M" to defendant's first amended original answer.

b. The plaintiffs admit the service on the Commissioners Court of Anderson County and on the City Council of the City of Palestine of the notices of which copies are attached as Exhibits "O" and "P" to said answer.

(22). The plaintiffs expressly deny each and every allegation contained in Section 22 and subdivisions (a) to (e) thereunder of said plea to the jurisdiction and plea in abatement.

(23). For further replication to said plea to the jurisdiction and plea in abatement these plaintiffs say and charge that they were and are strangers to all the judicial proceedings set out by defendant in its first amended original answer, and that the Circuit Court of the United States for the Northern District of Texas has never attempted or undertaken to acquire or exercise or reserve, and has never acquired, exercised, or reserved jurisdiction of the causes of action asserted in plaintiffs' first amended original petition, and this plaintiffs are ready to verify.

(24). For further replication to said plea to the jurisdiction and plea in abatement plaintiffs aver that if the Circuit Court of the United States for the Northern District of Texas had ever obtained or reserved jurisdiction over the causes of action alleged by plaintiffs, which is not admitted but is expressly denied, that heretofore, to-wit: on the 25th day of September, 1911, said Circuit Court made and entered a final judgment and decree in Consolidated Cause No. 2501 in said Court, styled The Mercantile Trust Company, Trustee, The Farmers' Loan and Trust Company, Trustee, George J. Gould et als, Marshall Car Wheel & Foundry Co. et al, Complainants, versus International and Great Northern Railroad Company, defendant, and in Equity Cause No. 2514, in said Court, styled The Farmers' Loan and Trust Company, Complainant, versus International & Great Northern Railroad Company, The Mercantile Trust Company, and Thomas J. Freeman as Receiver of the International and Great Northern Railroad Company, defendants, and being the same Causes referred to in defendant's first amended original answer, whereby the final report of William H. Flippen, Master Commissioner, and of Thomas J. Freeman, Receiver, were in all respects approved and confirmed, and whereby it was expressly ordered and adjudged by said Circuit Court that the International & Great Northern Railway Company should take and hold the railroads, properties and franchises of the International and Great Northern Railroad Company released and discharged from the possession and custody of said Receiver and of said Court from and after the 16th day of September 1911, and whereby it was further expressly adjudged, ordered and decreed by said Circuit Court that the said Thomas J. Freeman as Receiver of the railroads, properties and franchises of the International & Great Northern Railroad Company was discharged as such Receiver, and whereby it was further expressly adjudged, ordered and decreed by said Circuit Court that all of the railroads, properties and franchises of the International

& Great Northern Railroad Company or said Receiver formerly in the possession, custody, or control of said Receiver be and the same were forever and finally discharged from the possession, custody, and control of said Receiver and of said Circuit Court of the United States for the Northern District of Texas, and a true and certified copy of said final judgment and decree is hereto attached, marked Exhibit "A", and made a part hereof.

Wherefore, plaintiffs say that the jurisdiction of this Court, which was invoked by defendant on its motion for change of venue from the District Court of Anderson County, Texas, is complete and ample for the adjudication of all controverted issues herein and its exercise involves no collision or conflict with any other Court, State or Federal, and hence plaintiffs pray that defendant's plea to the jurisdiction and plea in abatement be overruled.

THE STATE OF TEXAS,
COUNTY OF ANDERSON.

I, Thos. B. Greenwood, do on my oath say that I am an attorney for plaintiffs in the above entitled cause and that the statements of fact contained in the above Supplemental Petition are believed by me to be true.

THOS. B. GREENWOOD.

Subscribed and sworn to before me this the 3d day of January, 1914.

(SEAL) M. J. JACKSON,
Notary Public for Anderson County, Texas.

2.

Plaintiffs specially except to the allegations contained paragraphs 33-a to 33-o, both numbers included, of defendant's first amended original answer upon the following grounds: (1) Because the facts alleged in said paragraphs are wholly insufficient to constitute any defense to any cause of action alleged by plaintiffs; (2) Because, as held by the Supreme Court of Texas, this suit is to enforce a general law of the State of Texas, enacted in

1889, and requiring for its application no other facts than that a railroad company previously owning the franchise to operate the railroad had, at a time prior to the enactment of the Statute, contracted or agreed, for a valuable consideration, to locate and keep the general offices, machine shops and round houses of such railroad at a particular place, it appearing from the facts alleged by both plaintiffs and defendant that no certain place was named in the charter of the International and Great Northern Railroad Company for the location of its general offices, and hence no matters set out in paragraphs 33-a to 33-o could affect or defeat the general law of the State.

And of these special exceptions, plaintiffs pray the judgment of the court.

3.

The plaintiffs deny the allegations contained in each of the following paragraphs of defendant's first amended original answer, to-wit: paragraphs IV, IV-a, V, VI, and VII.

4.

For replication to the facts averred in paragraph VIII of defendant's first amended original answer, plaintiffs say:

(1). The plaintiffs deny all the allegations in Section 1 contained, save that the Mercantile Trust Company filed, on Feb. 25, 1908, in the Circuit Court of the United States for the Northern District of Texas, the Bill of Complaint, as shown by the copy attached to defendant's first amended original answer and marked Exhibit "A".

(2). The plaintiffs admit that the suit mentioned in section 1 was docketed and transferred as alleged in Section 2 of said paragraph VIII, and admit that Exhibit "B" is a true copy of the order of appointment of the Receiver, but deny that said suit is still pending.

(3). The plaintiffs admit the allegations contained in Section 3 of said paragraph VIII, save that plaintiffs have no knowledge or information of the truth of the

matters alleged in the Bill set out in Exhibit "C", sufficient to form a belief as to their truth.

(4). The plaintiffs admit the allegations contained in Section 4 of said paragraph VIII.

(5). The plaintiffs admit the allegations contained in Section 5 of said paragraph VIII.

(6). The plaintiffs admit the allegations contained in Section 6 of said paragraph VIII.

(7). The plaintiffs admit the allegations contained in Section 7 of said paragraph VIII.

(8). The plaintiffs admit the allegations contained in Section 8 of said paragraph VIII.

(9). The plaintiffs admit the allegations contained in Section 9 of said paragraph VIII, save that plaintiffs have no knowledge or information of the truth of the matters alleged in the Supplemental Bill or as to any authorization of the mortgages therein mentioned, sufficient to form a belief as to their truth.

(10). The plaintiffs deny all the allegations contained in Section 10 of said paragraph VIII, save and except that the Circuit Court therein mentioned duly rendered and entered the decree of foreclosure, of which a copy is attached to defendant's first amended original answer, and is marked Exhibit "H".

(11). The plaintiffs admit the allegations contained in Section 11 of said paragraph VIII.

(12). The plaintiffs admit the allegations contained in Section 12 of said paragraph VIII.

(13). The plaintiffs admit the allegations contained in Section 13 of said paragraph VIII.

(14). The plaintiffs admit the allegations contained in Section 14 of said paragraph VIII.

(15). The plaintiffs deny the allegations contained in Section 15 of said paragraph VIII save they admit the incorporation of defendant under the Charter, of which a copy is attached to defendant's first amended original answer and marked Exhibit "K".

(16). The plaintiffs admit the allegations contained in

Section 16 of said paragraph VIII, save and except the allegation that defendant has operated its properties in accordance with the law of Texas, which latter allegation is expressly denied.

(17). The plaintiffs believe the allegations of Section 17 in said paragraph VIII to be true and hence admit same.

(18). The plaintiffs deny the allegations contained in Section 18 of said paragraph VIII.

(19) and (20). The plaintiffs deny the allegations contained in Sections 19 and 20 of said paragraph VIII.

(21). The plaintiffs deny the allegations contained in Section 21 of paragraph VIII, with the following exceptions:

a. The plaintiffs admit that defendant's board of directors adopted the resolution of which a copy of attached as Exhibit "M" to defendant's first amended original answer.

b. The plaintiffs admit the service on the Commissioners' Court of Anderson County and on the City Council of the City of Palestine of the notices of which copies are attached as Exhibits "O" and "P" to said answer.

(22). The plaintiffs expressly deny the allegations contained in Section 22 of paragraph VIII.

(23). The plaintiffs expressly deny each and every allegation contained in Section 23 of said paragraph VIII, and subdivisions (a) to (d) thereunder.

(24). For further special replication to said paragraph VIII of defendant's first amended original answer the plaintiffs repeat and re-aver all of the allegations contained in sections 23 and 24 of paragraph 1 of this supplemental petition, and hence pray judgment as in their first amended original petition.

5.

For replication to the facts averred in paragraph IX of defendant's first amended original answer, plaintiffs say:

(1). The plaintiffs repeat their replication above made to Section VIII and sub-sections 1 to 21.

(2). The plaintiffs admit the allegations contained in each of the following sections of paragraph IX, to-wit: sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 33-n, and 33-o.

(3). The plaintiffs deny the allegations contained in each of the following named sections of paragraph IX, to-wit: sections 12, 29, 30, and 31, save and except plaintiffs admit:

(a). That the principal office of the Houston and Great Northern Railroad Company was originally established at Houston.

(b). That the general offices of the International Railroad Company and of the Houston and Great Northern Railroad Company were consolidated at Houston, after the International moved its general offices from Hearne until the International and Great Northern Railroad Company, in 1875, established its general offices at Palestine, in compliance with the contracts plead by plaintiffs.

(4). The plaintiffs expressly deny the allegations contained in each of the following sections of said paragraph IX, to-wit: sections 13, 32, and 33.

(5). The plaintiffs have no knowledge or information of the truth of the allegations contained in each of the following named sections of said paragraph IX, to-wit: 33-a, 33-b, 33-c, 33-d, 33-e, 33-f, 33-g, 33-h, 33-i, 33-j, 33-k, 33-l & 33-m, and hence deny same.

(6). For replication to paragraphs 33-a to 33-o, of defendant's first amended original answer, plaintiffs say that if John S. Kennedy and Samuel Sloan, as trustees, ever became the purchasers of the railroads, properties and franchises of the International Railroad Company, of the Houston and Great Northern Railroad Company, and of the International and Great Northern Railroad Company, which is not admitted, that they became such purchasers as trustees for the stockholders of the International and Great Northern Railroad Company, as the same existed at the dates of the sales and conveyances of said railroads, properties and franchises, and as trustees

for the holders of the outstanding bonds of said companies, which were sought to be foreclosed by the decrees under which such railroads, properties and franchises were sold, and as trustees of the owners and holders of the decrees of foreclosure, in order to consummate an agreement of all parties at interest that the rights of said stockholders should not be extinguished or affected by said sale, but should be continued and preserved just as the same existed prior to the rendition of the decrees of foreclosure or any sale thereunder. That it was agreed between the International and Great Northern Railroad Company and its stockholders and the said Trustees and the said bondholders and the said owners of the decrees under which said railroads, properties and franchises were sold, prior to and at the date of such sale, that the said John S. Kennedy and Samuel Sloan should re-convey said railroads, properties and franchises to said International and Great Northern Railroad Company, as composed of the same stockholders as those who prior to said sale owned the outstanding stock of said International and Great Northern Railroad Company and that such Company, as composed of said former and old stockholders should then issue new bonds, secured by new mortgages on said railroads, properties and franchises, to secure the same indebtedness previously held by said bondholders, owning said decrees of foreclosure, and in consummation of said agreement and in order to prevent any real change in the ownership of said railroads, properties and franchises, the said trustees, Jno. S. Kennedy and Samuel Sloan, on or about the 1st day of November, 1879, reconveyed to the International and Great Northern Railroad Company, as owned by the stockholders thereof before said sale, the aforesaid railroads, properties and franchises, and on the same day said International and Great Northern Railroad Company, as owned and controlled by said former stockholders, executed and delivered its mortgages and bonds in renewal and extension of the indebtedness previously evidenced by said

foreclosed bonds. That said sale was made and consummated under the express agreement of all parties that same should not affect the stock ownership in said International and Great Northern Railroad Company, and such stock ownership was never changed, for if it was in the names of John S. Kennedy and Samuel Sloan as trustees, they were acting as nominal trustees for said Railroad Company and its former stockholders, and this plaintiffs are ready to verify.

(6). The plaintiffs expressly deny each and every allegation of section 34, of said paragraph IX, and of subsections (a) to (g) thereunder.

(7). The plaintiffs expressly deny each and every allegation of section 35 of said paragraph IX, and of subsections (a) to (g) thereunder.

(8). The plaintiffs expressly deny each and every allegation of section 36 of said paragraph IX and subsections (a) to (e) thereunder.

(9). The plaintiffs in replication of section 37 of paragraph IX of defendant's first amended original answer repeat all replications elsewhere made to the matters therein plead and repeated.

(10). The plaintiffs for replication to section 38, of said paragraph IX deny each and every allegation therein contained, save and except in so far as defendant realleges matters already plead, and as to such re-alleged matters the plaintiffs repeat their replications as elsewhere made.

(11). The plaintiffs expressly deny the allegations of Section 39 of said paragraph IX, and expressly deny that the charter of the Houston & Great Northern Railroad Company contained any provision forbidding a change of its principal office, by contract, as alleged, in 1872 or in 1875, and expressly deny that the charter of the International and Great Northern Railroad Company ever fixed the domicile or general offices of the consolidated railroad at Houston, Texas.

6.

For replication to the allegations contained in paragraph X of defendant's first amended original answer, plaintiffs say:

(1). Plaintiffs repeat and re-aver their replications elsewhere made to all allegations repeated and re-averred in section 1 of said paragraph X.

(2). Plaintiffs admit that the Act of 1889 has been construed by the Supreme Court of Texas, but deny that it has ever been construed in accordance with the defendant's contentions, all such contentions having always been rejected by said court, since its organization. All other allegations of section 2 of paragraph 10 save that the Supreme Court had construed said Act and that defendant had attempted in its charter to name Houston as the place for the establishment and maintenance of its general offices, are denied.

(3). Plaintiffs admit the allegations contained in sections 3, 4, 5, 7, & 9, of said paragraph X.

(4). The plaintiffs deny the allegations contained in sections 6, 8, 10, and 11, with its subsections (a) to (d), save such matters as have been hereinbefore expressly admitted.

7.

The plaintiffs admit the allegations contained in sections 2 and 5, of paragraph XI of defendant's first amended original answer, save plaintiffs deny that the enforcement of their claims will hamper defendant.

(2). The plaintiffs deny the allegations contained in sections 1, 3, 4, 6, and 7 with its subsections (a) to (c), under said paragraph XI, save as hereinbefore expressly admitted, save that the comparative sizes of Palestine and Houston are stated with substantial accuracy.

7-a.

For replication to the allegations contained in Section 11-a plaintiffs say (1st): Plaintiffs re-aver and re-adopt all of the allegations contained elsewhere in this 1st sup-

plemental petition by way of replication to Sections VII and IX of defendant's first amended original answer; (2nd) The plaintiffs admit that the legal proceedings were had in the District of Anderson County, Texas, which appear from the copies attached as Exhibits to defendant's first original answer, and which are referred to in said Section 11-a; (3rd) The Plaintiffs deny each and every allegation contained in Section 11-a, save as herein expressly admitted, and they expressly deny that the causes of action asserted herein by them were ever involved in or determined or adjudicated by the judgments of the District Court of Anderson County and of the Supreme Court of Texas, which are plead by defendant and plaintiffs specially deny that the aforesaid legal proceedings in anywise bar or preclude the enforcement of any of the causes of action shown in plaintiffs' first amended original petition.

Wherefore plaintiffs pray judgment as in their first amended original petition.

8.

For replication to the allegations of paragraph XII of defendant's first amended original answer, plaintiffs say:

(1). The plaintiffs re-aver and adopt all the allegations of their previous replications to paragraphs VIII and IX of said answer.

(2). The plaintiffs deny the allegations contained in each of the followings sections of said paragraph XII, to-wit: paragraphs 2, 3, 4, 5, 6, 7, and 8.

9.

For replication to paragraph XIII of defendant's first amended original answer, plaintiffs say:

(1). Plaintiffs re-aver all the matters plead by them in replication to Sections VIII and IX of said answer.

(2). Plaintiffs deny the allegations contained in section 1 of said paragraph XIII.

And, having answered fully and specifically the allegations of defendant's first amended original answer, the plaintiffs pray the court to hear proof upon the issues

joined between plaintiffs and defendant and for judgment as prayed for in plaintiffs' first amended original petition.

A. G. GREENWOOD,
CAMPBELL & SEWALL,
JNO. C. BOX,
R. O. WATKINS,
PERKINS & PERKINS,
JNO. B. GUINN,
THOS. B. GREENWOOD,
Attorneys for Plaintiffs.

THE STATE OF TEXAS,
COUNTY OF ANDERSON,

I, Thos. B. Greenwood, do swear that I am one of the attorneys for plaintiffs in the above entitled cause and that the statements of fact relied upon as a defense by plaintiffs in the foregoing supplemental petition are believed by me to be true.

THOS. B. GREENWOOD.

Subscribed and sworn to before me this the 3d day of January, 1914.

(SEAL)

M. J. JACKSON,
Notary Public for Anderson County, Texas.

For Exhibit A, see p. 367.

Filed Jan. 7, 1914.

DEFENDANT'S FIRST SUPPLEMENTAL ANSWER.

Filed Jan. 8, 1914.

IN THE DISTRICT COURT OF CHEROKEE COUNTY, TEXAS.

ANDERSON COUNTY ET AL
vs.
INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.

No. 6415.

To the Hon. Judge of said Court:

Now comes the International & Great Northern Railway Company, defendant herein, and with leave of the

Court, files this its supplemental answer herein, in answer to plaintiffs' first supplemental petition, viz:

1. Defendant denies the allegations contained in subdivisions 23 and 24 of Section One of said first supplemental petition.

2. Defendant denies the allegations contained in Section Two of said first supplemental petition.

3. Defendant denies the allegations contained in Section Five, subdivision 3(b) of said first supplemental petition.

4. Defendant denies the allegations contained in Section Five, subdivision Six, of said first supplemental petition.

5. And now having answered the allegations contained in plaintiffs' first supplemental petition, defendant prays for the judgment of the Court as prayed in defendant's first amended original answer.

F. A. Williams, N. A. Stedman,
Andrews, Ball & Streetman,
Morris & Sims, W. E. Donley,
Norman, Shook & Gibson,
F. B. Guinn,
Wilson, Dabney & King,
Attorneys for Defendant.

The State of Texas,
County of Cherokee.

I, ..., one of the attorneys for defendant in the above entitled and numbered cause, do swear that I believe the statement of facts in the foregoing answer to be true.

.....

Subscribed and sworn to before me this....day of ....., 1914.

.....
District Clerk, Cherokee County, Texas.

DEFENDANT'S BILL OF EXCEPTION NO. 2*a*.

ANDERSON COUNTY ET AL.

vs.

I. & G. N. RAILWAY COMPANY.

Filed Mar. 18, 1914.

BE IT REMEMBERED that before the presentation of demurrers in this case, and before the trial of this case before the jury, which was upon all issues of fact shown by the pleadings, except the plea in abatement and to the jurisdiction, the defendant, on the 7th of Jany., 1914, insisted upon a trial of its plea in abatement and to the jurisdiction contained in its First Amended Original Answer, being Section I thereof. Whereupon, it was agreed in open court by both the defendant and the plaintiffs that a jury should be waived upon the trial of said plea in abatement and to the jurisdiction without waiving the jury for the trial of the other issues, and that all matters raised by said plea should be tried before the judge without a jury, upon the facts as well as upon the law. Whereupon, the court proceeded to the trial of such plea in abatement and to the jurisdiction, and in support thereof the defendant introduced in evidence all of those matters stated in the Statement of Facts, as appears therein, and by page I to page IV (Roman figures) thereof, inclusive, preceding the statement of the matters introduced in evidence upon the jury trial; and the court having heard the evidence and considered said plea, was of the opinion that the same should not be sustained. Whereupon, the court overruled said plea, to which ruling of the court the defendant then excepted and took this its

Bill of Exception No. 2*a*, which it now presents, and prays that it be allowed.

N. A. STEDMAN,
F. A. WILLIAMS,
ANDREWS, BALL & STREETMAN,
WILSON, DABNEY & KING,
Attorneys for Defendant.

Approved:

T. B. GREENWOOD,
Atty. for Plffs.

The foregoing agreed bill was this day presented to me and is by me in all things approved this 17th day of March, 1914.

A. E. DAVIS,
Judge.

BILL OF EXCEPTION NO. 3.

ANDERSON COUNTY ET AL.

vs.

I. & G. N. RAILWAY COMPANY.

Filed Mar. 18, 1914.

BE IT REMEMBERED that on the trial of this case, and before the introduction of any parol testimony by the plaintiffs, the defendant moved the court to enforce the rule against the plaintiffs' witnesses, and remove them from the court room, under the terms of "the rules"; to which the plaintiffs assented, except that they insisted those persons should be excepted from the rule who were named in the petition as plaintiffs, and who would be called as witnesses, to wit: Wright, Ozment, Bowers and Hughes. Whereupon, the defendant pointed out that all of the citizens of Palestine were as much parties as those named in the petition, and that the parties suing, other than these named persons, who would not be used as wit-

nesses, could remain in the court room. Which motion being considered by the court, was by the court overruled. Whereupon, the defendant excepted to the ruling of the court, and took its Bill of Exceptions No. 3, and Wright, Bowers, Ozment and Hughes remained in the court room throughout the trial, and heard all of the testimony given therein, and each of them was present when the others testified, all as appears in the Statement of Facts in this case, on pages 28 and 29, under Section 8, and each thereafter testified. Wherefore, defendant presents this, its Bill of Exception No. 3, and prays that it may be allowed.

F. A. Williams,
N. A. Stedman,
Andrews, Ball & Streetman,
Wilson, Dabney & King,
Attorneys for Defendant.

Approved:

T. B. Greenwood,
Atty. for Plffs.

This Agreed Bill No. 3 was this day presented to me, and is found correct, and in all things approved. March 17th, 1914.

A. E. Davis,
Judge Sitting on Trial of Above Case.

DEFENDANT'S BILL OF EXCEPTIONS NO. 4

ANDERSON COUNTY ET AL.

vs.

I. & G. N. RAILWAY COMPANY.

Filed Mar. 18, 1914.

BE IT REMEMBERED that upon the trial of this case, the witness Howard being on the stand, and called by the plaintiffs, that plaintiffs offered in evidence from minutes of the H. & G. N. Railroad Company its By-

Laws, approved December 4, 1871; to the introduction of portions of which relating to the Executive Board, and attempting to bestow any powers upon the Executive Board, the defendant objected that the same was inadmissible, because the Executive Board could not be substituted for the Board of Directors, and that any such attempt would be an infringement upon the powers which the law placed in the Board of Directors; and also to the introduction of any portion thereof bestowing powers upon the Executive Board, it was objected that no powers could be lodged in the executive officers for substitution of powers placed by law in the Board of Directors; which objections were overruled by the court, and the defendant excepted to this ruling and took this Bill of Exception No. 4; and over these objections the by-laws were read in evidence, being the same set out on pages 74 to 85 of the Statement of Facts, and the portions thereof objected to being part of Section 5 of Art. III, p. 79, St. F. (excepting contracts specially provided for from the approval of the Board of Directors at next meeting, when made by the president, if any such there were), and also Section 1 relating to the Chief Engineer on page 81 of the St. F., and also Sections 10, 11, 12, 13, 14 of Art. II of the by-laws, appearing on pages 77 and 78 of the St. F.

Wherefore, the defendant presents this bill No. 4, and prays that it be allowed.

N. A. Stedman,
F. A. Williams,
Andrews, Ball & Streetman,
Wilson, Dabney & King,
Attorneys for Defendant.

Approved:

T. B. Greenwood,
Atty. for Plffs.

This Agreed Bill No. 4 was presented to me this 17th

day of March, 1914, and is in all things approved and allowed.

A. E. Davis,
Judge Presiding.

DEFENDANT'S BILL OF EXCEPTION NO. 5

ANDERSON COUNTY ET AL.

vs.

I. & G. N. RAILWAY COMPANY.

Filed Mar. 18, 1914.

BE IT REMEMBERED that upon the trial of this case the plaintiffs offered in evidence by-laws of the H. & G. N. Railroad Company, approved December 2, 1872, to all of which the defendant objected that the petition sets out an alleged contract as between Judge Reagan, Grow and Anderson County, alleged to have been entered into before the adoption of these by-laws; and also to the portions of said by-laws relating to the Executive Committee, objected that no powers could be lodged in the Executive Committee in substitution for the powers placed by law in the Board of Directors, which objections were overruled by the court, whereupon, the defendant excepted to this ruling and took this Bill 4, and over these objections the by-laws were read in evidence, the portions relating to the Executive Committee objected to being Section 11 of Art. II thereof, being the same as Section 10 of Art. II of the old by-laws, set out on page 77 of the St. F., all as appears on pages 85 to in 90, inclusive, of the St. F.

Wherefore, the defendant presents this Bill No. 5, and requests that the same be allowed.

N. A. STEDMAN,
F. A. WILLIAMS,
ANDREWS, BALL & STREETMAN,
WILSON, DABNEY & KING,
Attorneys for Defendant.

Approved:

T. B. GREENWOOD,
Atty. for Plffs.

This Agreed Bill 5 is in all things approved and allowed this 17th day of March, A. D. 1914.

A. E. DAVIS,
Judge Presiding.

DEFENDANT'S BILL OF EXCEPTION NO. 6.

ANDERSON COUNTY ET AL.
vs.
I. & G. N. RAILWAY COMPANY.

Filed Mar. 18, 1914.

BE IT REMEMBERED that upon the trial of this case the plaintiffs offered in evidence, from the minutes of the H. & G. N. Railroad Company, two resolutions referred to and described below, passed by the Executive Committee of that road, of date Feby. 4th, 1873, and Jan. 11, 1873, respectively, to the introduction of which the defendant objected (1) that the matter offered was immaterial and irrelevant, it being an irrelevancy what expense Grow had been to in procuring donations of county bonds and lands to International and H. & G. N. Railroads, and could have no bearing upon the issues involved. (2) That it was out of due order to introduce such matter now, but that it was upon the plaintiffs, if such matter was admissible, at any time, which is not admitted, to

offer first, the contract with Anderson County in regard to the bond issue, all of which was in writing. (3) Defendant's counsel requested plaintiffs' counsel to hand to him the proceedings of the County Court of Anderson County in 1872, with reference to the election and the bond issue, including Shattuck's protest, and the whole matter, which, being handed to defendant's counsel, he exhibited the same to the court, it being the documents all hereinafter set out and introduced in evidence by the plaintiffs, and objected to the offered minutes further (4) that the law required all contracts with reference to issue of bonds by the county, in promotion of the railroad, to be in writing, and that no independent considerations or collateral matters not so in writing are admissible in evidence. (5) That the contract appears to have been formed by the county, as shown by the writings, in 1872, that over forty years have elapsed since that time, and it is now being attempted to be proved by parol, modification of the contract and not in writing, which collateral matters and parol modifications and conditions are inadmissible after this lapse, to add to or detract from the contract, which is in writing. (6) That the matter now offered in evidence is offered with a view of contradicting, and if it has any relevancy, is in direct conflict to the written documents, giving the history of the election exhibited to the court by the defendant's counsel, and which plaintiffs have possession of, and which they say they will offer in evidence, and which are complete in themselves, and consist of a written record not subject to modification, or conditions or variations by parol. (7) That the record of the election and the proceedings therein, and the bond issue made by the County of Anderson, and now exhibited to the court, are the proper adjudication and determination of the considerations on which the bonds were issued, and show the matter to be *res adjudicata*, and cannot be detracted from or added to in order to show that there was an independent or pre-

liminary contract in connection with such matter. (8) That if plaintiffs had any rights, such as they are attempting to show by parol, they were personal rights, exclusively against the H. & G. N. R. R. Co., consolidated with the I. & G. N. R. R. Company, and now sold out, as appears from the evidence already introduced, and sold out under a mortgage made in 1881, as already appears; and it further appearing that the plaintiffs are claiming under the act of 1889, and that by such subsequent act a burden was fixed upon the properties or property now held by the defendant, the plaintiffs are attempting to violate the obligation of their alleged contracts by adding thereto, and claiming a security under the act of 1889, and to violate the obligation of the mortgage of 1881, and the rights of the defendant as a purchaser under the foreclosure thereof by modifying their alleged contracts of 1872 and 1875, and adding a security thereto, as contended by them, under the act of 1889, all in violation of the obligation of such alleged contracts, and of the Fourteenth Amendment to the Constitution of the United States, and of Sub-section One of Section X of Article I of the Constitution of the United States of America, and also in violation of the Constitution of the State of Texas, whereby the act of 1889, or the application made of it to the facts of this case, would be unconstitutional and void in such attempt to secure an admittedly purely personal contract in 1889, as against the property, or any of the properties, now held by the defendant. (9) Further, the defendant objects that the proposed minutes offered were of the Executive Committee, and that, if these matters had any relevancy, they were conclusively within the power of the Board of Directors, and not of the Executive Committee, and that the Executive Committee had no power under the law or the charter to pass any such resolution.

Which objections were all overruled by the court, and the defendant then, to this ruling, in open court excepted

and took this its Bill No. 6, and over the objections the resolutions were read in evidence, being those of the dates stated, set out on page 96 of the St. F. Wherefore, the defendant presents this its Bill No. 6, and prays that it be allowed.

F. A. WILLIAMS,
N. A. STEDMAN,
ANDREWS, BALL & STREETMAN,
WILSON, DABNEY & KING,
Attorneys for Defendant.

Approved:

T. B. GREENWOOD,
Atty. for Plffs.

This Agreed Bill No. 6 was presented to me this 17th day of March, 1914, and is in all things approved and allowed.

A. E. DAVIS,
Judge Presiding.

DEFENDANT'S BILL OF EXCEPTION NO. 7.

ANDERSON COUNTY ET AL.
vs.
I. & G. N. RAILWAY COMPANY.

Filed Mar. 18, 1914.

BE IT REMEMBERED that upon the trial of this case, the plaintiffs offered in evidence the by-laws adopted by the I. & G. N. Railroad Company by its stockholders Sept. 24th and 27th, 1873, and in force up to June, 1875, and thereafter these by-laws and those of the H. & G. N. Railroad already introduced, being shown by the minutes to be all the by-laws of the H. & G. N. and the I. & G. N. up to June, 1875. Whereupon, the defendant objected to the introduction in evidence of a portion of the by-laws

referring to the Executive Committee, and that portion described below, on the ground that no powers therein attempted to be vested in the Executive Committee were powers so legally vested, but were powers vested by law and under the charters of the companies in the Board of Directors, and could not be legally exercised by the Executive Committee, which objections were overruled by the court, and the defendant excepted, and then took its Bill No. 7, and over the objections the by-laws were read in evidence, the portions objected to being Section 11 of Art. II, p. 98 of the St. of F., being the same as Section 10 of Art. 2 of the by-laws of the H. & G. N. Railroad set out on page 77 of the Statement of Facts. Wherefore, the defendant presents this its Bill 7, and prays that it be allowed.

F. A. Williams,
N. A. Stedman,
Andrews, Ball & Streetman,
Wilson, Dabney & King,
Attorneys for Defendant.

Approved:

T. B. Greenwood,
Atty. for Plffs.

This Agreed Bill No. 7 was presented to me this 17th day of March, 1914, and is in all things approved and allowed.

A. E. Davis,
Judge Presiding.

DEFENDANT'S BILL OF EXCEPTION NO. 8.

ANDERSON COUNTY ET AL.

vs.

I. & G. N. RAILWAY COMPANY.

Filed Mar. 18, 1914.

BE IT REMEMBERED that upon the trial of this case the plaintiffs offered in evidence a certain resolu-

tion purporting to be of the directors of the I. & G. N. Railroad of date July 21, 1874, being a Joint Board of Directors of the H. & G. N. Railroad and International Railroad, consolidated into the I. & G. N. Railroad Company, which resolution is described below. To the introduction of which the defendant objected, making all of the objections set out in its Bill of Exception No. 6 herein taken and allowed; and also that the action of the joint board of the consolidated railroad was irrelevant, and that this transaction was subsequent to the alleged contract alleged to have been made by Grow.

Which objections being overruled the defendant excepted, and over these objections the resolution was read in evidence, being set out on page 100 of the St. F. Wherefore, the defendant presents this its Bill 8, and prays that it be allowed.

F. A. Williams,
N. A. Stedman,
Andrews, Ball & Streetman,
Wilson, Dabney & King,
Attorneys for Defendant.

Approved:

T. B. Greenwood,
Atty. for Plffs.

This Agreed Bill 8 was presented to me this 17th day of March, 1914, and is in all things approved and allowed.

A. E. Davis,
Judge Presiding.

DEFENDANT'S BILL OF EXCEPTION NO. 9.

ANDERSON COUNTY ET AL.

vs.

I. & G. N. RAILWAY COMPANY.

Filed Mar. 18, 1914.

BE IT REMEMBERED that upon the trial of this

case the plaintiffs offered in evidence a resolution adopted by the stockholders of the I. & G. N. Railroad Company on June 1st, 1881, ratifying a lease of that road to the M. K. & T. Railway Company, and also a certain agreement of date Nov. 26th, 1881, appearing upon the minutes of the I. & G. N. Railroad Company, signed by Huntington and Gould. Whereupon, the defendant objected to the introduction of the above lease and ratication of it and the Gould-Huntington contract, that they were immaterial and irrelevant. To which objection plaintiffs' counsel responded that he was offering these matters for the purpose of meeting the defendant's plea of limitations, setting up that the general offices had been moved to St. Louis in 1881, and remained there until in 1888, but the defendant insisted upon its objection that these matters were immaterial and irrelevant.

Whereupon, the court overruled the objection and the defendant then excepted and took this its Bill of Exception No. 9, and over the objections the matter objected to was read in evidence, being set out in the Statement of Facts herein, commencing with the bottom paragraph on page 101, and extending through the second paragraph on page 120. Wherefore, the defendant presents this its Bill 9, and prays that it be allowed.

F. A. Williams,
N. A. Stedman,
Andrews, Ball & Streetman,
Wilson, Dabney & King,
Attorneys for Defendant.

Approved:

T. B. Greenwood,
Atty. for Plffs.

This Agreed Bill 9 was presented to me this 17th day of March, 1914, and is in all things approved and allowed.

A. E. Davis,
Judge Presiding.

DEFENDANT'S BILL OF EXCEPTION NO. 10.

ANDERSON COUNTY ET AL.

vs.

I. & G. N. RAILWAY COMPANY.

Filed Mar. 18, 1914.

BE IT REMEMBERED that on the trial of this case the plaintiffs asked the witness Howard to show from the minutes who was the General Manager of the I. & G. N. Railroad during the Bonner-Eddy Receivership, and up to the death of Eddy, and whether or not Eddy, while he was such General Manager, did sign a confession of judgment in favor of Gould for a large sum against the I. & G. N. Railroad. To all of which the defendant objected that the matters offered were immaterial and irrelevant.

Which objections were overruled by the court, and the defendant then excepted to this ruling, and over the objection, the witness testified from the minutes as appears on page 121 thereof. Wherefore, the defendant presents this its Bill 10, and prays that it be allowed.

N. A. Stedman,
F. A. Williams,
Andrews, Ball & Streetman,
Wilson, Dabney & King,
Attorneys for Defendant.

Approved:

T. B. Greenwood,
Atty. for Plffs.

This Agreed Bill 10 was presented to me this 17th day of March, 1914, and is in all things approved and allowed.

A. E. Davis,
Judge Presiding.

DEFENDANT'S BILL OF EXCEPTION NO. 11.

ANDERSON COUNTY ET AL.

vs.

I. & G. N. RAILWAY COMPANY.

Filed Mar. 18, 1914.

BE IT REMEMBERED that on the trial of this case Wright, one of the plaintiffs, was called as a witness by the plaintiffs, having been, along with his co-plaintiffs Ozment, Bowers and Hughes, over the objection of the defendant, excused from the rule as shown by Bill of Exception No. 3 already allowed, and Wright being sworn and tendered as a witness, the defendant not waiving its Bill No. 3, but subject to the same, moved the court to exclude from the court room and place under "the rule" Ozment, Bowers and Hughes, while Wright was testifying, and so to exclude from the court room when any of these four persons was testifying, the other three, the plaintiffs stating that they would put all of these four persons upon the witness stand, the ground of the motion being that it appeared that Wright and each of these witnesses would be tendered to give parol testimony in support of an alleged transaction claimed to have been entered into in parol over forty years ago; all of the citizens of Palestine being plaintiffs in the case, and because, on account of the great lapse of time, one of these men listening to the other testify, might have his mind swayed and impressed with what testimony he should give, and that it would be an abuse of the court's discretion not to enforce the rule, and instruct these witnesses according to the practice, and exclude them from the court room, at least while any of the four was testifying, all as appears in the Statement of Facts, p. 148; and this motion was overruled by the court, and the defendant then excepted and took its Bill No. 11, and over this objection, Wright, Ozment, Bowers and Hughes all gave their testimony in the presence and hearing of

each other; Wright, Ozment and Hughes all testifying to a certain speech alleged to have been made by Grow, and Wright and Ozment, in addition, testifying to a certain alleged transaction with Hoxie and Wright in addition to an interview between Judge Reagan and Grow, and action thereon; all as appears in St. F., pages 148-207, 224-237, 223-224, 262-264, 210-211.

Wherefore, the defendant presents this its Bill 11, and prays that it be allowed.

N. A. Stedman,
F. A. Williams,
Andrews, Ball & Streetman,
Wilson, Dabney & King,
Attorneys for Defendant.

Approved:

T. B. Greenwood,
Atty. for Plffs.

This Agreed Bill 11 was presented to me this 17th day of March, 1914, and is in all things approved and allowed.

A. E. Davis,
Judge Presiding.

DEFENDANT'S BILL OF EXCEPTION NO. 12.

ANDERSON COUNTY ET AL.

vs.

I. & G. N. RAILWAY COMPANY.

Filed Mar. 18, 1914.

BE IT REMEMBERED that on the trial of this case the witness Wright was called by the plaintiffs, and having testified that he was present at a stated meeting between Grow, Noble and Judge Reagan on the occasion when the alleged contract stated in the pleadings to have been made in March, 1872, by Grow as President of the Houston and Great Northern Railroad, and Judge Rea-

gan, representing the citizens of Palestine, was entered on, was then asked to state what took place between Judge Reagan and Mr. Grow in his presence at such meeting, and the presence of Noble, and what was said and done on such occasion; and also what was said and done in that connection at the witness' livery stable the next morning after the meeting at Judge Reagan's house, and whether or not Judge Reagan made a canvass of the county in support of the bond issue; this testimony being offered in support of the alleged contract by the plaintiffs set out as having been formed in March, 1872. Whereupon, to these questions, and to any testimony thereunder, the defendant objected as follows:

(1) That it now developed, as shown by the contract with the County introduced by the plaintiffs that there was a complete and perfectly legal written contract between Anderson County, Texas, and the H. & G. N. R. R., required by law to be in writing, and which could only legally be formed in writing, which, as shown by the petition, it was proposed to modify, add to, change, or vary by parol testimony; and that such writing being complete in itself could not be so modified, changed, varied or added to. (2) That the testimony offered as to what Judge Reagan said and what Grow said and others said was hearsay. (3) That the testimony is offered, as appears by the pleadings and the statement now made by the plaintiffs, in support of a contract alleged to have been made in behalf of the citizens of Palestine acting by Judge Reagan, upon an illegal consideration, to wit: Judge Reagan's alleged undertaking to induce and influence the voters of the county to vote a bond issue, the alleged consideration to the railroad being solely the engagement of Judge Reagan to induce and advocate such a bond issue. (4) That the evidence is offered for the purpose of showing an agreement or an alleged contract, in promotion of a County contract, and to attach to the County contract, which is in writing, an alleged promotion contract, which, if made, would be upon an

illegal consideration and is prohibited by law and public policy. (5) That after the lapse of over 40 years it is not permissible to prove, in connection with a written contract with the County and the public, what were the inducements or considerations or representations outside of the written contract there were upon which it was made, nor can a written contract adopted by the voters be so modified. (6) That it appears from the pleadings, and tender of the testimony, that it is now proposed to show that Judge Reagan's services were hired to induce and influence the voters of Anderson County to vote a bond issue, on inducements outside of the writings, that the shops and general offices were to be erected in Palestine for the benefit of the people of Palestine, as contradistinguished from the people of the County, and that it would have been illegal to arrange to bestow such benefits upon the people of part of the county as contradistinguished from the people of all of the county. (7) That the proposed agreement, as plead and as proposed to be testified to in parol, if legal and provable under the law, which is denied, would have to be in writing, and comes within the terms of the statute of frauds, which is now invoked; and therefore it is not provable in parol. (8) That after the lapse of over 40 years and after rights had been acquired and acted upon by various parties, on the basis of the written contract and agreement already introduced, it is not permissible to prove by parol the alleged contract. (8a) That a record of the transaction with the County introduced by plaintiffs, showed the judgment of the County Court settling the whole matter and the considerations for the contract, adjudged to have been performed by the railroad, whereby the matter was *res adjudicata*, and the parties estopped. (9) That there is no evidence that Grow had any authority to make any agreement, such as is proposed to be shown by parol, because the law lodged the authority to make any such agreement, if it could be made at all, wholly with the board of directors, and, furthermore, that there

is no evidence whatsoever of the ratification of such an agreement, which ratification could only be by the board of directors. (10) That the testimony would be immaterial and irrelevant. (11) It appears by the decree of foreclosure of the sold out International & Great Northern Railroad Company in May, 1910, and introduced by the plaintiffs, that all of the issues involved in said proposed testimony were settled, and if not settled were reserved exclusively for the United States Court. (12) The plaintiffs rely upon the act of the Legislature of Texas of 1889, carried into articles 6423-4-5 of the present Revised Statutes of Texas, and are now claiming that by such act, long subsequent to the alleged contract which they plead in this case, a lien, burden, or servitude were fixed upon the property or properties, or some of them, of the sold out I. & G. N. R. R., which have been ac quired by this defendant; without which lien or burden they can not recover; and in that by this statute and its terms they are extending and attempting to burden and add to the alleged contracts in its extensions and purported obligations, by going beyond the alleged contracts, whereby it appears, when applied to the facts of this case, that such act of 1889, as so construed, is unconstitutional and void and violates sub-section one of section X of article one of the Constitution of the United States, prohibiting any State from passing a law impairing the obligation of contracts. The plaintiffs claiming that their alleged personal contract so became secured first in 1889, and that in 1889 the statute placed other obligations on the alleged contracts, and not included in the contracts. (13) Because said act of the legislature of 1889 violates sub-section one of section X of article one of the Constitution of the United States and impairs the obligation of contracts when, and as construed by the plaintiffs and plead by them; without which construction and application they cannot recover; in that it appears, from the decree of foreclosure and evidence introduced by them, that the I. & G. N. R. R. was sold out under a mortgage termed

the second mortgage, issued in 1881; that the defendant is the assignee and holder as purchaser of all the rights whatsoever accruing to the mortgagees; and further, as to any obligations, claimed by the plaintiffs to have been imposed by the act of 1889 (all of which were additions to and burdens upon the alleged contract asserted by plaintiffs) they are, in violation of said mortgage, attempting to make prior in law rights which were junior in time, if any such rights existed, all of which is in violation of the Constitution of the United States, here and now invoked. (14) It appears that the plaintiffs rely upon said State act of 1889, as construed by them, which act is in violation, when so construed, of section one of article XIV of the Amendments to the Constitution of the United States, commonly called the XIV Amendment; in that such statute imposes great penalties; and in that the insistence that the statute is applicable to the defendant, constitutes an attempt to abridge the privileges and immunities of the defendant and to deprive it of its property without due process of law, and to deny it the equal protection of the law by penalizing or threatening to penalize it at the rate of $5,000 a day, and further penalize it, if it should resort to the courts to resist this action and litigate its rights by refusing to obey such unconstitutional statute. (15) The plaintiffs can not recover, as admitted by them, without the aid of said State Statute of 1889, which statute, as applied by them, is void and unconstitutional and violates section one of article 14 of the Amendments to the Constitution of the United States; in that it is an undue interference with the business and obligations of the defendant, which it owes to the public in state and interstate commerce; whereby it attempts to interfere with the lawful discretion and power of the defendant to conduct its business within the limits of the law; and whereby it attempts, by subsequent statute, to place burdens and liens and additions on and securing personal contracts as claimed by the plaintiffs, thereby denying to this defendant the equal

protection of the law and taking its property without due process of law by such illegal interference. (16) That the said act of 1889 of Texas, as applied, is unconstitutional and void, and yet without it the plaintiffs can not recover; in that such act is applicable only to chartered railroads and not applicable to individuals, receivers or other persons operating as railroad carriers, or to other persons or corporations whatsoever, and so violates section one of article XIV of the Amendments to the Constitution of the United States, being legislation against a species or class, not rightly classified on any legal ground; and in that it places a burden upon the species or class not placed upon other persons and corporations classifiable with it; thereby violating the prohibition of denying to any persons "the equal protection of the laws," and abridging the privileges and immunities of the defendant and depriving it of its property without due process of law. (17) The plaintiffs rely upon the said act of 1889, which is claimed by them to secure their alleged contracts in this case, which as applied, is illegal and void and contrary to the Constitution of the State of Texas: (a) because the same assesses a penalty of an amount prohibited by the Constitution; (b) because the statute as construed and pleaded is retroactive; (c) because the plaintiffs seek to recover in violation of the obligations and terms of the alleged contracts on which they sue and in violation of the mortgage contract, of the sold out railroad, made in 1881; (d) because such statute is *ex post facto* and pronounces penalties, and therein is contrary to the Constitution of the United States, as well as that of the state; (e) because as construed by plaintiffs the statute denies to the defendant the equal protection of the law and is violative of the due process of law; (f) because such statute as construed by the plaintiffs, and without which construction they can not prevail, is an attempt to place on this defendant, never assuming the same, alleged obligations of the sold out I. & G. N. R. R. or its predecessors, and which were personal to them. (17a) Because the plaintiffs alleged and attempted to

prove a contract binding "forever," the law and Constitution not permitting properties and obligations to be bound up or enforced "forever," and the alleged contracts being as claimed forever, or indeterminate, are terminable at option, if contracts at all, which is not admitted. (18) Because the plaintiffs have introduced the conveyance of the properties of the sold out railroad to this defendant, and also its charter and the decree of foreclosure under which the properties were sold, from which it appears that the defendant bought free of all the obligations now asserted by the plaintiffs. (19) Because plaintiffs have introduced the charter of the defendant, from which it appears the general offices are located at Houston, Texas, and the charter being legally issued, the defendant is bound to maintain its general offices at Houston, Texas. (20) Because it also appears that the H. & G. N. R. R.'s charter, introduced by the plaintiffs, required said offices to be at Houston, Texas, and the charter of the International, introduced by plaintiffs, not designating a definite place for the offices, and the two roads consolidated under act of 1889, the offices are obligated to be kept at Houston, Texas.

And the foregoing objections being argued, were submitted to the court, and were by him all overruled. Whereupon, the defendant excepted to this ruling and took its Bill No. 12, and over the defendant's objections, the witness testified as appears in the Statement of Facts, commencing with the third line from the top of page 155, and continuing to the paragraph commencing below the middle of page 158. Wherefore, the defendant presents this its Bill No. 12, and prays that it be allowed.

F. A. Williams,
N. A. Stedman,
Andrews, Ball & Streetman,
Wilson, Dabney & King,
Attorneys for Defendant.

Approved:

T. B. Greenwood,
Atty. for Plffs.

This Agreed Bill 12 was presented to me this 17th day of March, 1914, and is in all things approved and allowed.

A. E. DAVIS,
Judge Presiding.

DEFENDANT'S BILL OF EXCEPTION NO. 13.

ANDERSON COUNTY ET AL.

vs.

I. & G. N. RAILWAY COMPANY.

Filed Mar. 18, 1914.

BE IT REMEMBERED that on the trial of this case, the witness Wright being upon the stand, was asked whether or not Judge Reagan made a canvass of Anderson County in support of the bond issue; to which the defendant objected, being the objections included in its Bill of Exception 12, already approved, and also that this would be hearsay. To which the plaintiffs replied that they did not propose to show any declarations made by Judge Reagan, but merely that he made a canvass; but the defendant insisted upon its objection, which was overruled by the court, and the defendant then excepted, taking its Bill No. 13, and over the same the witness testified as appears upon page 158 of the Statement of Facts, extending to the paragraph commencing below the middle of the page. Wherefore, the defendant presents this its Bill 13, and prays that it be allowed.

N. A. STEDMAN,
F. A. WILLIAMS,
ANDREWS, BALL & STREETMAN,
WILSON, DABNEY & KING,
Attorneys for Defendant.

Approved:

T. B. GREENWOOD,
Atty. for Plffs.

This Agreed Bill 13 was presented to me this 17th day of March, 1914, and is in all things approved and allowed.

A. E. DAVIS,
Judge Presiding.

DEFENDANT'S BILL OF EXCEPTION NO. 14.

ANDERSON COUNTY ET AL.
vs.
I. & G. N. RAILWAY COMPANY.

Filed Mar. 18, 1914.

BE IT REMEMBERED that on the trial of this case the witness Wright being on the stand, called by the plaintiffs, the plaintiffs announced that they proposed to show by him what Grow said in his speech at Palestine, with reference to the contract alleged in their pleading to have been made between Grow and Reagan, the speech being proposed to be shown to have been made just about two days before the bond election, which took place on the first three or four days in May, 1872, in Palestine, the only voting place in the county on this bond issue, and they then asked Wright to state what Grow said in that speech. Whereupon, the defendant objected as follows:

(1) That it now developed, as shown by the contract with the County introduced by the plaintiffs, that there was a complete and perfectly legal written contract between Anderson County, Texas, and the H. & G. N. R. R., required by law to be in writing, and which could only legally be formed in writing, which, as shown by the petition, it was proposed to modify, add to, change, or vary by parol testimony; and that such writing being complete in itself could not be so modified, changed, varied or added to. (2) That the testimony offered as to what Judge Reagan said and what Grow said and others said

was hearsay. (3) That the testimony is offered, as appears by the pleadings and the statement now made by the plaintiffs, in support of a contract alleged to have been made in behalf of the citizens of Palestine acting by Judge Reagan upon an illegal consideration, to wit: Judge Reagan's alleged undertaking to induce and influence the voters of the county to vote a bond issue, the alleged consideration to the railroad being solely the engagement of Judge Reagan to induce and advocate such a bond issue. (4) That the evidence is offered for the purpose of showing an agreement or an alleged contract, in promotion of a County contract, and to attach to the County contract, which is in writing, an alleged promotion contract, which, if made, would be upon an illegal consideration and is prohibited by law and public policy. (5) That after the lapse of over 40 years it is not permissible to prove, in connection with a written contract with the County and the public, what were the inducements or considerations or representations outside of the written contract there were upon which it was made, nor can a written contract adopted by the voters be so modified. (6) That it appears from the pleadings, and tender of the testimony, that it is now proposed to show that Judge Reagan's services were hired to induce and influence the voters of Anderson County to vote a bond issue, on inducements outside of the writings, that the shops and general offices were to be erected in Palestine for the benefit of the people of Palestine, as contradistinguished from the people of the County, and that it would have been illegal to arrange to bestow such benefits upon the people of part of the county as contradistinguished from the people of all of the county. (7) That the proposed agreement, as plead and as proposed to be testified to in parol, if legal and provable under the law, which is denied, would have to be in writing, and comes within the terms of the statute of frauds, which is now invoked; and therefore it is not provable in parol. (8)

That after the lapse of over 40 years and after rights had been acquired and acted upon by various parties, on the basis of the written contract and agreement already introduced, it is not permissible to prove by parol the alleged contract. (8a) That a record of the transaction with the County introduced by plaintiffs, showed the judgment of the County Court settling the whole matter and the consideration for the contract, adjudged to have been performed by the railroad, whereby the matter was *res adjudicata,* and the parties estopped. (9) That there is no evidence that Grow had any authority to make any agreement, such as is proposed to be shown by parol, because the law lodged the authority to make any such agreement, if it could be made at all, wholly with the board of directors, and, furthermore, that there is no evidence whatsoever of the ratification of such an agreement, which ratification could only be by the board of directors. (10) That the testimony would be immaterial and irrelevant. (11) It appears by the decree of foreclosure of the sold out International & Great Northern Railroad Company in May, 1910, and introduced by the plaintiffs, that all of the issues involved in said proposed testimony were settled, and if not settled, were reserved exclusively for the United States Court. (12) The plaintiffs rely upon the act of the Legislature of Texas of 1889, carried into articles 6423-4-5 of the present Revised Statutes of Texas, and are now claiming that by such act, long subsequent to the alleged contract which they plead in this case, a lien, burden, or servitude were fixed upon the property or properties, or some of them, of the sold out I. & G. N. R. R., which have been acquired by this defendant; without which lien or burden they can not recover; and in that by this statute and its terms they are extending and attempting to burden and add to the alleged contracts in its extensions and purported obligations, by going beyond the alleged contracts, whereby it appears, when applied to the facts of this case,

that such act of 1889, as so construed, is unconstitutional and void and violates sub-section one of section X of article one of the Constitution of the United States, prohibiting any State from passing a law impairing the obligation of contracts. The plaintiffs claiming that their alleged personal contract so became secured first in 1889, and that in 1889 the statute placed other obligations on the alleged contracts, and not included in the contracts. (13) Because said act of the legislature of 1889 violates sub-section one of section X of article one of the Constitution of the United States and impairs the obligation of contracts when, and as construed by the plaintiffs and plead by them; without which construction and application they can not recover; in that it appears, from the decree of foreclosure and evidence introduced by them, that the I. & G. N. R. R. was sold out under a mortgage termed the second mortgage, issued in 1881; that the defendant is the assignee and holder as purchaser of all the rights whatsoever accruing to the mortgagees; and further, as to any obligations, claimed by the plaintiffs to have been imposed by the act of 1889 (all of which were additions to and burdens upon the alleged contract asserted by plaintiffs) they are, in violation of said mortgage, attempting to make prior in law rights which were junior in time, if any such rights existed, all of which is in violation of the Constitution of the United States, here and now invoked. (14) It appears that the plaintiffs rely upon said State act of 1889, as construed by them, which act is in violation, when so construed, of section one of article XIV of the Amendments to the Constitution of the United States, commonly called the XIV Amendment; in that such statute imposes great penalties; and in that the insistence that the statute is applicable to the defendant, constitutes an attempt to abridge the privileges and immunities of the defendant and to deprive it of its property without due process of law, and to deny it the equal protection of the law by penalizing or threatening

to penalize it at the rate of $5000 a day, and further penalize it, if it should resort to the courts to resist this action and litigate its rights by refusing to obey such unconstitutional statute. (15) The plaintiffs can not recover, as admitted by them, without the aid of said State Statute of 1889, which statute, as applied by them, is void and unconstitutional and violates section one of article 14 of the Amendments to the Constitution of the United States; in that it is an undue interference with the business and obligations of the defendant, which it owes to the public in state and interstate commerce; whereby it attempts to interfere with the lawful discretion and power of the defendant to conduct its business within the limits of the law; and whereby it attempts, by subsequent statute, to place burdens and liens and additions on and securing personal contracts as claimed by the plaintiffs, thereby denying to this defendant the equal protection of the law and taking its property without due process of law by such illegal interference. (16) That the said act of 1889 of Texas, as applied, is unconstitutional and void, and yet without it the plaintiffs cannot recover; in that such act is applicable only to chartered railroads and not applicable to individuals, receivers or other persons operating as railroad carriers, or to other persons or corporations whatsoever, and so violates section one of article XIV of the Amendments to the Constitution of the United States, being legislation against a species or class, not rightly classified on any legal ground; and in that it places a burden upon the species or class not placed upon other persons and corporations classifiable with it; thereby violating the prohibition of denying to any persons "the equal protection of the laws," and abridging the privileges and immunities of the defendant and depriving it of its property without due process of law. (17) The plaintiffs rely upon the said act of 1889, which is claimed by them to secure their alleged contracts in this case, which, as applied, is illegal

and void and contrary to the Constitution of the State of Texas: (a) because the same assesses a penalty of an amount prohibited by the Constitution; (b) because the statute as construed and pleaded is retroactive; (c) because the plaintiffs seek to recover in violation of the obligations and terms of the alleged contracts on which they sue and in violation of the mortgage contract, of the sold out railroad, made in 1881; (d) because such statute is *ex post facto* and pronounces penalties, and therein is contrary to the Constitution of the United States, as well as that of the State; (e) because as construed by plaintiffs the statute denies to the defendant the equal protection of the law and is violative of the due process of law; (f) because such statute as construed by the plaintiffs, and without which construction they can not prevail, is an attempt to place on this defendant, never assuming the same, alleged obligations of the sold out I. & G. N. R. R. or its predecessors, and which were personal to them. (17a) Because the plaintiffs alleged and attempted to prove a contract binding "forever," the law and Constitution not permitting properties and obligations to be bound up or enforced "forever," and the alleged contracts being as claimed forever, or indeterminate, are terminable at option, if contracts at all, which is not admitted. (18) Because the plaintiffs have introduced the conveyance of the properties of the sold out railroad to this defendant, and also its charter and the decree of foreclosure under which the properties were sold, from which it appears that the defendant bought free of all the obligations now asserted by the plaintiffs. (19) Because plaintiffs have introduced the charter of the defendant, from which it appears the general offices are located at Houston, Texas, and the charter being legally issued, the defendant is bound to maintain its general offices at Houston, Texas. (20) Because it also appears that the H. & G. N. R. R.'s charter, introduced by the plaintiffs, required said offices to be at Houston, Texas,

and the charter of the International, introduced by plaintiffs, not designating a definite place for the offices, and the two roads consolidated under act of 1889, the offices are obligated to be kept at Houston, Texas.

And also, as follows: (1) That a contract agreement cannot be made by campaign speeches; and campaign and electioneering promises and statements were inadmissible in order to show what the contract was, or to add to, modify, or change the same. (2) That the testimony was hearsay. (3) That it is not introducable after this immense lapse of time. (4) That if admitted in evidence, it is a statement which would not bind the defendant, which had purchased the property under foreclosure mortgage of 1881, as shown by the evidence. (5) That it was not shown that Grow had any authority to make such contract or agreement, if any there was. (6) That the admissions of Grow, if any, as an agent, were not now provable.

And thereupon, the objections having been made, at the request of plaintiffs' counsel, the court stated to the jury that the testimony, with regard to what Grow may have said in his speech in front of the court house at Palestine, was only admitted to be considered by the jury in determining whether there was a contract between the citizens of Palestine and the Railroad Company, as alleged by the plaintiffs, and not with Anderson County, and that they should not consider such testimony for any other purpose.

And thereupon, the court overruled all of the defendant's objections. Whereupon, the defendant, in view of the court's statement, renewed each and all of them, and the court again overruled all of these objections, and the defendant excepted and took its Bill No. 14, and over these objections the witness Wright testified as to what he said Grow stated in the speech mentioned; all as appears commencing on the tenth line from the bottom of page 159, and extending into the 7th line from bot-

tom of page 160 of the Statement of Facts. Wherefore, the defendant presents this its Bill of Exception No. 14, and prays that it be allowed.

F. A. WILLIAMS,
N. A. STEDMAN,
ANDREWS, BALL & STREETMAN,
WILSON, DABNEY & KING,
Attorneys for Defendant.

Approved:
T. B. GREENWOOD,
Atty. for Plffs.

This Agreed Bill 14 was presented to me this 17th day of March, 1914, and is in all things approved and allowed.

A. E. DAVIS,
Judge Presiding.

DEFENDANT'S BILL OF EXCEPTION NO. 15.

ANDERSON COUNTY ET AL.
vs.
I. & G. N. RAILWAY COMPANY.

Filed Mar. 18, 1914.

BE IT REMEMBERED that upon the trial of this case, the witness Wright being upon the stand, testified that he saw Grow, the President of the H. & G. N., when he came to Palestine to get the bonds issued by Anderson County to the H. & G. N., and that Grow asked him to go to the County Court with him, which he, witness, stated he did. The witness was next asked to state what took place between Grow and the court, and what Grow told the court when he presented his written application to the court for the bonds already in evidence as part of the record of the bond issue. To all of which the defendant objected as follows:

(1) That it now developed, as shown by the contract

with the County introduced by the plaintiffs, that there was a complete and perfectly legal written contract between Anderson County, Texas, and the H. & G. N. R. R., required by law to be in writing, and which could only legally be formed in writing, which, as shown by the petition, it was proposed to modify, add to, change, or vary by parol testimony; and that such writing being complete in itself could not be so modified, changed, varied or added to. (2) That the testimony offered as to what Judge Reagan said and what Grow said and others said was hearsay. (3) That the testimony is offered, as appears by the pleadings and the statement now made by the plaintiffs, in support of a contract alleged to have been made in behalf of the citizens of Palestine acting by Judge Reagan upon an illegal consideration, to wit: Judge Reagan's alleged undertaking to induce and influence the voters of the county to vote a bond issue, the alleged consideration to the railroad being solely the engagement of Judge Reagan to induce and advocate such a bond issue. (4) That the evidence is offered for the purpose of showing an agreement or an alleged contract, in promotion of a County contract, and to attach to the County contract, which is in writing, an alleged promotion contract, which, if made, would be upon an illegal consideration and is prohibited by law and public policy. (5) That after the lapse of over 40 years it is not permissible to prove, in connection with a written contract with the County and the public, what were the inducements or considerations or representations outside of the written contract there were upon which it was made, nor can a written contract adopted by the voters be so modified. (6) That it appears from the pleadings, and tender of the testimony, that it is now proposed to show that Judge Reagan's services were hired to induce and influence the voters of Anderson County to vote a bond issue, on inducements outside of the writings, that the shops and general offices were to be erected in Pal-

estine for the benefit of the people of Palestine, as contradistinguished from the people of the County, and that it would have been illegal to arrange to bestow such benefits upon the people of part of the county as contradistinguished from the people of all of the county. (7) That the proposed agreement, as plead and as proposed to be testified to in parol, if legal and provable under the law, which is denied, would have to be in writing, and comes within the terms of the statute of frauds, which is now invoked; and therefore it is not provable in parol. (8) That after the lapse of over 40 years and after rights had been acquired and acted upon by various parties, on the basis of the written contract and agreement already introduced, it is not permissible to prove by parol the alleged contract. (8a) That a record of the transaction with the County introduced by plaintiffs, showed the judgment of the County Court settling the whole matter, and the considerations for the contract, adjudged to have been performed by the railroad, whereby the matter was *res adjudicata*, and the parties estopped. (9) That there is no evidence that Grow had any authority to make any agreement, such as is proposed to be shown by parol, because the law lodged the authority to make any such agreement, if it could be made at all, wholly with the board of directors, and, furthermore, that there is no evidence whatsoever of the ratification of such an agreement, which ratification could only be by the board of directors. (10) That the testimony would be immaterial and irrelevant. (11) It appears by the decree of foreclosure of the sold out International & Great Northern Railroad Company in May, 1910, and introduced by the plaintiffs, that all of the issues involved in said proposed testimony were settled, and if not settled were reserved exclusively for the United States Court. (12) The plaintiffs rely upon the act of the Legislature of Texas of 1889, carried into articles 6423-4-5 of the present Revised Statutes of Texas, and are now claiming that by

such act, long subsequent to the alleged contract which they plead in this case, a lien, burden, or servitude were fixed upon the property or properties, or some of them, of the sold out I. & G. N. R. R., which have been acquired by this defendant; without which lien or burden they cannot recover; and in that by this statute and its terms they are extending and attempting to burden and add to the alleged contracts in its extensions and purported obligations, by going beyond the alleged contracts, whereby it appears, when applied to the facts of this case, that such act of 1889, as so construed, is unconstitutional and void and violates sub-section one of section X or article one of the Constitution of the United States, prohibiting any State from passing a law impairing the obligation of contracts. The plaintiffs claiming that their alleged personal contract so became secured first in 1889, and that in 1889 the statute placed other obligations on the alleged contracts, and not included in the contracts. (13) Because said act of the legislature of 1889 violates sub-section one of section X of article one of the Constitution of the United States and impairs the obligation of contracts when, and as construed by the plaintiffs and plead by them; without which construction and application they cannot recover; in that it appears, from the decree of foreclosure and evidence introduced by them, that the I. & G. N. R. R. was sold out under a mortgage termed the second mortgage, issued in 1881; that the defendant is the assignee and holder as purchaser of all the rights whatsoever accruing to the mortgagees; and further, as to any obligations, claimed by the plaintiffs to have been imposed by the act of 1889 (all of which were additions to and burdens upon the alleged contract asserted by plaintiffs) they are, in violation of said mortgage, attempting to make prior in law rights which were junior in time, if any such rights existed, all of which is in violation of the Constitution of the United States, here and now invoked. (14) It appears that the plaintiffs rely

upon said State act of 1889, as construed by them, which act is in violation, when so construed, of section one of article XIV of the Amendments to the Constitution of the United States, commonly called the XIV Amendment; in that such statute imposes great penalties; and in that the insistence that the statute is applicable to the defendant, constitutes an attempt to abridge the privileges and immunities of the defendant and to deprive it of its property without due process of law, and to deny it the equal protection of the law by penalizing or threatening to penalize it at the rate of $5000 a day, and further penalize it, if it should resort to the courts to resist this action and litigate its rights by refusing to obey such unconstitutional statute. (15) The plaintiffs cannot recover, as admitted by them, without the aid of said State Statute of 1889, which statute, as applied by them, is void and unconstitutional and violates section one of article 14 of the Amendments to the Constitution of the United States; in that it is an undue interference with the business and obligations of the defendant, which it owes to the public in state and interstate commerce; whereby it attempts to interfere with the lawful discretion and power of the defendant to conduct its business within the limits of the law; and whereby it attempts, by subsequent statute, to place burdens and liens and additions on and securing personal contracts as claimed by the plaintiffs, thereby denying to this defendant the equal protection of the law, and taking its property without due process of law by such illegal interference. (16) That the said act of 1889 of Texas, as applied, is unconstitutional and void, and yet without it the plaintiffs cannot recover; in that such act is applicable only to chartered railroads and not applicable to individuals, receivers or other persons operating as railroad carriers, or to other persons or corporations whatsoever, and so violates section one of article XIV of the Amendments to the Constitution of the United States, being legislation against

a species or class, not rightly classified on any legal ground; and in that it places a burden upon the species or class not placed upon other persons and corporations classifiable with it; thereby violating the prohibition of denying to any persons "the equal protection of the laws," and abridging the privileges and immunities of the defendant and depriving it of its property without due process of law. (17) The plaintiffs rely upon the said act of 1889, which is claimed by them to secure their alleged contracts in this case, which as applied, is illegal and void and contrary to the Constitution of the State of Texas: (a) because the same assesses a penalty of an amount prohibited by the Constitution; (b) because the statute as construed and pleaded is retroactive; (c) because the plaintiffs seek to recover in violation of the obligations and terms of the alleged contracts on which they sue, and in violation of the mortgage contract, of the sold out railroad, made in 1881; (d) because such statute is *ex post facto* and pronounces penalties, and therein is contrary to the Constitution of the United States, as well as that of the State; (e) because as construed by plaintiffs the statute denies to the defendant the equal protection of the law and is violative of the due process of law; (f) because such statute as construed by the plaintiffs, and without which construction they cannot prevail, is an attempt to place on this defendant, never assuming the same, alleged obligations of the sold out I. G. N. R. R. or its predecessors, and which were personal to them. (17a) Because the plaintiffs alleged and attempted to prove a contract binding "forever," the law and Constitution not permitting properties and obligations to be bound up or enforced "forever," and the alleged contracts being as claimed forever, or indeterminate, are terminable at option, if contracts at all, which is not ad-

mitted. (18) Because the plaintiffs have introduced the conveyance of the properties of the sold out railroad to this defendant, and also its charter and the decree of foreclosure under which the properties were sold, from which it appears that the defendant bought free of all the obligations now asserted by the plaintiffs. (19) Because plaintiffs have introduced the charter of the defendant, from which it appears the general offices are located at Houston, Texas, and the charter being legally issued, the defendant is bound to maintain its general offices at Houston, Texas. (20) Because it also appears that the H. & G. N. R. R.'s charter, introduced by the plaintiffs, required said offices to be at Houston, Texas, and the charter of the International, introduced by plaintiffs, not designating a definite place for the offices, and the two roads consolidated under act of 1889, the offices are obligated to be kept at Houston, Texas.

And also, the defendant objected that the obligations between the county and the railroad company were fixed, when Grow applied for the bonds, the election having been held and the railroad built in, and that the contract was not subject to modifications and there could not have been at that time any consideration either way for additional contracts; and also, that the record and judgment of the County Court introduced by the plaintiffs declared that the railroad had already performed its obligations, and that such judgment could not be impeached.

Which objections being considered by the court were all overruled, and the defendant excepted, and took its Bill No. 15, and over the objections, the witness testified as appears, commencing on the third line from the bottom of page 161, and extending on page 162 to the paragraph commencing ten lines from the bottom thereof. Where-

fore, the defendant presents this its Bill 15, and prays that it be allowed.

N. A. Stedman,
F. A. Williams,
Andrews, Ball & Streetman,
Wilson, Dabney & King,
Attorneys for Defendant.

Approved:
T. B. Greenwood,
Atty. for Plffs.

This Agreed Bill 15 was presented to me this 17th day of March, 1914, and is in all things approved and allowed.

A. E. Davis,
Judge Presiding.

DEFENDANT'S BILL OF EXCEPTION NO. 16.

ANDERSON COUNTY ET AL.
vs.
I. & G. N. RAILWAY COMPANY.

Filed Mar. 18, 1914.

BE IT REMEMBERED that upon the trial of this case, the witness Wright being upon the stand, the plaintiffs stated that they proposed to prove by him descriptions of properties, sites and acreage, etc., in Palestine, for the purpose of showing that their alleged contracts were performed, and to show ratification. Whereupon, the defendant objected that the matters proposed to be shown were subsequent to the transactions attempted to be proved, and therefore could have no tendency to prove it, and were immaterial and irrelevant. They opposed, also, the following objections, to wit: those set out in Bill of Exceptions No. 12, now referred to, and which has been allowed.

And these objections having been considered by the

court, were all by him overruled, and the defendant then excepted and took its Bill No. 16, and over these objections the plaintiffs testified as appears on page 163 of the Statement of Facts. Wherefore, the defendant presents this its Bill No. 16, and prays that it be allowed.

N. A. STEDMAN,
F. A. WILLIAMS,
ANDREWS, BALL & STREETMAN,
WILSON, DABNEY & KING,
Attorneys for Defendant.

Approved:
T. B. GREENWOOD,
Atty. for Plffs.

This Agreed Bill 16 was presented to me this 17th day of March, A. D. 1914, and is in all things approved and allowed.

A. E. DAVIS,
Judge Presiding.

DEFENDANT'S BILL OF EXCEPTION NO. 17.

ANDERSON COUNTY ET AL.
vs.
I. & G. N. RAILWAY COMPANY.

Filed Mar. 18, 1914.

BE IT REMEMBERED that on the trial of this case, the witness Wright being upon the stand, the plaintiffs stated that they proposed to prove descriptions of the properties of the I. & G. N. Railroad Company at Palestine, their sites, acreage, etc., for the purpose of showing that their alleged contracts were performed, and to show ratification, and then proceeded to ask the witness Wright to describe such properties, and as they stand now, owned by the defendant. To which question and any answer thereto the defendant objected that the mat-

ters proposed to be shown were subsequent to the transaction intended to be proved, and were also immaterial and irrelevant, and they also opposed all of the objections set out in their Bill of Exceptions No. 12, which has been allowed by the court, and re-stated them to the court.

Which objections being considered, were by the court overruled, and the defendant took this its Bill of Exception No. 17, and over the objections, the witness testified as appears, commencing near the middle of page 163, and extending through the first paragraph on page 164 of the St. F. Wherefore, the defendant presents this its Bill of Exceptions No. 17, and prays that it be allowed.

N. A. Stedman,
F. A. Williams,
Andrews, Ball & Streetman,
Wilson, Dabney & King,
Attorneys for Defendant.

Approved:
T. B. Greenwood,
Atty. for Plffs.

This Agreed Bill 17 was presented to me this 17th day of March, 1914, and is in all things approved and allowed.

A. E. Davis,
Judge Presiding.

BILL OF EXCEPTION NO. 18.

ANDERSON COUNTY ET AL.
vs.
I. & G. N. RAILWAY COMPANY.

Filed Mar. 18, 1914.

BE IT REMEMBERED that on the trial of this case. the witness Wright being on the stand, testified that he knew H. M. Hoxie, Superintendent, he thought, of the

I. & G. N. Railroad Company, and that in 1875 he had a transaction with Hoxie relative to the general office of the I. & G. N. Railroad Company. He was then asked what took place at that transaction, state all of it and who were present, and what was done and said at that meeting, and to describe the meeting, and also what was done in pursuance of any agreement made thereafter. Whereupon, the defendant objected to the questions and any answers thereto, as follows:

(1) That it now developed, as shown by the contract with the County introduced by the plaintiffs that there was a complete and perfectly legal written contract between Anderson County, Texas, and the H. & G. N. R. R., required by law to be in writing, and which could only legally be formed in writing, which, as shown by the petition, it was proposed to modify, add to, change, or vary by parol testimony; and that such writing being complete in itself could not be so modified, changed, varied or added to. (2) That the testimony offered as to what Judge Reagan said and what Grow said and others said was hearsay. (3) That the testimony is offered, as appears by the pleadings and the statement now made by the plaintiffs, in support of a contract alleged to have been made in behalf of the citizens of Palestine acting by Judge Reagan, upon an illegal consideration, to wit: Judge Reagan's alleged undertaking to induce and influence the voters of the county to vote a bond issue, the alleged consideration to the railroad being solely the engagement of Judge Reagan to induce and advocate such a bond issue. (4) That the evidence is offered for the purpose of showing an agreement or an alleged contract, in promotion of a County contract, and to attach to the County contract, which is in writing, an alleged promotion contract, which, if made, would be upon an illegal consideration and is prohibited by law and public policy. (5) That after the lapse of over 40 years it is not permissible to prove, in connection with a written contract with the County and the public, what were the

inducements or considerations or representations outside of the written contract there were upon which it was made, nor can a written contract adopted by the voters be so modified. (6) That it appears from the pleadings, and tender of the testimony, that it is now proposed to show that Judge Reagan's services were hired to induce and influence the voters of Anderson County to vote a bond issue, on inducements outside of the writings, that the shops and general offices were to be erected in Palestine for the benefit of the people of Palestine, as contradistinguished from the people of the County, and that it would have been illegal to arrange to bestow such benefits upon the people of part of the county as contradistinguished from the people of all of the county. (7) That the proposed agreement, as plead and as proposed to be testified to in parol, if legal and provable under the law, which is denied, would have to be in writing, and comes within the terms of the statute of frauds, which is now invoked; and therefore it is not provable in parol. (8) That after the lapse of over 40 years and after rights had been acquired and acted upon by various parties, on the basis of the written contract and agreement already introduced, it is not permissible to prove by parol the alleged contract. (8a) That a record of the transaction with the County introduced by plaintiffs, showed the judgment of the County Court settling the whole matter and the considerations for the contract, adjudged to have been performed by the railroad, whereby the matter was *res adjudicata,* and the parties estopped. (9) That there is no evidence that Grow had any authority to make any agreement, such as is proposed to be shown by parol, because the law lodged the authority to make any such agreement, if it could be made at all, wholly with the board of directors, and, furthermore, that there is no evidence whatsoever of the ratification of such an agreement, which ratification could only be by the board of directors. (10) That the testimony would be immaterial and irrelevant. (11) It appears by the decree of

foreclosure of the sold out International & Great Northern Railroad Company in May, 1910, and introduced by the plaintiffs, that all of the issues involved in said proposed testimony were settled, and if not settled were reserved exclusively for the United States Court. (12) The plaintiffs rely upon the act of the Legislature of Texas of 1889, carried into articles 6423-4-5 of the present Revised Statutes of Texas, and are now claiming that by such act, long subsequent to the alleged contract which they plead in this case, a lien, burden, or servitude were fixed upon the property or properties, or some of them, of the sold out I. & G. N. R. R., which have been ac quired by this defendant; without which lien or burden they can not recover; and in that by this statute and its terms they are extending and attempting to burden and add to the alleged contracts in its extensions and purported obligations, by going beyond the alleged contracts, whereby it appears, when applied to the facts of this case, that such act of 1889, as so construed, is unconstitutional and void and violates sub-section one of section X of article one of the Constitution of the United States, prohibiting any State from passing a law impairing the obligation of contracts. The plaintiffs claiming that their alleged personal contract so became secured first in 1889, and that in 1889 the statute placed other obligations on the alleged contracts, and not included in the contracts. (13) Because said act of the legislature of 1889 violates sub-section one of section X of article one of the Constitution of the United States and impairs the obligation of contracts when, and as construed by the plaintiffs and plead by them; without which construction and application they cannot recover; in that it appears, from the decree of foreclosure and evidence introduced by them, that the I. & G. N. R. R. was sold out under a mortgage termed the second mortgage, issued in 1881; that the defendant is the assignee and holder as purchaser of all the rights whatsoever accruing to the mortgagees; and further, as to any obligations, claimed by the plaintiffs to have been

imposed by the act of 1889 (all of which were additions to and burdens upon the alleged contract asserted by plaintiffs) they are, in violation of said mortgage, attempting to make prior in law rights which were junior in time, if any such rights existed, all of which is in violation of the Constitution of the United States, here and now invoked. (14) It appears that the plaintiffs rely upon said State act of 1889, as construed by them, which act is in violation, when so construed, of section one of article XIV of the Amendments to the Constitution of the United States, commonly called the XIV Amendment; in that such statute imposes great penalties; and in that the insistence that the statute is applicable to the defendant, constitutes an attempt to abridge the privileges and immunities of the defendant and to deprive it of its property without due process of law, and to deny it the equal protection of the law by penalizing or threatening to penalize it at the rate of $5,000 a day, and further penalize it, if it should resort to the courts to resist this action and litigate its rights by refusing to obey such unconstitutional statute. (15) The plaintiffs can not recover, as admitted by them, without the aid of said State Statute of 1889, which statute, as applied by them, is void and unconstitutional and violates section one of article 14 of the Amendments to the Constitution of the United States; in that it is an undue interference with the business and obligations of the defendant, which it owes to the public in state and interstate commerce; whereby it attempts to interfere with the lawful discretion and power of the defendant to conduct its business within the limits of the law; and whereby it attempts, by subsequent statute, to place burdens and liens and additions on and securing personal contracts as claimed by the plaintiffs, thereby denying to this defendant the equal protection of the law and taking its property without due process of law by such illegal interference. (16) That the said act of 1889 of Texas, as applied, is unconstitutional and void, and yet without it the plaintiffs can not re-

cover; in that such act is applicable only to chartered railroads and not applicable to individuals, receivers or other persons operating as railroad carriers, or to other persons or corporations whatsoever, and so violates section one of article XIV of the Amendments to the Constitution of the United States, being legislation against a species or class, not rightly classified on any legal ground; and in that it places a burden upon the species or class not placed upon other persons and corporations classifiable with it; thereby violating the prohibition of denying to any persons "the equal protection of the laws," and abridging the privileges and immunities of the defendant and depriving it of its property without due process of law. (17) The plaintiffs rely upon the said act of 1889, which is claimed by them to secure their alleged contracts in this case, which as applied, is illegal and void and contrary to the Constitution of the State of Texas: (a) because the same assesses a penalty of an amount prohibited by the Constitution; (b) because the statute as construed and pleaded is retroactive; (c) because the plaintiffs seek to recover in violation of the obligations and terms of the alleged contracts on which they sue and in violation of the mortgage contract, of the sold out railroad, made in 1881; (d) because such statute is *ex post facto* and pronounces penalties, and therein is contrary to the Constitution of the United States, as well as that of the state; (e) because as construed by plaintiffs the statute denies to the defendant the equal protection of the law and is violative of the due process of law; (f) because such statute as construed by the plaintiffs, and without which construction they can not prevail, is an attempt to place on this defendant, never assuming the same, alleged obligations of the sold out I. & G. N. R. R. or its predecessors, and which were personal to them. (17a) Because the plaintiffs alleged and attempted to prove a contract binding "forever," the law and Constitution not permitting properties and obligations to be bound up or enforced "forever," and the alleged con-

tracts being as claimed forever, or indeterminate, are terminable at option, if contracts at all, which is not admitted. (18) Because the plaintiffs have introduced the conveyance of the properties of the sold out railroad to this defendant, and also its charter and the decree of foreclosure under which the properties were sold, from which it appears that the defendant bought free of all the obligations now asserted by the plaintiffs. (19) Because plaintiffs have introduced the charter of the defendant, from which it appears the general offices are located at Houston, Texas, and the charter being legally issued, the defendant is bound to maintain its general offices at Houston, Texas. (20) Because it also appears that the H. & G. N. R. R.'s charter, introduced by the plaintiffs, required said offices to be at Houston, Texas, and the charter of the International, introduced by plaintiffs, not designating a definite place for the offices, and the two roads consolidated under act of 1889, the offices are obligated to be kept at Houston, Texas.

And furthermore: (1) That the plaintiffs now state that Captain R. S. Hayes, then the General Manager or superior of Mr. Hoxie, of the I. & G. N. R. R., was proposed to be brought into the transaction; that this testimony, obviously, will relate to the "Rent-House" alleged contract set forth in plaintiffs' petition, wherein Captain Hayes is not mentioned, and that no transaction can be based upon him, it being plead that the transaction was made with Hoxie, not with Hayes. (2) That the bonds issued by the county had been already delivered, and it was a closed transaction, and that therefore there could be no consideration for this alleged "Rent-House" transaction; (3) that the alleged "Rent-House" transaction was a transaction which, if it constituted a contract, which is not admitted, was required by the statute of frauds to be in writing, and cannot, therefore, be proved in parol; (4) that, as alleged, no contract is stated; (5) that, as alleged, and within the

terms of the allegation, there was shown no consideration to the Railroad for any contract; (6) that, as alleged, the contract was indefinite as to time, if it was a contract, which is not admitted, and therefore was at the option of either party to discontinue the performance, and was not further enforceable; (7) that an alleged contract binding "forever" was plead, and that no such agreement, if made, could be a contract, as no such contract could be "forever." And all of the objections hereinabove stated were by the court overruled, and to the ruling of the court the defendant then excepted and took its Bill of Exceptions No. 18, and over such exceptions, the witness testified as set out, commencing on page 165 at the beginning of paragraph, eighth line from bottom, and extending to cross-examination of Wright on page 171 of the Statement of Facts. Wherefore, the defendant presents this its Bill 18, and prays that it be allowed.

F. A. Williams,
N. A. Stedman,
Andrews, Ball & Streetman,
Wilson, Dabney & King,
Attorneys for Defendant.

Approved:
T. B. Greenwood,
Atty. for Plffs.

This Agreed Bill 18 was presented to me this 17th day of March, 1914, and is in all things approved and allowed.

A. E. Davis,
Judge Presiding.

DEFENDANT'S BILL OF EXCEPTION NO. 18*a*.

ANDERSON COUNTY ET AL.

vs.

I. & G. N. RAILWAY COMPANY.

Filed Mar. 18, 1914.

BE IT REMEMBERED that on the trial of this case,

the witness Wright called by plaintiffs, stated that at the meeting with Hoxie in the early part of 1875, Hoxie told Ozment, present at that meeting, that he had received a letter from Grow, and was proceeding to testify as to what Hoxie stated was the contents of that letter, covering matter already included in Bill of Exception No. 18, but the defendant then also specially objected to his testifying to the contents of such letter, because his testimony would be hearsay, and because Hoxie's statement of what was in the letter was hearsay, and also because Grow was not then in the service of the company, and had severed his connection with the company, and because no accepted statement from him could bind the company, nor could any admissions made by him at that time, in 1875, he, at most, merely having been an agent; and that an agent's admissions were not, under these circumstances, admissible. These objections being made, plaintiffs' counsel stated that notice had been given to the defendant to produce the original of it, and defendant's counsel stated that search had been made, and that if there was ever such a letter, none could be found, the notice having been given about ten days before the trial.

Which objections were then overruled by the court, and the defendant excepted and took this its Bill 18-a, and over these objections, the witness testified that Hoxie stated to Ozment on this occasion that he had a letter from Galusha A. Grow, insisting on his (Hoxie) complying with the contract, which Grow stated in this letter he had made with Judge Reagan, whereby Grow said that he and Judge Reagan had agreed to locate the general offices at Palestine, as well as the shops and roundhouses, and that he wanted it to be done, as appears in Statement of Facts on page 166. Wherefore, the defendant pre-

sents this its Bill of Exceptions No. 18-a, and prays that it be allowed.

N. A. Stedman,
F. A. Williams,
Andrews, Ball & Streetman,
Wilson, Dabney & King,
Attorneys for Defendant.

Approved:
T. B. Greenwood,
Atty. for Plffs.

This Agreed Bill 18-a was presented to me this 17th day of March, 1914, and is in all things approved and allowed.

A. E. Davis,
Judge Presiding.

DEFENDANT'S BILL NO. 19.

ANDERSON COUNTY ET AL.
vs.
I. & G. N. RAILWAY COMPANY.

Filed Mar. 18, 1914.

BE IT REMEMBERED that upon the trial of this case, Mrs. John H. Reagan was called as a witness by the plaintiffs, and stated that she knew of a meeting at which she was personally present, between Judge Reagan and Galusha A. Grow, President of the H. & G. N. R. R., and which took place at Judge Reagan's residence in March, 1872, Grow being accompanied by Noble and Wright, who, with herself and Judge Reagan alone were present. She was then requested to state what took place at this conference, and what was said and done; whereupon the defendant objected as follows:

(1) That it now developed, as shown by the contract with the County introduced by the plaintiffs, that there

was a complete and perfectly legal written contract between Anderson County, Texas, and the H. & G. N. R. R., required by law to be in writing, and which could only legally be formed in writing, which, as shown by the petition, it was proposed to modify, add to, change, or vary by parol testimony; and that such writing being complete in itself could not be so modified, changed, varied or added to. (2) That the testimony offered as to what Judge Reagan said and what Grow said and others said was hearsay. (3) That the testimony is offered, as appears by the pleadings and the statement now made by the plaintiffs, in support of a contract alleged to have been made in behalf of the citizens of Palestine acting by Judge Reagan upon an illegal consideration, to wit: Judge Reagan's alleged undertaking to induce and influence the voters of the county to vote a bond issue, the alleged consideration to the railroad being solely the engagement of Judge Reagan to induce and advocate such a bond issue. (4) That the evidence is offered for the purpose of showing an agreement or an alleged contract, in promotion of a County contract, and to attach to the County contract, which is in writing, an alleged promotion contract, which, if made, would be upon an illegal consideration and is prohibited by law and public policy. (5) That after the lapse of over 40 years it is not permissible to prove, in connection with a written contract with the County and the public, what were the inducements or considerations or representations outside of the written contract there were upon which it was made, nor can a written contract adopted by the voters be so modified. (6) That it appears from the pleadings, and tender of the testimony, that it is now proposed to show that Judge Reagan's services were hired to induce and influence the voters of Anderson County to vote a bond issue, on inducements outside of the writings, that the shops and general offices were to be erected in Palestine for the benefit of the people of Palestine, as con-

tradistinguished from the people of the County, and that it would have been illegal to arrange to bestow such benefits upon the people of part of the county as contradistinguished from the people of all of the county. (7) That the proposed agreement, as plead and as proposed to be testified to in parol, if legal and provable under the law, which is denied, would have to be in writing, and comes within the terms of the statute of frauds, which is now invoked; and therefore it is not provable in parol. (8) That after the lapse of over 40 years and after rights had been acquired and acted upon by various parties, on the basis of the written contract and agreement already introduced, it is not permissible to prove by parol the alleged contract. (8a) That a record of the transaction with the County introduced by plaintiffs, showed the judgment of the County Court settling the whole matter and the consideration for the contract, adjudged to have been performed by the railroad, whereby the matter was *res adjudicata*, and the parties estopped. (9) That there is no evidence that Grow had any authority to make any agreement, such as is proposed to be shown by parol, because the law lodged the authority to make any such agreement, if it could be made at all, wholly with the board of directors, and, furthermore, that there is no evidence whatsoever of the ratification of such an agreement, which ratification could only be by the board of directors. (10) That the testimony would be immaterial and irrelevant. (11) It appears by the decree of foreclosure of the sold out International & Great Northern Railroad Company in May, 1910, and introduced by the plaintiffs, that all of the issues involved in said proposed testimony were settled, and if not settled, were reserved exclusively for the United States Court. (12) The plaintiffs rely upon the act of the Legislature of Texas of 1889, carried into articles 6423-4-5 of the present Revised Statutes of Texas, and are now claiming that by such act, long subsequent to the alleged contract which

they plead in this case, a lien, burden, or servitude were fixed upon the property or properties, or some of them, of the sold out I. & G. N. R. R., which have been acquired by this defendant; without which lien or burden they can not recover; and in that by this statute and its terms they are extending and attempting to burden and add to the alleged contracts in its extensions and purported obligations, by going beyond the alleged contracts, whereby it appears, when applied to the facts of this case, that such act of 1889, as so construed, is unconstitutional and void and violates sub-section one of section X of article one of the Constitution of the United States, prohibiting any State from passing a law impairing the obligation of contracts. The plaintiffs claiming that their alleged personal contract so became secured first in 1889, and that in 1889 the statute placed other obligations on the alleged contracts, and not included in the contracts. (13) Because said act of the legislature of 1889 violates sub-section one of section X of article one of the Constitution of the United States and impairs the obligation of contracts when, and as construed by the plaintiffs and plead by them; without which construction and application they can not recover; in that it appears, from the decree of foreclosure and evidence introduced by them, that the I. & G. N. R. R. was sold out under a mortgage termed the second mortgage, issued in 1881; that the defendant is the assignee and holder as purchaser of all the rights whatsoever accruing to the mortgagees; and further, as to any obligations, claimed by the plaintiffs to have been imposed by the act of 1889 (all of which were additions to and burdens upon the alleged contract asserted by plaintiffs) they are, in violation of said mortgage, attempting to make prior in law rights which were junior in time, if any such rights existed, all of which is in violation of the Constitution of the United States, here and now invoked. (14) It appears that the plaintiffs rely upon said State act of 1889, as construed by them, which

act is in violation, when so construed, of section one of article XIV of the Amendments to the Constitution of the United States, commonly called the XIV Amendment; in that such statute imposes great penalties; and in that the insistence that the statute is applicable to the defendant, constitutes an attempt to abridge the privileges and immunities of the defendant and to deprive it of its property without due process of law, and to deny it the equal protection of the law by penalizing or threatening to penalize it at the rate of $5000 a day, and further penalize it, if it should resort to the courts to resist this action and litigate its rights by refusing to obey such unconstitutional statute. (15) The plaintiffs can not recover, as admitted by them, without the aid of said State Statute of 1889, which statute, as applied by them, is void and unconstitutional and violates section one of article 14 of the Amendments to the Constitution of the United States; in that it is an undue interference with the business and obligations of the defendant, which it owes to the public in state and interstate commerce; whereby it attempts to interfere with the lawful discretion and power of the defendant to conduct its business within the limits of the law; and whereby it attempts, by subsequent statute, to place burdens and liens and additions on and securing personal contracts as claimed by the plaintiffs, thereby denying to this defendant the equal protection of the law and taking its property without due process of law by such illegal interference. (16) That the said act of 1889 of Texas, as applied, is unconstitutional and void, and yet without it the plaintiffs cannot recover; in that such act is applicable only to chartered railroads and not applicable to individuals, receivers or other persons operating as railroad carriers, or to other persons or corporations whatsoever, and so violates section one of article XIV of the Amendments to the Constitution of the United States, being legislation against a species or class, not rightly classified on any legal

ground; and in that it places a burden upon the species or class not placed upon other persons and corporations classifiable with it; thereby violating the prohibition of denying to any persons "the equal protection of the laws," and abridging the privileges and immunities of the defendant and depriving it of its property without due process of law. (17) The plaintiffs rely upon the said act of 1889, which is claimed by them to secure their alleged contracts in this case, which, as applied, is illegal and void and contrary to the Constitution of the State of Texas: (a) because the same assesses a penalty of an amount prohibited by the Constitution; (b) because the statute as construed and pleaded is retroactive; (c) because the plaintiffs seek to recover in violation of the obligations and terms of the alleged contracts on which they sue and in violation of the mortgage contract, of the sold out railroad, made in 1881; (d) because such statute is *ex post facto* and pronounces penalties, and therein is contrary to the Constitution of the United States, as well as that of the State; (e) because as construed by plaintiffs the statute denies to the defendant the equal protection of the law and is violative of the due process of law; (f) because such statute as construed by the plaintiffs, and without which construction they can not prevail, is an attempt to place on this defendant, never assuming the same, alleged obligations of the sold out I. & G. N. R. R. or its predecessors, and which were personal to them. (17a) Because the plaintiffs alleged and attempted to prove a contract binding "forever," the law and Constitution not permitting properties and obligations to be bound up or enforced "forever," and the alleged contracts being as claimed forever, or indeterminate, are terminable at option, if contracts at all, which is not admitted. (18) Because the plaintiffs have introduced the conveyance of the properties of the sold out railroad to this defendant, and also its charter and the decree of foreclosure under which the properties were sold, from

which it appears that the defendant bought free of all the obligations now asserted by the plaintiffs. (19) Because plaintiffs have introduced the charter of the defendant, from which it appears the general offices are located at Houston, Texas, and the charter being legally issued, the defendant is bound to maintain its general offices at Houston, Texas. (20) Because it also appears that the H. & G. N. R. R.'s charter, introduced by the plaintiffs, required said offices to be at Houston, Texas, and the charter of the International, introduced by plaintiffs, not designating a definite place for the offices, and the two roads consolidated under act of 1889, the offices are obligated to be kept at Houston, Texas.

And the court having considered these objections, overruled them all; whereupon, the defendant excepted, taking its Bill of Exceptions No. 19, and over these objections, the witness testified as set out on pages 208 and 209 of the Statement of Facts, commencing at the end of the 8th line on page 208, and continuing down to the end of her testimony, below the middle of page 209. Wherefore, the defendant presents this its Bill of Exceptions No. 19, and prays that it may be allowed.

N. A. Stedman,
F. A. Williams,
Andrews, Ball & Streetman,
Wilson, Dabney & King,
Attorneys for Defendant.

Approved:
T. B. Greenwood,
Atty. for Plffs.

The foregoing Agreed Bill No. 19 of the defendant was this day presented to me, and is by me this 17th day of March, 1914, in all things approved and allowed.

A. E. Davis,
Judge Sitting in the Trial of This Case.

DEFENDANT'S BILL NO. 20.

ANDERSON COUNTY ET AL.

vs.

I. & G. N. RAILWAY COMPANY.

Filed Mar. 18, 1914.

BE IT REMEMBERED that on the trial of this case, the witness Charles Jacobs was called by the plaintiffs, and testified that he heard Grow, President of the H. & G. N. R. R. Co. make a speech in the spring of 1872, in front of the Court House, and then he was asked to state what Grow said in that speech and its substance; whereupon, the defendant objected as follows:

(1) That it now developed, as shown by the contract with the County introduced by the plaintiffs, that there was a complete and perfectly legal written contract between Anderson County, Texas, and the H. & G. N. R. R., required by law to be in writing, and which could only legally be formed in writing, which, as shown by the petition, it was proposed to modify, add to, change, or vary by parol testimony; and that such writing being complete in itself could not be so modified, changed, varied or added to. (2) That the testimony offered as to what Judge Reagan said and what Grow said and others said was hearsay. (3) That the testimony is offered, as appears by the pleadings and the statement now made by the plaintiffs, in support of a contract alleged to have been made in behalf of the citizens of Palestine acting by Judge Reagan upon an illegal consideration, to wit: Judge Reagan's alleged undertaking to induce and influence the voters of the county to vote a bond issue, the alleged consideration to the railroad being solely the engagement of Judge Reagan to induce and advocate such a bond issue. (4) That the evidence is offered for the purpose of showing an agreement or an alleged contract, in promotion of a County contract, and to attach to the County contract, which is in writing, an alleged

promotion contract, which, if made, would be upon an illegal consideration and is prohibited by law and public policy. (5) That after the lapse of over 40 years it is not permissible to prove, in connection with a written contract with the County and the public, what were the inducements or considerations or representations outside of the written contract there were upon which it was made, nor can a written contract adopted by the voters be so modified. (6) That it appears from the pleadings, and tender of the testimony, that it is now proposed to show that Judge Reagan's services were hired to induce and influence the voters of Anderson County to vote a bond issue, on inducements outside of the writings, that the shops and general offices were to be erected in Palestine for the benefit of the people of Palestine, as contradistinguished from the people of the County, and that it would have been illegal to arrange to bestow such benefits upon the people of part of the county as contradistinguished from the people of all of the county. (7) That the proposed agreement, as plead and as proposed to be testified to in parol, if legal and provable under the law, which is denied, would have to be in writing, and comes within the terms of the statute of frauds, which is now invoked; and therefore it is not provable in parol. (8) That after the lapse of over 40 years and after rights had been acquired and acted upon by various parties, on the basis of the written contract and agreement already introduced, it is not permissible to prove by parol the alleged contract. (8a) That a record of the transaction with the County introduced by plaintiffs, showed the judgment of the County Court settling the whole matter, and the considerations for the contract, adjudged to have been performed by the railroad, whereby the matter was *res adjudicata,* and the parties estopped. (9) That there is no evidence that Grow had any authority to make any agreement, such as is proposed to be shown by parol, because the law lodged the authority to make

any such agreement, if it could be made at all, wholly with the board of directors, and, furthermore, that there is no evidence whatsoever of the ratification of such an agreement, which ratification could only be by the board of directors. (10) That the testimony would be immaterial and irrelevant. (11) It appears by the decree of foreclosure of the sold out International & Great Northern Railroad Company in May, 1910, and introduced by the plaintiffs, that all of the issues involved in said proposed testimony were settled, and if not settled were reserved exclusively for the United States Court. (12) The plaintiffs rely upon the act of the Legislature of Texas of 1889, carried into articles 6423-4-5 of the present Revised Statutes of Texas, and are now claiming that by such act, long subsequent to the alleged contract which they plead in this case, a lien, burden, or servitude were fixed upon the property or properties, or some of them, of the sold out I. & G. N. R. R., which have been acquired by this defendant; without which lien or burden they cannot recover; and in that by this statute and its terms they are extending and attempting to burden and add to the alleged contracts in its extensions and purported obligations, by going beyond the alleged contracts, whereby it appears, when applied to the facts of this case, that such act of 1889, as so construed, is unconstitutional and void and violates sub-section one of section X or article one of the Constitution of the United States, prohibiting any State from passing a law impairing the obligation of contracts. The plaintiffs claiming that their alleged personal contract so became secured first in 1889, and that in 1889 the statute placed other obligations on the alleged contracts, and not included in the contracts. (13) Because said act of the legislature of 1889 violates sub-section one of section X of article one of the Constitution of the United States and impairs the obligation of contracts when, and as construed by the plaintiffs and plead by them; without which construction and applica-

tion they cannot recover; in that it appears, from the decree of foreclosure and evidence introduced by them, that the I. & G. N. R. R. was sold out under a mortgage termed the second mortgage, issued in 1881; that the defendant is the assignee and holder as purchaser of all the rights whatsoever accruing to the mortgagees; and further, as to any obligations, claimed by the plaintiffs to have been imposed by the act of 1889 (all of which were additions to and burdens upon the alleged contract asserted by plaintiffs) they are, in violation of said mortgage, attempting to make prior in law rights which were junior in time, if any such rights existed, all of which is in violation of the Constitution of the United States, here and now invoked. (14) It appears that the plaintiffs rely upon said State act of 1889, as construed by them, which act is in violation, when so construed, of section one of article XIV of the Amendments to the Constitution of the United States, commonly called the XIV Amendment; in that such statute imposes great penalties; and in that the insistence that the statute is applicable to the defendant, constitutes an attempt to abridge the privileges and immunities of the defendant and to deprive it of its property without due process of law, and to deny it the equal protection of the law by penalizing or threatening to penalize it at the rate of $5000 a day, and further penalize it, if it should resort to the courts to resist this action and litigate its rights by refusing to obey such unconstitutional statute. (15) The plaintiffs cannot recover, as admitted by them, without the aid of said State Statute of 1889, which statute, as applied by them, is void and unconstitutional and violates section one of article 14 of the Amendments to the Constitution of the United States; in that it is an undue interference with the business and obligations of the defendant, which it owes to the public in state and interstate commerce; whereby it attempts to interfere with the lawful discretion and power of the defendant to conduct its business

within the limits of the law; and whereby it attempts, by subsequent statute, to place burdens and liens and additions on and securing personal contracts as claimed by the plaintiffs, thereby denying to this defendant the equal protection of the law, and taking its property without due process of law by such illegal interference. (16) That the said act of 1889 of Texas, as applied, is unconstitutional and void, and yet without it the plaintiffs cannot recover; in that such act is applicable only to chartered railroads and not applicable to individuals, receivers or other persons operating as railroad carriers, or to other persons or corporations whatsoever, and so violates section one of article XIV of the Amendments to the Constitution of the United States, being legislation against a species or class, not rightly classified on any legal ground; and in that it places a burden upon the species or class not placed upon other persons and corporations classifiable with it; thereby violating the prohibition of denying to any persons "the equal protection of the laws," and abridging the privileges and immunities of the defendant and depriving it of its property without due process of law. (17) The plaintiffs rely upon the said act of 1889, which is claimed by them to secure their alleged contracts in this case, which as applied, is illegal and void and contrary to the Constitution of the State of Texas: (a) because the same assesses a penalty of an amount prohibited by the Constitution; (b) because the statute as construed and pleaded is retroactive; (c) because the plaintiffs seek to recover in violation of the obligations and terms of the alleged contracts on which they sue, and in violation of the mortgage contract, of the sold out railroad, made in 1881; (d) because such statute is *ex post facto* and pronounces penalties, and therein is contrary to the Constitution of the United States, as well as that of the State; (e) because as construed by plaintiffs the statute denies to the defendant the equal protection of the law and is violative of the due process of law;

(f) because such statute as construed by the plaintiffs, and without which construction they cannot prevail, is an attempt to place on this defendant, never assuming the same, alleged obligations of the sold out I. G. N. R. R. or its predecessors, and which were personal to them. (17a) Because the plaintiffs alleged and attempted to prove a c[illegible]ıct binding "forever," the law and Constitution not permitting properties and obligations to be bound up or enforced "forever," and the alleged contracts being as claimed forever, or indeterminate, are terminable at option, if contracts at all, which is not admitted. (18) Because the plaintiffs have introduced the conveyance of the properties of the sold out railroad to this defendant, and also its charter and the decree of foreclosure under which the properties were sold, from which it appears that the defendant bought free of all the obligations now asserted by the plaintiffs. (19) Because plaintiffs have introduced the charter of the defendant, from which it appears the general offices are located at Houston, Texas, and the charter being legally issued, the defendant is bound to maintain its general offices at Houston, Texas. (20) Because it also appears that the H. & G. N. R. R.'s charter, introduced by the plaintiffs, required said offices to be at Houston, Texas, and the charter of the International, introduced by plaintiffs, not designating a definite place for the offices, and the two roads consolidated under act of 1889, the offices are obligated to be kept at Houston, Texas.

And these objections were considered by the court, and then by him overruled; whereupon, the defendant excepted and took its Bill No. 20, and over the defendant's objections, the witness testified as set out on page 212 of the Statement of Facts, beginning at the end of the 11th line from the top of the page, and continuing to the point on that page where his cross-examination commenced.

Wherefore, the defendant presents this its Bill of Exception No. 20, and prays that it be allowed.

N. A. STEDMAN,
F. A. WILLIAMS,
ANDREWS, BALL & STREETMAN,
WILSON, DABNEY & KING,
Attorneys for Defendant.

Approved:

T. B. GREENWOOD,
Atty. for Plffs.

The foregoing Agreed Bill No. 20 of the defendant was this day presented to me, and is by me this 17th day of March, 1914, in all things approved and allowed.

A. E. DAVIS,
Judge Sitting in the Trial of This Case.

DEFENDANT'S BILL NO. 21.

ANDERSON COUNTY ET AL.
vs.
I. & G. N. RAILWAY COMPANY.

Filed Mar. 18, 1914.

BE IT REMEMBERED that upon the trial of the above case, P. H. Hughes, one of the plaintiffs, was called by them, and testified that he heard a speech made by Grow prior to the bond election of the County in 1872, the speech being made at the court house in Palestine. The witness was then requested to state what Grow said in that speech, to which the defendant objected as follows:

(1) That it now developed, as shown by the contract with the County introduced by the plaintiffs that there was a complete and perfectly legal written contract between Anderson County, Texas, and the H. & G. N. R. R., required by law to be in writing, and which could only

legally be formed in writing, which, as shown by the petition, it was proposed to modify, add to, change, or vary by parol testimony; and that such writing being complete in itself could not be so modified, changed, varied or added to. (2) That the testimony offered as to what Judge Reagan said and what Grow said and others said was hearsay. (3) That the testimony is offered, as appears by the pleadings and the statement now made by the plaintiffs, in support of a contract alleged to have been made in behalf of the citizens of Palestine acting by Judge Reagan, upon an illegal consideration, to wit: Judge Reagan's alleged undertaking to induce and influence the voters of the county to vote a bond issue, the alleged consideration to the railroad being solely the engagement of Judge Reagan to induce and advocate such a bond issue. (4) That the evidence is offered for the purpose of showing an agreement or an alleged contract, in promotion of a County contract, and to attach to the County contract, which is in writing, an alleged promotion contract, which, if made, would be upon an illegal consideration and is prohibited by law and public policy. (5) That after the lapse of over 40 years it is not permissible to prove, in connection with a written contract with the County and the public, what were the inducements or considerations or representations outside of the written contract there were upon which it was made, nor can a written contract adopted by the voters be so modified. (6) That it appears from the pleadings, and tender of the testimony, that it is now proposed to show that Judge Reagan's services were hired to induce and influence the voters of Anderson County to vote a bond issue, on inducements outside of the writings, that the shops and general offices were to be erected in Palestine for the benefit of the people of Palestine, as contradistinguished from the people of the County, and that it would have been illegal to arrange to bestow such benefits upon the people of part of the county as contradistinguished from the people of all of the county. (7) That

the proposed agreement, as plead and as proposed to be testified to in parol, if legal and provable under the law, which is denied, would have to be in writing, and comes within the terms of the statute of frauds, which is now invoked; and therefore it is not provable in parol. (8) That after the lapse of over 40 years and after rights had been acquired and acted upon by various parties, on the basis of the written contract and agreement already introduced, it is not permissible to prove by parol the alleged contract. (8a) That a record of the transaction with the County introduced by plaintiffs, showed the judgment of the County Court settling the whole matter and the considerations for the contract, adjudged to have been performed by the railroad, whereby the matter was *res adjudicata,* and the parties estopped. (9) That there is no evidence that Grow had any authority to make any agreement, such as is proposed to be shown by parol, because the law lodged the authority to make any such agreement, if it could be made at all, wholly with the board of directors, and, furthermore, that there is no evidence whatsoever of the ratification of such an agreement, which ratification could only be by the board of directors. (10) That the testimony would be immaterial and irrelevant. (11) It appears by the decree of foreclosure of the sold out International & Great Northern Railroad Company in May, 1910, and introduced by the plaintiffs, that all of the issues involved in said proposed testimony were settled, and if not settled were reserved exclusively for the United States Court. (12) The plaintiffs rely upon the act of the Legislature of Texas of 1889, carried into articles 6423-4-5 of the present Revised Statutes of Texas, and are now claiming that by such act, long subsequent to the alleged contract which they plead in this case, a lien, burden, or servitude were fixed upon the property or properties, or some of them, of the sold out I. & G. N. R. R., which have been acquired by this defendant; without which lien or burden they can not recover; and in that by this statute and its

terms they are extending and attempting to burden and add to the alleged contracts in its extensions and purported obligations, by going beyond the alleged contracts, whereby it appears, when applied to the facts of this case, that such act of 1889, as so construed, is unconstitutional and void and violates sub-section one of section X of article one of the Constitution of the United States, prohibiting any State from passing a law impairing the obligation of contracts. The plaintiffs claiming that their alleged personal contract so became secured first in 1889, and that in 1889 the statute placed other obligations on the alleged contracts, and not included in the contracts. (13) Because said act of the legislature of 1889 violates sub-section one of section X of article one of the Constitution of the United States and impairs the obligation of contracts when, and as construed by the plaintiffs and plead by them; without which construction and application they cannot recover; in that it appears, from the decree of foreclosure and evidence introduced by them, that the I. & G. N. R. R. was sold out under a mortgage termed the second mortgage, issued in 1881; that the defendant is the assignee and holder as purchaser of all the rights whatsoever accruing to the mortgagees; and further, as to any obligations, claimed by the plaintiffs to have been imposed by the act of 1889 (all of which were additions to and burdens upon the alleged contract asserted by plaintiffs) they are, in violation of said mortgage, attempting to make prior in law rights which were junior in time, if any such rights existed, all of which is in violation of the Constitution of the United States, here and now invoked. (14) It appears that the plaintiffs rely upon said State act of 1889, as construed by them, which act is in violation, when so construed, of section one of article XIV of the Amendments to the Constitution of the United States, commonly called the XIV Amendment; in that such statute imposes great penalties; and in that the insistence that the statute is applicable to the defendant, constitutes an attempt to abridge the privileges

and immunities of the defendant and to deprive it of its property without due process of law, and to deny it the equal protection of the law by penalizing or threatening to penalize it at the rate of $5,000 a day, and further penalize it, if it should resort to the courts to resist this action and litigate its rights by refusing to obey such unconstitutional statute. (15) The plaintiffs can not recover, as admitted by them, without the aid of said State Statute of 1889, which statute, as applied by them, is void and unconstitutional and violates section one of article 14 of the Amendments to the Constitution of the United States; in that it is an undue interference with the business and obligations of the defendant, which it owes to the public in state and interstate commerce; whereby it attempts to interfere with the lawful discretion and power of the defendant to conduct its business within the limits of the law; and whereby it attempts, by subsequent statute, to place burdens and liens and additions on and securing personal contracts as claimed by the plaintiffs, thereby denying to this defendant the equal protection of the law and taking its property without due process of law by such illegal interference. (16) That the said act of 1889 of Texas, as applied, is unconstitutional and void, and yet without it the plaintiffs can not recover; in that such act is applicable only to chartered railroads and not applicable to individuals, receivers or other persons operating as railroad carriers, or to other persons or corporations whatsoever, and so violates section one of article XIV of the Amendments to the Constitution of the United States, being legislation against a species or class, not rightly classified on any legal ground; and in that it places a burden upon the species or class not placed upon other persons and corporations classifiable with it; thereby violating the prohibition of denying to any persons "the equal protection of the laws," and abridging the privileges and immunities of the defendant and depriving it of its property without due process of law. (17) The plaintiffs rely upon the

said act of 1889, which is claimed by them to secure their alleged contracts in this case, which as applied, is illegal and void and contrary to the Constitution of the State of Texas: (a) because the same assesses a penalty of an amount prohibited by the Constitution; (b) because the statute as construed and pleaded is retroactive; (c) because the plaintiffs seek to recover in violation of the obligations and terms of the alleged contracts on which they sue and in violation of the mortgage contract, of the sold out railroad, made in 1881; (d) because such statute is *ex post facto* and pronounces penalties, and therein is contrary to the Constitution of the United States, as well as that of the state; (e) because as construed by plaintiffs the statute denies to the defendant the equal protection of the law and is violative of the due process of law; (f) because such statute as construed by the plaintiffs, and without which construction they can not prevail, is an attempt to place on this defendant, never assuming the same, alleged obligations of the sold out I. & G. N. R. R. or its predecessors, and which were personal to them. (17a) Because the plaintiffs alleged and attempted to prove a contract binding "forever," the law and Constitution not permitting properties and obligations to be bound up or enforced "forever," and the alleged contracts being as claimed forever, or indeterminate, are terminable at option, if contracts at all, which is not admitted. (18) Because the plaintiffs have introduced the conveyance of the properties of the sold out railroad to this defendant, and also its charter and the decree of foreclosure under which the properties were sold, from which it appears that the defendant bought free of all the obligations now asserted by the plaintiffs. (19) Because plaintiffs have introduced the charter of the defendant, from which it appears the general offices are located at Houston, Texas, and the charter being legally issued, the defendant is bound to maintain its general offices at Houston, Texas. (20) Because it also appears that the H. & G. N. R. R.'s charter, introduced by the

plaintiffs, required said offices to be at Houston, Texas, and the charter of the International, introduced by plaintiffs, not designating a definite place for the offices, and the two roads consolidated under act of 1889, the offices are obligated to be kept at Houston, Texas.

Which objections being considered by the court, were by the court overruled, and the defendant took its Bill No. 21, and the witness, over the objections, testified as set out in the Statement of Facts, commencing with the last line of page 210, and continuing on page 211 to the end of his testimony, two lines from the bottom of the page. Wherefore, the defendant presents this its Bill of Exceptions No. 21, and prays that it be allowed.

N. A. STEDMAN,
F. A. WILLIAMS,
ANDREWS, BALL & STREETMAN,
WILSON, DABNEY & KING,
Attorneys for Defendant.

Approved:
T. B. GREENWOOD,
Atty. for Plffs.

The foregoing Agreed Bill No. 21 of the defendant was this day presented to me, and is by me this 17th day of March, 1914, in all things approved and allowed.

A. E. DAVIS,
Judge Sitting in the Trial of This Case.

DEFENDANT'S BILL NO. 22.

ANDERSON COUNTY ET AL.
vs.
I. & G. N. RAILWAY COMPANY.

Filed Mar. 18, 1914.

BE IT REMEMBERED that on the trial of this case, the witness John F. Watts was called by the plaintiffs, and testified that he was present at the public meeting

at the Court House at which Galusha A. Grow made an address, and that Judge Reagan introduced Grow, this address being made at, or just before, the election in 1872, held to vote on a bond issue to the H. & G. N. R. R. The witness was then requested to state what Judge Reagan said, and what Grow said on that occasion; whereupon, the defendant objected to the question and any answer thereto, as follows:

(1) That it now developed, as shown by the contract with the County introduced by the plaintiffs, that there was a complete and perfectly legal written contract between Anderson County, Texas, and the H. & G. N. R. R., required by law to be in writing, and which could only legally be formed in writing, which, as shown by the petition, it was proposed to modify, add to, change, or vary by parol testimony; and that such writing being complete in itself could not be so modified, changed, varied or added to. (2) That the testimony offered as to what Judge Reagan said and what Grow said and others said was hearsay. (3) That the testimony is offered, as appears by the pleadings and the statement now made by the plaintiffs, in support of a contract alleged to have been made in behalf of the citizens of Palestine acting by Judge Reagan upon an illegal consideration, to wit: Judge Reagan's alleged undertaking to induce and influence the voters of the county to vote a bond issue, the alleged consideration to the railroad being solely the engagement of Judge Reagan to induce and advocate such a bond issue. (4) That the evidence is offered for the purpose of showing an agreement or an alleged contract, in promotion of a County contract, and to attach to the County contract, which is in writing, an alleged promotion contract, which, if made, would be upon an illegal consideration and is prohibited by law and public policy. (5) That after the lapse of over 40 years it is not permissible to prove, in connection with a written contract with the County and the public, what were the

inducements or considerations or representations outside of the written contract there were upon which it was made, nor can a written contract adopted by the voters be so modified. (6) That it appears from the pleadings, and tender of the testimony, that it is now proposed to show that Judge Reagan's services were hired to induce and influence the voters of Anderson County to vote a bond issue, on inducements outside of the writings, that the shops and general offices were to be erected in Palestine for the benefit of the people of Palestine, as contradistinguished from the people of the County, and that it would have been illegal to arrange to bestow such benefits upon the people of part of the county as contradistinguished from the people of all of the county. (7) That the proposed agreement, as plead and as proposed to be testified to in parol, if legal and provable under the law, which is denied, would have to be in writing, and comes within the terms of the statute of frauds, which is now invoked; and therefore it is not provable in parol. (8) That after the lapse of over 40 years and after rights had been acquired and acted upon by various parties, on the basis of the written contract and agreement already introduced, it is not permissible to prove by parol the alleged contract. (8a) That a record of the transaction with the County introduced by plaintiffs, showed the judgment of the County Court settling the whole matter and the consideration for the contract, adjudged to have been performed by the railroad, whereby the matter was *res adjudicata,* and the parties estopped. (9) That there is no evidence that Grow had any authority to make any agreement, such as is proposed to be shown by parol, because the law lodged the authority to make any such agreement, if it could be made at all, wholly with the board of directors, and, furthermore, that there is no evidence whatsoever of the ratification of such an agreement, which ratification could only be by the board of directors. (10) That the testimony would be imma-

terial and irrelevant. (11) It appears by the decree of foreclosure of the sold out International & Great Northern Railroad Company in May, 1910, and introduced by the plaintiffs, that all of the issues involved in said proposed testimony were settled, and if not settled, were reserved exclusively for the United States Court. (12) The plaintiffs rely upon the act of the Legislature of Texas of 1889, carried into articles 6423-4-5 of the present Revised Statutes of Texas, and are now claiming that by such act, long subsequent to the alleged contract which they plead in this case, a lien, burden, or servitude were fixed upon the property or properties, or some of them, of the sold out I. & G. N. R. R., which have been acquired by this defendant; without which lien or burden they can not recover; and in that by this statute and its terms they are extending and attempting to burden and add to the alleged contracts in its extensions and purported obligations, by going beyond the alleged contracts, whereby it appears, when applied to the facts of this case, that such act of 1889, as so construed, is unconstitutional and void and violates sub-section one of section X of article one of the Constitution of the United States, prohibiting any State from passing a law impairing the obligation of contracts. The plaintiffs claiming that their alleged personal contract so became secured first in 1889, and that in 1889 the statute placed other obligations on the alleged contracts, and not included in the contracts. (13) Because said act of the legislature of 1889 violates sub-section one of section X of article one of the Constitution of the United States and impairs the obligation of contracts when, and as construed by the plaintiffs and plead by them; without which construction and application they can not recover; in that it appears, from the decree of foreclosure and evidence introduced by them, that the I. & G. N. R. R. was sold out under a mortgage termed the second mortgage, issued in 1881; that the defendant is the assignee and holder as purchaser of all the rights

whatsoever accruing to the mortgagees; and further, as to any obligations, claimed by the plaintiffs to have been imposed by the act of 1889 (all of which were additions to and burdens upon the alleged contract asserted by plaintiffs) they are, in violation of said mortgage, attempting to make prior in law rights which were junior in time, if any such rights existed, all of which is in violation of the Constitution of the United States, here and now invoked. (14) It appears that the plaintiffs rely upon said State act of 1889, as construed by them, which act is in violation, when so construed, of section one of article XIV of the Amendments to the Constitution of the United States, commonly called the XIV Amendment; in that such statute imposes great penalties; and in that the insistence that the statute is applicable to the defendant, constitutes an attempt to abridge the privileges and immunities of the defendant and to deprive it of its property without due process of law, and to deny it the equal protection of the law by penalizing or threatening to penalize it at the rate of $5000 a day, and further penalize it, if it should resort to the courts to resist this action and litigate its rights by refusing to obey such unconstitutional statute. (15) The plaintiffs can not recover, as admitted by them, without the aid of said State Statute of 1889, which statute, as applied by them, is void and unconstitutional and violates section one of article 14 of the Amendments to the Constitution of the United States; in that it is an undue interference with the business and obligations of the defendant, which it owes to the public in state and interstate commerce; whereby it attempts to interfere with the lawful discretion and power of the defendant to conduct its business within the limits of the law; and whereby it attempts, by subsequent statute, to place burdens and liens and additions on and securing personal contracts as claimed by the plaintiffs, thereby denying to this defendant the equal protection of the law and taking its property without due

process of law by such illegal interference. (16) That the said act of 1889 of Texas, as applied, is unconstitutional and void, and yet without it the plaintiffs cannot recover; in that such act is applicable only to chartered railroads and not applicable to individuals, receivers or other persons operating as railroad carriers, or to other persons or corporations whatsoever, and so violates section one of article XIV of the Amendments to the Constitution of the United States, being legislation against a species or class, not rightly classified on any legal ground; and in that it places a burden upon the species or class not placed upon other persons and corporations classifiable with it; thereby violating the prohibition of denying to any persons "the equal protection of the laws," and abridging the privileges and immunities of the defendant and depriving it of its property without due process of law. (17) The plaintiffs rely upon the said act of 1889, which is claimed by them to secure their alleged contracts in this case, which, as applied, is illegal and void and contrary to the Constitution of the State of Texas: (a) because the same assesses a penalty of an amount prohibited by the Constitution; (b) because the statute as construed and pleaded is retroactive; (c) because the plaintiffs seek to recover in violation of the obligations and terms of the alleged contracts on which they sue and in violation of the mortgage contract, of the sold out railroad, made in 1881; (d) because such statute is *ex post facto* and pronounces penalties, and therein is contrary to the Constitution of the United States, as well as that of the State; (e) because as construed by plaintiffs the statute denies to the defendant the equal protection of the law and is violative of the due process of law; (f) because such statute as construed by the plaintiffs, and without which construction they can not prevail, is an attempt to place on this defendant, never assuming the same, alleged obligations of the sold out I. & G. N. R. R. or its predecessors, and which were personal to them. (17a) Because the plaintiffs alleged and attempted to

prove a contract binding "forever," the law and Constitution not permitting properties and obligations to be bound up or enforced "forever," and the alleged contracts being as claimed forever, or indeterminate, are terminable at option, if contracts at all, which is not admitted. (18) Because the plaintiffs have introduced the conveyance of the properties of the sold out railroad to this defendant, and also its charter and the decree of foreclosure under which the properties were sold, from which it appears that the defendant bought free of all the obligations now asserted by the plaintiffs. (19) Because plaintiffs have introduced the charter of the defendant, from which it appears the general offices are located at Houston, Texas, and the charter being legally issued, the defendant is bound to maintain its general offices at Houston, Texas. (20) Because it also appears that the H. & G. N. R. R.'s charter, introduced by the plaintiffs, required said offices to be at Houston, Texas, and the charter of the International, introduced by plaintiffs, not designating a definite place for the offices, and the two roads consolidated under act of 1889, the offices are obligated to be kept at Houston, Texas.

And these objections being considered, were by the court all overruled. Whereupon, the defendant excepted to the ruling of the court, and took its Bill No. 22, and over the objections, Watts testified as is shown on page 210 of the Statement of Facts, commencing at the end of the 5th line from the top of the page, and continuing to the end of his testimony on that page. Wherefore, the defendant presents this its Bill No. 22, and prays that it be allowed.

F. A. Williams,
N. A. Stedman,
Andrews, Ball & Streetman,
Wilson, Dabney & King,
Attorneys for Defendant.

Approved:
T. B. Greenwood,
Atty. for Plffs.

The foregoing Agreed Bill No. 22 of the defendant was this day presented to me, and is by me this 17th day of March, 1914, in all things approved and allowed.

A. E. DAVIS,
Judge Sitting in the Trial of this Case.

DEFENDANT'S BILL NO. 23.

ANDERSON COUNTY ET AL.

vs.

I. & G. N. RAILWAY COMPANY.

Filed Mar. 18, 1914.

BE IT REMEMBERED that upon the trial of the above case, the witness Robert McClure was called by the plaintiffs, and testified that he heard Grow, President of the H. & G. N. R. R., make a speech at Palestine, one or two or three days before the County Bond Election in 1872. He was then asked to state what Grow said in that speech; whereupon, the defendant objected as follows:

(1) That it now developed, as shown by the contract with the County introduced by the plaintiffs, that there was a complete and perfectly legal written contract between Anderson County, Texas, and the H. & G. N. R. R., required by law to be in writing, and which could only legally be formed in writing, which, as shown by the petition, it was proposed to modify, add to, change, or vary by parol testimony; and that such writing being complete in itself could not be so modified, changed, varied or added to. (2) That the testimony offered as to what Judge Reagan said and what Grow said and others said was hearsay. (3) That the testimony is offered, as appears by the pleadings and the statement now made by the plaintiffs, in support of a contract alleged to have been made in behalf of the citizens of Palestine acting

by Judge Reagan upon an illegal consideration, to wit: Judge Reagan's alleged undertaking to induce and influence the voters of the county to vote a bond issue, the alleged consideration to the railroad being solely the engagement of Judge Reagan to induce and advocate such a bond issue. (4) That the evidence is offered for the purpose of showing an agreement or an alleged contract, in promotion of a County contract, and to attach to the County contract, which is in writing, an alleged promotion contract, which, if made, would be upon an illegal consideration and is prohibited by law and public policy. (5) That after the lapse of over 40 years it is not permissible to prove, in connection with a written contract with the County and the public, what were the inducements or considerations or representations outside of the written contract there were upon which it was made, nor can a written contract adopted by the voters be so modified. (6) That it appears from the pleadings, and tender of the testimony, that it is now proposed to show that Judge Reagan's services were hired to induce and influence the voters of Anderson County to vote a bond issue, on inducements outside of the writings, that the shops and general offices were to be erected in Palestine for the benefit of the people of Palestine, as contradistinguished from the people of the County, and that it would have been illegal to arrange to bestow such benefits upon the people of part of the county as contradistinguished from the people of all of the county. (7) That the proposed agreement, as plead and as proposed to be testified to in parol, if legal and provable under the law, which is denied, would have to be in writing, and comes within the terms of the statute of frauds, which is now invoked; and therefore it is not provable in parol. (8) That after the lapse of over 40 years and after rights had been acquired and acted upon by various parties, on the basis of the written contract and agreement already introduced, it is not permissible to prove by parol

the alleged contract. (8a) That a record of the transaction with the County introduced by plaintiffs, showed the judgment of the County Court settling the whole matter, and the considerations for the contract, adjudged to have been performed by the railroad, whereby the matter was *res adjudicata*, and the parties estopped. (9) That there is no evidence that Grow had any authority to make any agreement, such as is proposed to be shown by parol, because the law lodged the authority to make any such agreement, if it could be made at all, wholly with the board of directors, and, furthermore, that there is no evidence whatsoever of the ratification of such an agreement, which ratification could only be by the board of directors. (10) That the testimony would be immaterial and irrelevant. (11) It appears by the decree of foreclosure of the sold out International & Great Northern Railroad Company in May, 1910, and introduced by the plaintiffs, that all of the issues involved in said proposed testimony were settled, and if not settled were reserved exclusively for the United States Court. (12) The plaintiffs rely upon the act of the Legislature of Texas of 1889, carried into articles 6423-4-5 of the present Revised Statutes of Texas, and are now claiming that by such act, long subsequent to the alleged contract which they plead in this case, a lien, burden, or servitude were fixed upon the property or properties, or some of them, of the sold out I. & G. N. R. R., which have been acquired by this defendant; without which lien or burden they cannot recover; and in that by this statute and its terms they are extending and attempting to burden and add to the alleged contracts in its extensions and purported obligations, by going beyond the alleged contracts, whereby it appears, when applied to the facts of this case, that such act of 1889, as so construed, is unconstitutional and void and violates sub-section one of section X or article one of the Constitution of the United States, prohibiting any State from passing a law impairing the ob-

ligation of contracts. The plaintiffs claiming that their alleged personal contract so became secured first in 1889, and that in 1889 the statute placed other obligations on the alleged contracts, and not included in the contracts. (13) Because said act of the legislature of 1889 violates sub-section one of section X of article one of the Constitution of the United States and impairs the obligation of contracts when, and as construed by the plaintiffs and plead by them; without which construction and application they cannot recover; in that it appears, from the decree of foreclosure and evidence introduced by them, that the I. & G. N. R. R. was sold out under a mortgage termed the second mortgage, issued in 1881; that the defendant is the assignee and holder as purchaser of all the rights whatsoever accruing to the mortgagees; and further, as to any obligations, claimed by the plaintiffs to have been imposed by the act of 1889 (all of which were additions to and burdens upon the alleged contract asserted by plaintiffs) they are, in violation of said mortgage, attempting to make prior in law rights which were junior in time, if any such rights existed, all of which is in violation of the Constitution of the United States, here and now invoked. (14) It appears that the plaintiffs rely upon said State act of 1889, as construed by them, which act is in violation, when so construed, of section one of article XIV of the Amendments to the Constitution of the United States, commonly called the XIV Amendment; in that such statute imposes great penalties; and in that the insistence that the statute is applicable to the defendant, constitutes an attempt to abridge the privileges and immunities of the defendant and to deprive it of its property without due process of law, and to deny it the equal protection of the law by penalizing or threatening to penalize it at the rate of $5000 a day, and further penalize it, if it should resort to the courts to resist this action and litigate its rights by refusing to obey such unconstitutional statute. (15) The plaintiffs cannot

recover, as admitted by them, without the aid of said State Statute of 1889, which statute, as applied by them, is void and unconstitutional and violates section one of article 14 of the Amendments to the Constitution of the United States; in that it is an undue interference with the business and obligations of the defendant, which it owes to the public in state and interstate commerce; whereby it attempts to interfere with the lawful discretion and power of the defendant to conduct its business within the limits of the law; and whereby it attempts, by subsequent statute, to place burdens and liens and additions on and securing personal contracts as claimed by the plaintiffs, thereby denying to this defendant the equal protection of the law, and taking its property without due process of law by such illegal interference. (16) That the said act of 1889 of Texas, as applied, is unconstitutional and void, and yet without it the plaintiffs cannot recover; in that such act is applicable only to chartered railroads and not applicable to individuals, receivers or other persons operating as railroad carriers, or to other persons or corporations whatsoever, and so violates section one of article XIV of the Amendments to the Constitution of the United States, being legislation against a species or class, not rightly classified on any legal ground; and in that it places a burden upon the species or class not placed upon other persons and corporations classifiable with it; thereby violating the prohibition of denying to any persons "the equal protection of the laws," and abridging the privileges and immunities of the defendant and depriving it of its property without due process of law. (17) The plaintiffs rely upon the said act of 1889, which is claimed by them to secure their alleged contracts in this case, which as applied, is illegal and void and contrary to the Constitution of the State of Texas: (a) because the same assesses a penalty of an amount prohibited by the Constitution; (b) because the statute as construed and pleaded is retroactive; (c) be-

cause the plaintiffs seek to recover in violation of the obligations and terms of the alleged contracts on which they sue, and in violation of the mortgage contract, of the sold out railroad, made in 1881; (d) because such statute is *ex post facto* and pronounces penalties, and therein is contrary to the Constitution of the United States, as well as that of the State; (e) because as construed by plaintiffs the statute denies to the defendant the equal protection of the law and is violative of the due process of law; (f) because such statute as construed by the plaintiffs, and without which construction they cannot prevail, is an attempt to place on this defendant, never assuming the same, alleged obligations of the sold out I. G. N. R. R. or its predecessors, and which were personal to them. (17a) Because the plaintiffs alleged and attempted to prove a contract binding "forever," the law and Constitution not permitting properties and obligations to be bound up or enforced "forever," and the alleged contracts being as claimed forever, or indeterminate, are terminable at option, if contracts at all, which is not admitted. (18) Because the plaintiffs have introduced the conveyance of the properties of the sold out railroad to this defendant, and also its charter and the decree of foreclosure under which the properties were sold, from which it appears that the defendant bought free of all the obligations now asserted by the plaintiffs. (19) Because plaintiffs have introduced the charter of the defendant, from which it appears the general offices are located at Houston, Texas, and the charter being legally issued, the defendant is bound to maintain its general offices at Houston, Texas. (20) Because it also appears that the H. & G. N. R. R.'s charter, introduced by the plaintiffs, required said offices to be at Houston, Texas, and the charter of the International, introduced by plaintiffs, not designating a definite place for the offices, and the two roads consolidated under act of 1889, the offices are obligated to be kept at Houston, Texas.

Which objections being considered by the court, were by him overruled, and the defendant then excepted, and took this its Bill No. 23, and over these objections, the witness testified as set out in the Statement of Facts, commencing in the middle of the 9th line from the bottom on page 213, and extending to the end of his testimony on page 214. Wherefore, the defendant presents this its Bill of Exceptions 23, and prays that it be allowed.

F. A. WILLIAMS,
N. A. STEDMAN,
ANDREWS, BALL & STREETMAN,
WILSON, DABNEY & KING,
Attorneys for Defendant.

Approved:

T. B. GREENWOOD,
Atty. for Plffs.

The foregoing Agreed Bill No. 23 of the defendant was this day presented to me, and is by me this 17th day of March, 1914, in all things approved and allowed.

A. E. DAVIS,
Judge Sitting in the Trial of This Case.

DEFENDANT'S BILL NO. 24.

ANDERSON COUNTY ET AL.
vs.
I. & G. N. RAILWAY COMPANY.

Filed Mar. 18, 1914.

BE IT REMEMBERED that upon the trial of the above case, J. W. Ozment was called by the plaintiffs, and testified that Grow, the President of the H. & G. N., made a speech at Palestine in 1872, a few days before the election for the Bond Issue, and that Judge Reagan introduced Grow, and that he was present and heard these speeches.

The witness was then asked to state what Judge Reagan said and what Grow said in their respective speeches, to which the defendant objected as follows:

(1) That it now developed, as shown by the contract with the County introduced by the plaintiffs that there was a complete and perfectly legal written contract between Anderson County, Texas, and the H. & G. N. R. R., required by law to be in writing, and which could only legally be formed in writing, which, as shown by the petition, it was proposed to modify, add to, change, or vary by parol testimony; and that such writing being complete in itself could not be so modified, changed, varied or added to. (2) That the testimony offered as to what Judge Reagan said and what Grow said and others said was hearsay. (3) That the testimony is offered, as appears by the pleadings and the statement now made by the plaintiffs, in support of a contract alleged to have been made in behalf of the citizens of Palestine acting by Judge Reagan, upon an illegal consideration, to wit: Judge Reagan's alleged undertaking to induce and influence the voters of the county to vote a bond issue, the alleged consideration to the railroad being solely the engagement of Judge Reagan to induce and advocate such a bond issue. (4) That the evidence is offered for the purpose of showing an agreement or an alleged contract, in promotion of a County contract, and to attach to the County contract, which is in writing, an alleged promotion contract, which, if made, would be upon an illegal consideration and is prohibited by law and public policy. (5) That after the lapse of over 40 years it is not permissible to prove, in connection with a written contract with the County and the public, what were the inducements or considerations or representations outside of the written contract there were upon which it was made, nor can a written contract adopted by the voters be so modified. (6) That it appears from the pleadings, and tender of the testimony, that it is now proposed to show that Judge Reagan's services were hired to induce

and influence the voters of Anderson County to vote a bond issue, on inducements outside of the writings, that the shops and general offices were to be erected in Palestine for the benefit of the people of Palestine, as contradistinguished from the people of the County, and that it would have been illegal to arrange to bestow such benefits upon the people of part of the county as contradistinguished from the people of all of the county. (7) That the proposed agreement, as plead and as proposed to be testified to in parol, if legal and provable under the law, which is denied, would have to be in writing, and comes within the terms of the statute of frauds, which is now invoked; and therefore it is not provable in parol. (8) That after the lapse of over 40 years and after rights had been acquired and acted upon by various parties, on the basis of the written contract and agreement already introduced, it is not permissible to prove by parol the alleged contract. (8a) That a record of the transaction with the County introduced by plaintiffs, showed the judgment of the County Court settling the whole matter and the considerations for the contract, adjudged to have been performed by the railroad, whereby the matter was *res adjudicata,* and the parties estopped. (9) That there is no evidence that Grow had any authority to make any agreement, such as is proposed to be shown by parol, because the law lodged the authority to make any such agreement, if it could be made at all, wholly with the board of directors, and, furthermore, that there is no evidence whatsoever of the ratification of such an agreement, which ratification could only be by the board of directors. (10) That the testimony would be immaterial and irrelevant. (11) It appears by the decree of foreclosure of the sold out International & Great Northern Railroad Company in May, 1910, and introduced by the plaintiffs, that all of the issues involved in said proposed testimony were settled, and if not settled were reserved exclusively for the United States Court. (12) The plaintiffs rely upon the act of the Legislature of Texas

of 1889, carried into articles 6423-4-5 of the present Revised Statutes of Texas, and are now claiming that by such act, long subsequent to the alleged contract which they plead in this case, a lien, burden, or servitude were fixed upon the property or properties, or some of them, of the sold out I. & G. N. R. R., which have been acquired by this defendant; without which lien or burden they can not recover; and in that by this statute and its terms they are extending and attempting to burden and add to the alleged contracts in its extensions and purported obligations, by going beyond the alleged contracts, whereby it appears, when applied to the facts of this case, that such act of 1889, as so construed, is unconstitutional and void and violates sub-section one of section X of article one of the Constitution of the United States, prohibiting any State from passing a law impairing the obligation of contracts. The plaintiffs claiming that their alleged personal contract so became secured first in 1889, and that in 1889 the statute placed other obligations on the alleged contracts, and not included in the contracts. (13) Because said act of the legislature of 1889 violates sub-section one of section X of article one of the Constitution of the United States and impairs the obligation of contracts when, and as construed by the plaintiffs and plead by them; without which construction and application they cannot recover; in that it appears, from the decree of foreclosure and evidence introduced by them, that the I. & G. N. R. R. was sold out under a mortgage termed the second mortgage, issued in 1881; that the defendant is the assignee and holder as purchaser of all the rights whatsoever accruing to the mortgagees; and further, as to any obligations, claimed by the plaintiffs to have been imposed by the act of 1889 (all of which were additions to and burdens upon the alleged contract asserted by plaintiffs) they are, in violation of said mortgage, attempting to make prior in law rights which were junior in time, if any such rights existed, all of which is in violation of the Constitution of the United States, here and

now invoked. (14) It appears that the plaintiffs rely upon said State act of 1889, as construed by them, which act is in violation, when so construed, of section one of article XIV of the Amendments to the Constitution of the United States, commonly called the XIV Amendment; in that such statute imposes great penalties; and in that the insistence that the statute is applicable to the defendant, constitutes an attempt to abridge the privileges and immunities of the defendant and to deprive it of its property without due process of law, and to deny it the equal protection of the law by penalizing or threatening to penalize it at the rate of $5,000 a day, and further penalize it, if it should resort to the courts to resist this action and litigate its rights by refusing to obey such unconstitutional statute. (15) The plaintiffs can not recover, as admitted by them, without the aid of said State Statute of 1889, which statute, as applied by them, is void and unconstitutional and violates section one of article 14 of the Amendments to the Constitution of the United States; in that it is an undue interference with the business and obligations of the defendant, which it owes to the public in state and interstate commerce; whereby it attempts to interfere with the lawful discretion and power of the defendant to conduct its business within the limits of the law; and whereby it attempts, by subsequent statute, to place burdens and liens and additions on and securing personal contracts as claimed by the plaintiffs, thereby denying to this defendant the equal protection of the law and taking its property without due process of law by such illegal interference. (16) That the said act of 1889 of Texas, as applied, is unconstitutional and void, and yet without it the plaintiffs can not recover; in that such act is applicable only to chartered railroads and not applicable to individuals, receivers or other persons operating as railroad carriers, or to other persons or corporations whatsoever, and so violates section one of article XIV of the Amendments to the Constitution of the United States, being legislation against

a species or class, not rightly classified on any legal ground; and in that it places a burden upon the species or class not placed upon other persons and corporations classifiable with it; thereby violating the prohibition of denying to any persons "the equal protection of the laws," and abridging the privileges and immunities of the defendant and depriving it of its property without due process of law. (17) The plaintiffs rely upon the said act of 1889, which is claimed by them to secure their alleged contracts in this case, which as applied, is illegal and void and contrary to the Constitution of the State of Texas: (a) because the same assesses a penalty of an amount prohibited by the Constitution; (b) because the statute as construed and pleaded is retroactive; (c) because the plaintiffs seek to recover in violation of the obligations and terms of the alleged contracts on which they sue and in violation of the mortgage contract, of the sold out railroad, made in 1881; (d) because such statute is *ex post facto* and pronounces penalties, and therein is contrary to the Constitution of the United States, as well as that of the state; (e) because as construed by plaintiffs the statute denies to the defendant the equal protection of the law and is violative of the due process of law; (f) because such statute as construed by the plaintiffs, and without which construction they can not prevail, is an attempt to place on this defendant, never assuming the same, alleged obligations of the sold out I. & G. N. R. R. or its predecessors, and which were personal to them. (17a) Because the plaintiffs alleged and attempted to prove a contract binding "forever," the law and Constitution not permitting properties and obligations to be bound up or enforced "forever," and the alleged contracts being as claimed forever, or indeterminate, are terminable at option, if contracts at all, which is not admitted. (18) Because the plaintiffs have introduced the conveyance of the properties of the sold out railroad to this defendant, and also its charter and the decree of foreclosure under which the properties were sold, from

which it appears that the defendant bought free of all the obligations now asserted by the plaintiffs. (19) Because plaintiffs have introduced the charter of the defendant, from which it appears the general offices are located at Houston, Texas, and the charter being legally issued, the defendant is bound to maintain its general offices at Houston, Texas. (20) Because it also appears that the H. & G. N. R. R.'s charter, introduced by the plaintiffs, required said offices to be at Houston, Texas, and the charter of the International, introduced by plaintiffs, not designating a definite place for the offices, and the two roads consolidated under act of 1889, the offices are obligated to be kept at Houston, Texas.

Which objections being considered by the court, were by him overruled, to which action the defendant then excepted, and took this its Bill 24, and over these objections, the witness testified as set out in the Statement of Facts, commencing on page 225, near the end of the 14th line from the top, and continuing to the paragraph on page 226, commencing "Mr. Ozment said." Wherefore, the defendant presents this its Bill of Exceptions No. 24, and prays that it be allowed.

N. A. STEDMAN,
F. A. WILLIAMS,
ANDREWS, BALL & STREETMAN,
WILSON, DABNEY & KING,
Attorneys for Defendant.

Approved:

T. B. GREENWOOD,
Atty. for Plffs.

The foregoing Agreed Bill No. 24 of the defendant was this day presented to me, and is by me this 17th day of March, 1914, in all things approved and allowed.

A. E. DAVIS,
Judge Sitting in the Trial of This Case.

DEFENDANT'S BILL NO. 25.

ANDERSON COUNTY ET AL.

vs.

I. & G. N. RAILWAY COMPANY.

Filed Mar. 18, 1914.

BE IT REMEMBERED that upon the trial of this case, the witness Ozment was testifying, called by plaintiffs, and said that he knew H. M. Hoxie, and that in 1875 he met Hoxie with Wright and other citizens at the Magnolia Street crossing in Palestine, and went aboard Hoxie's private car. He was then asked to state what took place, and what conversations were held in the car with Hoxie, and what agreement, if any, was then made, and what was done, if anything, in pursuance of such agreement, to which questions and any answers in response thereto the defendant objected as follows:

(1) That it now developed, as shown by the contract with the County introduced by the plaintiffs, that there was a complete and perfectly legal written contract between Anderson County, Texas, and the H. & G. N. R. R., required by law to be in writing, and which could only legally be formed in writing, which, as shown by the petition, it was proposed to modify, add to, change, or vary by parol testimony; and that such writing being complete in itself could not be so modified, changed, varied or added to. (2) That the testimony offered as to what Judge Reagan said and what Grow said and others said was hearsay. (3) That the testimony is offered, as appears by the pleadings and the statement now made by the plaintiffs, in support of a contract alleged to have been made in behalf of the citizens of Palestine acting by Judge Reagan upon an illegal consideration, to wit: Judge Reagan's alleged undertaking to induce and influence the voters of the county to vote a bond issue, the alleged consideration to the railroad being solely the engagement of Judge Reagan to induce and advocate

such a bond issue. (4) That the evidence is offered for the purpose of showing an agreement or an alleged contract, in promotion of a County contract, and to attach to the County contract, which is in writing, an alleged promotion contract, which, if made, would be upon an illegal consideration and is prohibited by law and public policy. (5) That after the lapse of over 40 years it is not permissible to prove, in connection with a written contract with the County and the public, what were the inducements or considerations or representations outside of the written contract there were upon which it was made, nor can a written contract adopted by the voters be so modified. (6) That it appears from the pleadings, and tender of the testimony, that it is now proposed to show that Judge Reagan's services were hired to induce and influence the voters of Anderson County to vote a bond issue, on inducements outside of the writings, that the shops and general offices were to be erected in Palestine for the benefit of the people of Palestine, as contradistinguished from the people of the County, and that it would have been illegal to arrange to bestow such benefits upon the people of part of the county as contradistinguished from the people of all of the county. (7) That the proposed agreement, as plead and as proposed to be testified to in parol, if legal and provable under the law, which is denied, would have to be in writing, and comes within the terms of the statute of frauds, which is now invoked; and therefore it is not provable in parol. (8) That after the lapse of over 40 years and after rights had been acquired and acted upon by various parties, on the basis of the written contract and agreement already introduced, it is not permissible to prove by parol the alleged contract. (8a) That a record of the transaction with the County introduced by plaintiffs, showed the judgment of the County Court settling the whole matter and the consideration for the contract, adjudged to have been performed by the railroad, whereby the

matter was *res adjudicata,* and the parties estopped. (9) That there is no evidence that Grow had any authority to make any agreement, such as is proposed to be shown by parol, because the law lodged the authority to make any such agreement, if it could be made at all, wholly with the board of directors, and, furthermore, that there is no evidence whatsoever of the ratification of such an agreement, which ratification could only be by the board of directors. (10) That the testimony would be immaterial and irrelevant. (11) It appears by the decree of foreclosure of the sold out International & Great Northern Railroad Company in May, 1910, and introduced by the plaintiffs, that all of the issues involved in said proposed testimony were settled, and if not settled, were reserved exclusively for the United States Court. (12) The plaintiffs rely upon the act of the Legislature of Texas of 1889, carried into articles 6423-4-5 of the present Revised Statutes of Texas, and are now claiming that by such act, long subsequent to the alleged contract which they plead in this case, a lien, burden, or servitude were fixed upon the property or properties, or some of them, of the sold out I. & G. N. R. R., which have been acquired by this defendant; without which lien or burden they can not recover; and in that by this statute and its terms they are extending and attempting to burden and add to the alleged contracts in its extensions and purported obligations, by going beyond the alleged contracts, whereby it appears, when applied to the facts of this case, that such act of 1889, as so construed, is unconstitutional and void and violates sub-section one of section X of article one of the Constitution of the United States, prohibiting any State from passing a law impairing the obligation of contracts. The plaintiffs claiming that their alleged personal contract so became secured first in 1889, and that in 1889 the statute placed other obligations on the alleged contracts, and not included in the contracts. (13) Because said act of the legislature of 1889 violates

sub-section one of section X of article one of the Constitution of the United States and impairs the obligation of contracts when, and as construed by the plaintiffs and plead by them; without which construction and application they can not recover; in that it appears, from the decree of foreclosure and evidence introduced by them, that the I. & G. N. R. R. was sold out under a mortgage termed the second mortgage, issued in 1881; that the defendant is the assignee and holder as purchaser of all the rights whatsoever accruing to the mortgagees; and further, as to any obligations, claimed by the plaintiffs to have been imposed by the act of 1889 (all of which were additions to and burdens upon the alleged contract asserted by plaintiffs) they are, in violation of said mortgage, attempting to make prior in law rights which were junior in time, if any such rights existed, all of which is in violation of the Constitution of the United States, here and now invoked. (14) It appears that the plaintiffs rely upon said State act of 1889, as construed by them, which act is in violation, when so construed, of section one of article XIV of the Amendments to the Constitution of the United States, commonly called the XIV Amendment; in that such statute imposes great penalties; and in that the insistence that the statute is applicable to the defendant, constitutes an attempt to abridge the privileges and immunities of the defendant and to deprive it of its property without due process of law, and to deny it the equal protection of the law by penalizing or threatening to penalize it at the rate of $5000 a day, and further penalize it, if it should resort to the courts to resist this action and litigate its rights by refusing to obey such unconstitutional statute. (15) The plaintiffs can not recover, as admitted by them, without the aid of said State Statute of 1889, which statute, as applied by them, is void and unconstitutional and violates section one of article 14 of the Amendments to the Constitution of the United States; in that it is an undue interference with

the business and obligations of the defendant, which it owes to the public in state and interstate commerce; whereby it attempts to interfere with the lawful discretion and power of the defendant to conduct its business within the limits of the law; and whereby it attempts, by subsequent statute, to place burdens and liens and additions on and securing personal contracts as claimed by the plaintiffs, thereby denying to this defendant the equal protection of the law and taking its property without due process of law by such illegal interference. (16) That the said act of 1889 of Texas, as applied, is unconstitutional and void, and yet without it the plaintiffs cannot recover; in that such act is applicable only to chartered railroads and not applicable to individuals, receivers or other persons operating as railroad carriers, or to other persons or corporations whatsoever, and so violates section one of article XIV of the Amendments to the Constitution of the United States, being legislation against a species or class, not rightly classified on any legal ground; and in that it places a burden upon the species or class not placed upon other persons and corporations classifiable with it; thereby violating the prohibition of denying to any persons "the equal protection of the laws," and abridging the privileges and immunities of the defendant and depriving it of its property without due process of law. (17) The plaintiffs rely upon the said act of 1889, which is claimed by them to secure their alleged contracts in this case, which, as applied, is illegal and void and contrary to the Constitution of the State of Texas: (a) because the same assesses a penalty of an amount prohibited by the Constitution; (b) because the statute as construed and pleaded is retroactive; (c) because the plaintiffs seek to recover in violation of the obligations and terms of the alleged contracts on which they sue and in violation of the mortgage contract, of the sold out railroad, made in 1881; (d) because such statute is *ex post facto* and pronounces penalties, and therein is

contrary to the Constitution of the United States, as well as that of the State; (e) because as construed by plaintiffs the statute denies to the defendant the equal protection of the law and is violative of the due process of law; (f) because such statute as construed by the plaintiffs, and without which construction they can not prevail, is an attempt to place on this defendant, never assuming the same, alleged obligations of the sold out I. & G. N. R. R. or its predecessors, and which were personal to them. (17a) Because the plaintiffs alleged and attempted to prove a contract binding "forever," the law and Constitution not permitting properties and obligations to be bound up or enforced "forever," and the alleged contracts being as claimed forever, or indeterminate, are terminable at option, if contracts at all, which is not admitted. (18) Because the plaintiffs have introduced the conveyance of the properties of the sold out railroad to this defendant, and also its charter and the decree of foreclosure under which the properties were sold, from which it appears that the defendant bought free of all the obligations now asserted by the plaintiffs. (19) Because plaintiffs have introduced the charter of the defendant, from which it appears the general offices are located at Houston, Texas, and the charter being legally issued, the defendant is bound to maintain its general offices at Houston, Texas. (20) Because it also appears that the H. & G. N. R. R.'s charter, introduced by the plaintiffs, required said offices to be at Houston, Texas, and the charter of the International, introduced by plaintiffs, not designating a definite place for the offices, and the two roads consolidated under act of 1889, the offices are obligated to be kept at Houston, Texas.

And furthermore, the defendant objected: (1) That the plaintiffs now state that Captain R. S. Hayes, then the General Manager or superior of Mr. Hoxie, of the I. & G. N. R. R., was proposed to be brought into the transaction; that this testimony, obviously, will relate to the

"Rent-House" alleged contract set forth in plaintiff's petition, wherein Captain Hayes is not mentioned, and that no transaction can be based upon him, it being plead that the transaction was made with Hoxie, not with Hayes; (2) that the bonds issued by the county had been already delivered, and it was a closed transaction, and that, therefore, there could be no consideration for this alleged "Rent-House" transaction; (3) that the alleged "Rent-House" transaction was a transaction which, if it constituted a contract, which is not admitted, was required by the statute of frauds to be in writing, and cannot, therefore, be proved in parol; (4) that, as alleged, no contract is stated; (5) that, as alleged, and within the terms of the allegation, there was shown no consideration to the Railroad for any contract; (6) that, as alleged, the contract was indefinite as to time, if it was a contract, which is not admitted, and therefore was, at the option of either party to discontinue the performance, and was not further enforceable; (7) that an alleged contract binding "forever" was plead, and that no such agreement, if made, could be a contract, as no such contract could be "forever."

All which objections hereinabove stated being considered by the court, were overruled, to which action of the court the defendant excepted, and took its Bill No. 25, and over these objections, the witness testified as set out in the Statement of Facts, commencing near the end of line 9 from the top of page 227, and continuing to his cross-examination, near the bottom of page 228. Wherefore, the defendant presents this its Bill No. 25, and prays that it be allowed.

F. A. Williams,
N. A. Stedman,
Andrews, Ball & Streetman,
Wilson, Dabney & King,
Attorneys for Defendant.

Approved:
T. B. Greenwood,
Atty. for Plffs.

The foregoing Agreed Bill No. 25 of the defendant was this day presented to me, and is by me this 17th day of March, 1914, in all things approved and allowed.

A. E. DAVIS,

Judge Sitting in the Trial of This Case.

DEFENDANT'S BILL NO. 27.

ANDERSON COUNTY ET AL.

vs.

I. & G. N. RAILWAY COMPANY.

Filed Mar. 18, 1914.

BE IT REMEMBERED that on the trial of this case, N. A. Stedman, one of the counsel for the defendant, was placed upon the witness stand by the plaintiff, and asked whether or not Trice, General Manager of the I. & G. N. Railroad Company, in 1898, requested his opinion upon the subject of the right of the Company to remove the General Offices from Palestine to some other point, and whether or not he examined into the County Records only in this regard, and advised Trice that he saw no impediment to the removal of the General Office, and whether or not on the 16th day of May, 1899, he read in one of the newspapers in general circulation in Palestine a letter from Judge John H. Reagan, now exhibited to the witness, and set out in Bill of Exceptions 28 hereinafter and in the record, and whether or not, having read this newspaper article, he called it to the attention of Mr. Trice and other officers of the Railroad, and why he called it to their attention. Which questions having been asked, the defendant objected thereto, first, that Judge Stedman, at these times, in 1898 and 1899, was the General Attorney and Counsel of the Railroad, and therefore, any communication about the matters asked about between himself and the officers of the Railroad, and advice

thereon, would be confidential and privileged communications of the highest order. Second, the whole matter was immaterial and irrelevant. Third, that the whole matter was confusing and immaterial as to any question of notice, and as to the newspaper article, the same objections as herein in this Bill above stated, were made, and further, that it was inquired into in support of a matter or transaction alleged to have been conducted by Judge Reagan himself, in which he was the principal party, and therefore, could not be in explanation of letters which he wrote way back in 1872 and 1874; that the newspaper article contained self-serving declarations. Fourth, that after such a great lapse of time, the newspaper article could not become a part of the transaction. Fifth, that the newspaper article showed that it was merely a political article, written many years after the transaction, and, therefore, inadmissible, and no inquiry about the same was admissible. Sixth, because the newspaper article (not now offered in evidence, but exhibited to the witness) states conclusions, and not facts, and is prejudicial in its character. Seventh, because the newspaper article was hearsay, and immaterial and irrelevant to any issue. The newspaper article was not now offered, but was offered next hereafter, as appears from Bill 28, but was intended to be offered when Judge Stedman was being questioned, and the objections above made were made without waiver of the right to object on these and other grounds to the newspaper article, and when it should be offered, and these objections being considered by the court, were by him all overruled, and the defendant excepted to this ruling, and took its Bill No. 27, and over these objections the witness was required to answer, and did answer, as follows:

That he thought that in the year 1898 Trice requested his opinion on the subject of whether of not the Company had a right to remove the General Offices from Palestine, and then that he made a very exhaustive investigation

of the County Records of Anderson County, and that all that he found were the matters between the H. & G. N. Railroad Company and Anderson County, with reference to the bond issue already introduced in evidence, and that he requested Howard, Custodian of the Records of the International Railroad Company and the H. & G. N., and Secretary of the I. & G. N. Railroad Company, to make a particular and exhaustive search among the records of his office with the view of discovering anything that the witness did not find on the County Records, and that his recollection is that the only matters found by Howard in the County Records was a duplicate of the same things on record in the County Records; that, on the 16th of May, 1899, he was still the General Attorney for the I. & G. N. Railroad Company, acting as such in the General Offices at Palestine, and that Mr. Trice was then Second Vice-President and General Manager of the I. & G. N. Railroad Company, and its highest Executive Officer in Texas at that time, and that Mr. Howard was then its Secretary, and a member of its Board of Directors, and Mr. Maury, then its Auditor, but he is not sure whether Maury was then a Director, and that Mr. G. L. Noble was then Assistant General Manager, and the witness was a Director; that he read the newspaper article written by Judge Reagan and published in two Palestine newspapers in general circulation, and exhibited to him, published on the 16th of May, 1889; that after reading it his impression now is that he mentioned it to Mr. Trice, but it is barely possible that Trice mentioned it to him, and that he feels sure he discussed it with Trice, and that it is his impression that he mentioned it to Howard, who was then a Director, and his impression is that he mentioned it to Maury, then the Auditor, and also to Noble, then Assistant General Manager, but that he would not say positively that he mentioned the article to these gentlemen first, for it is barely possible that they first mentioned it to him, but he is sure that they talked

about the article, and he thought that he did acquaint Trice, Howard and Maury with the substance of the article, and that he is sure they were acquainted with it in some way, and that after reading it he filed it away with other documents pertaining to the Railroad's business in the safe in his office, where it remained for several years, he having been General Attorney until 1906, and General Solicitor until 1908, and further, he thought that it was probably correct that his advice, whatever it may have been, had been given to Trice, and had been concluded some time before he read this newspaper publication; that he called the attention of these gentlemen to this newspaper article because it related to a subject so connected with the Railroad that he thought they were interested. Before being called to the stand, Judge Stedman had stated, the jury being out, but otherwise in open court, to Judge and Counsel, that he did not regard the communications between himself and others with regard to the newspaper article as privileged, but defendant, by leading counsel, did not concede this. He also testified that all the General Officers in charge of the Railroad in 1898 and 1899 resided in Palestine, except that the President and one Vice-President resided in New York.

On cross-examination by defendant, and after he had testified as above, over the objections of the defendant, the witness stated that his impression now is, without a perfect recollection about the matter, that he told Mr. Trice that he did not regard the newspaper article as stating a contract, with respect to the General Offices, Machine Shops and Round Houses; and that if he did, he did not think it would be admitted in evidence in view of the written records he had discovered in the Court House at Palestine. He stated this in answer to a question asking him whether or not he had given this advice as a lawyer, and the plaintiffs objected to this question being asked, but were overruled by the court. And the witness having answered this way on cross-examination,

the defendant moved the court, upon all the objections stated above, and the additional objection that his testimony now definitely showed that he was acting in his official connection with the Railroad at the time, to strike out all of Judge Stedman's evidence on direct examination, which motion was overruled by the court, and the defendant excepted. Wherefore, the defendant now presents this its Bill of Exceptions No. 27, and prays that it be allowed.

N. A. Stedman,
F. A. Williams,
Andrews, Ball & Streetman,
Wilson, Dabney & King,
Attorneys for Defendant.

Approved:
T. B. Greenwood,
Atty. for Plffs.

This Agreed Bill was this 17th day of March, 1914, presented to me, and having been approved by the plaintiffs and found correct by me, is in all things allowed.

A. E. Davis,
Judge.

DEFENDANT'S BILL NO. 28.

ANDERSON COUNTY ET AL.
vs.
I. & G. N. RAILWAY COMPANY.

Filed Mar. 18, 1914.

BE IT REMEMBERED that on the trial of this case, the witness N. A. Stedman, of the counsel for the defendant, being called by the plaintiffs, was asked by them whether or not on about the 16th of May, 1899, he read in one of the newspapers in general circulation in Palestine a letter from Judge John H. Reagan, and the wit-

ness stated that he had read the letter and acquainted Trice, the General Manager, Howard the Secretary, and Maury, and perhaps Noble, the Assistant General Manager, with the newspaper article, or called it to their attention, or had it called to their attention. It was admitted by the defendant that the article was authentic and written by Judge Reagan. The witness, Stedman, also stated that the article was published in two newspapers in Palestine about May 16th, 1899, both in gerenal circulation there. Whereupon, the plaintiffs offered this newspaper article in evidence; to the introduction of which the defendant objected as follows:

(1) That it now developed, as shown by the contract with the County introduced by the plaintiffs, that there was a complete and perfectly legal written contract between Anderson County, Texas, and the H. & G. N. R. R., required by law to be in writing, and which could only legally be formed in writing, which, as shown by the petition, it was proposed to modify, add to, change, or vary by parol testimony; and that such writing being complete in itself could not be so modified, changed, varied or or added to. (2) That the article offered as to what Judge Reagan said and what Grow said and others said was hearsay. (3) That the article is offered, as appears by the pleadings and the statement now made by the plaintiffs, in support of a contract alleged to have been made in behalf of the citizens of Palestine acting by Judge Reagan upon an illegal consideration, to wit: Judge Reagan's alleged undertaking to induce and influence the voters of the county to vote a bond issue, the alleged consideration to the railroad being solely the engagement of Judge Reagan to induce and advocate such a bond issue. (4) That the evidence is offered for the purpose of showing an agreement or an alleged contract, in promotion of a County contract, and to attach to the County contract, which is in writing, an alleged promotion contract, which, if made, would be upon an

illegal consideration and is prohibited by law and public policy. (5) That after the lapse of over 40 years it is not permissible to prove, in connection with a written contract with the County and the public, what were the inducements or considerations or representations outside of the written contract there were upon which it was made, nor can a written contract adopted by the voters be so modified. (6) That it appears from the pleadings, and tender of the testimony, that it is now proposed to show that Judge Reagan's services were hired to induce and influence the voters of Anderson County to vote a bond issue, on inducements outside of the writings, that the shops and general offices were to be erected in Palestine for the benefit of the people of Palestine, as contradistinguished from the people of the County, and that it would have been illegal to arrange to bestow such benefits upon the people of part of the county as contradistinguished from the people of all of the county. (7) That the proposed agreement, as plead and as proposed to be testified to in parol, if legal and provable under the law, which is denied, would have to be in writing, and comes within the terms of the statute of frauds, which is now invoked; and therefore it is not provable in parol. (8) That after the lapse of over 40 years and after rights had been acquired and acted upon by various parties, on the basis of the written contract and agreement already introduced, it is not permissible to prove by parol the alleged contract. (8a) That a record of the transaction with the County introduced by plaintiffs, showed the judgment of the County Court settling the whole matter, and the considerations for the contract, adjudged to have been performed by the railroad, whereby the matter was *res adjudicata*, and the parties estopped. (9) That there is no evidence that Grow had any authority to make any agreement, such as is proposed to be shown by parol, because the law lodged the authority to make any such agreement, if it could be made at all, wholly

with the board of directors, and, furthermore, that there is no evidence whatsoever of the ratification of such an agreement, which ratification could only be by the board of directors. (10) That the testimony would be immaterial and irrelevant. (11) It appears by the decree of foreclosure of the sold out International & Great Northern Railroad Company in May, 1910, and introduced by the plaintiffs, that all of the issues involved in said proposed testimony were settled, and if not settled were reserved exclusively for the United States Court. (12) The plaintiffs rely upon the act of the Legislature of Texas of 1889, carried into articles 6423-4-5 of the present Revised Statutes of Texas, and are now claiming that by such act, long subsequent to the alleged contract which they plead in this case, a lien, burden, or servitude were fixed upon the property or properties, or some of them, of the sold out I. & G. N. R. R., which have been acquired by this defendant; without which lien or burden they cannot recover; and in that by this statute and its terms they are extending and attempting to burden and add to the alleged contracts in its extensions and purported obligations, by going beyond the alleged contracts, whereby it appears, when applied to the facts of this case, that such act of 1889, as so construed, is unconstitutional and void and violates sub-section one of section X or article one of the Constitution of the United States, prohibiting any State from passing a law impairing the obligation of contracts. The plaintiffs claiming that their alleged personal contract so became secured first in 1889, and that in 1889 the statute placed other obligations on the alleged contracts, and not included in the contracts. (13) Because said act of the legislature of 1889 violates sub-section one of section X of article one of the Constitution of the United States and impairs the obligation of contracts when, and as construed by the plaintiffs and plead by them; without which construction and application they cannot recover; in that it appears, from the de-

cree of foreclosure and evidence introduced by them, that the I. & G. N. R. R. was sold out under a mortgage termed the second mortgage, issued in 1881; that the defendant is the assignee and holder as purchaser of all the rights whatsoever accruing to the mortgagees; and further, as to any obligations, claimed by the plaintiffs to have been imposed by the act of 1889 (all of which were additions to and burdens upon the alleged contract asserted by plaintiffs) they are, in violation of said mortgage, attempting to make prior in law rights which were junior in time, if any such rights existed, all of which is in violation of the Constitution of the United States, here and now invoked. (14) It appears that the plaintiffs rely upon said State act of 1889, as construed by them, which act is in violation, when so construed, of section one of article XIV of the Amendments to the Constitution of the United States, commonly called the XIV Amendment; in that such statute imposes great penalties; and in that the insistence that the statute is applicable to the defendant, constitutes an attempt to abridge the privileges and immunities of the defendant and to deprive it of its property without due process of law, and to deny it the equal protection of the law by penalizing or threatening to penalize it at the rate of $5000 a day, and further penalize it, if it should resort to the courts to resist this action and litigate its rights by refusing to obey such unconstitutional statute. (15) The plaintiffs cannot recover, as admitted by them, without the aid of said State Statute of 1889, which statute, as applied by them, is void and unconstitutional and violates section one of article 14 of the Amendments to the Constitution of the United States; in that it is an undue interference with the business and obligations of the defendant, which it owes to the public in state and interstate commerce; whereby it attempts to interfere with the lawful discretion and power of the defendant to conduct its business within the limits of the law; and whereby it attempts, by

subsequent statute, to place burdens and liens and additions on and securing personal contracts as claimed by the plaintiffs, thereby denying to this defendant the equal protection of the law, and taking its property without due process of law by such illegal interference. (16) That the said act of 1889 of Texas, as applied, is unconstitutional and void, and yet without it the plaintiffs cannot recover; in that such act is applicable only to chartered railroads and not applicable to individuals, receivers or other persons operating as railroad carriers, or to other persons or corporations whatsoever, and so violates section one of article XIV of the Amendments to the Constitution of the United States, being legislation against a species or class, not rightly classified on any legal ground; and in that it places a burden upon the species or class not placed upon other persons and corporations classifiable with it; thereby violating the prohibition of denying to any persons "the equal protection of the laws," and abridging the privileges and immunities of the defendant and depriving it of its property without due process of law. (17) The plaintiffs rely upon the said act of 1889, which is claimed by them to secure their alleged contracts in this case, which as applied, is illegal and void and contrary to the Constitution of the State of Texas: (a) because the same assesses a penalty of an amount prohibited by the Constitution; (b) because the statute as construed and pleaded is retroactive; (c) because the plaintiffs seek to recover in violation of the obligations and terms of the alleged contracts on which they sue, and in violation of the mortgage contract, of the sold out railroad, made in 1881; (d) because such statute is *ex post facto* and pronounces penalties, and therein is contrary to the Constitution of the United States, as well as that of the State; (e) because as construed by plaintiffs the statute denies to the defendant the equal protection of the law and is violative of the due process of law; (f) because such statute as construed by the plaintiffs,

and without which construction they cannot prevail, is an attempt to place on this defendant, never assuming the same, alleged obligations of the sold out I. G. N. R. R. or its predecessors, and which were personal to them. (17a) Because the plaintiffs alleged and attempted to prove a contract binding "forever," the law and Constitution not permitting properties and obligations to be bound up or enforced "forever," and the alleged contracts being as claimed forever, or indeterminate, are terminable at option, if contracts at all, which is not admitted. (18) Because the plaintiffs have introduced the conveyance of the properties of the sold out railroad to this defendant, and also its charter and the decree of foreclosure under which the properties were sold, from which it appears that the defendant bought free of all the obligations now asserted by the plaintiffs. (19) Because plaintiffs have introduced the charter of the defendant, from which it appears the general offices are located at Houston, Texas, and the charter being legally issued, the defendant is bound to maintain its general offices at Houston, Texas. (20) Because it also appears that the H. & G. N. R. R.'s charter, introduced by the plaintiffs, required said offices to be at Houston, Texas, and the charter of the International, introduced by plaintiffs, not designating a definite place for the offices, and the two roads consolidated under act of 1889, the offices are obligated to be kept at Houston, Texas.

And also as follows:

First, because it necessarily refers to something taking place between Judge Stedman, as General Attorney, and his client, and is a privileged communication with regard to all of these matters; and, second, the entire matter is immaterial and irrelevant as to any issues in this case; and, third, the question of notice is entirely immaterial as to any issue in this case, the rights of the parties could not be affected thereby, and, therefore, the whole matter about the newspaper article is confusing;

and, fourth, it is likely to be prejudicial to the rights of the defendant in this case, and it is hearsay, and it was offered only, as defendant understands, in support of a matter or transaction alleged to have been conducted by Judge Reagan himself, in which he was a principal party, and therefore it could not be in explanation of the letters which he wrote away back in 1872 and 1874 with regard to this matter, and that the newspaper article contained self-serving declarations, and further, that after such a great lapse of time, the newspaper could not become a part of the transaction, and further, the newspaper article shows it is merely a political article, written many years after these transactions, and, therefore, it is not admissible, and no inquiry about the same is admissible; and further, because it states conclusions and not facts, and further, because it is prejudicial in its character; and also, that the document, on its face, is incomplete, and goes back and refers to other letters and matters and other documents, to which it is in reply, and without which it is undefined, and that it was unsworn. And the court considered all of the above objections and overruled the same. Whereupon, the defendant excepted, and took its Bill No. 28, and over these objections the newspaper article was read in evidence from the Daily Visitor, of date May 16th, 1899, and set out in the Statement of Facts, commencing with the word "copy" in the middle of page 355, and continuing to the number "6," on page 358. Wherefore, the defendant presents this its Bill No. 28, and prays that it be allowed.

N. A. Stedman,
F. A. Williams,
Andrews, Ball & Streetman,
Wilson, Dabney & King,
Attorneys for Defendant.

Approved:

T. B. Greenwood,
Atty. for Plffs.

The foregoing Agreed Bill No. 28 of the defendant was this day presented to me, and is by me this 17th day of March, 1914, in all things approved and allowed.

A. E. DAVIS,
Judge Sitting in the Trial of This Case.

DEFENDANT'S BILL NO. 29.

ANDERSON COUNTY ET AL.

vs.

I. & G. N. RAILWAY COMPANY.

Filed Mar. 18, 1914.

BE IT REMEMBERED that on the trial of this case, the plaintiffs offered in eivdence a deed from the I. & G. N. R. R. Co. to Hatfield, Jr., dated September 15th, 1874, for the purpose, as stated, of showing the reservation in the deed of a large piece of ground in the City of Palestine for machine shops, to the introduction of which the defendant objected that it was immaterial and irrelevant, and that an inspection of the deed did not show that it was for the purpose stated, nor was it restricted to Anderson County, but reserved various rights of way and sites at different places and in different counties, and was a general conveyance, with general reservations, which objections were by the court overruled, and the defendant then excepted, and took its Bill No. 29, and over the objections, the deed was read in evidence, its contents being stated in the Statement of Facts on pages 216 and 217, Section 29 thereon. Wherefore, the defendant presents this its Bill No. 29, and prays that it be allowed.

N. A. STEDMAN,
F. A. WILLIAMS,
ANDREWS, BALL & STREETMAN,
WILSON, DABNEY & KING,
Attorneys for Defendant.

Approved:
T. B. GREENWOOD,
Atty. for Plffs.

The foregoing Agreed Bill No. 29 of the defendant was this day presented to me, and is by me this 17th day of March, 1914, in all things approved and allowed.

A. E. DAVIS,
Judge Sitting in the Trial of This Case.

DEFENDANT'S BILL NO. 30.

ANDERSON COUNTY ET AL.
vs.
I. & G. N. RAILWAY COMPANY.

Filed Mar. 18, 1914.

BE IT REMEMBERED that upon a trial of this case the plaintiffs offered in evidence a deed from the Texas Land Company, wherein it was stated that the grantor was the assignee of Hatfield, Jr., the deed being to the I. & G. N. R. R. Co., dated November 8, 1880, and describing by field notes the land reserved in the original conveyance to Hatfield, Jr., referred to in Bill of Exceptions 29, to which the defendant objected that it was immaterial and irrelevant, and a general conveyance with reservations, which objections were overruled by the court, and the defendant then and there excepted, and over the objections, the deed was introduced in evidence, and is described in the Statement of Facts on page 217, Section 30 thereon. Wherefore, the defendant presents this its Bill No. 30, and prays that it be allowed.

F. A. WILLIAMS,
N. A. STEDMAN,
ANDREWS, BALL & STREETMAN,
WILSON, DABNEY & KING,
Attorneys for Defendant.

Approved:
T. B. GREENWOOD,
Atty. for Plffs.

The foregoing Agreed Bill No. 30 of the defendant was this day presented to me, and is by me this 17th day of March, 1914, in all things approved and allowed.

A. E. DAVIS,
Judge Sitting in the Trial of This Case.

DEFENDANT'S BILL NO. 31.

ANDERSON COUNTY ET AL.
vs.
I. & G. N. RAILWAY COMPANY.

Filed Mar. 18, 1914.

BE IT REMEMBERED that on the trial of this case, the plaintiffs offered in evidence a map purporting to show the Railroad reservation filed December 12th, 1872, and being marked "Office of Chief Engineer, Superintendent of Construction International Railroad, Hearne, Texas, June, 1872." To the introduction of which the defendant objected, 1st, that it was immaterial and irrelevant; 2nd, that it related to the acts of the International Railroad, and not the H. & G. N. R. R.; 3rd, that it was dated long after the matters alleged to have occurred in the petition, which objections were by the court overruled, and the defendant then excepted, and took its Bill No. 31, and over these objections, the map was introduced in eivdence, being the map set out in the Statement of Facts next following page 218, and numbered 219. Wherefore, the defendant presents this its Bill of Exceptions No. 31, and prays that it be allowed.

N. A. STEDMAN,
F. A. WILLIAMS,
ANDREWS, BALL & STREETMAN,
WILSON, DABNEY & KING,
Attorneys for Defendant.

Approved:
T. B. GREENWOOD,
Atty. for Plffs.

The foregoing Agreed Bill No. 31 of the defendant was this day presented to me, and is by me this 17th day of March, 1914, in all things approved and allowed.

A. E. DAVIS,
Judge Sitting in the Trial of This Case.

DEFENDANT'S BILL NO. 32.

ANDERSON COUNTY ET AL.
vs.
I. & G. N. RAILWAY COMPANY.

Filed Mar. 18, 1914.

BE IT REMEMBERED that upon the trial of this case the plaintiffs offered in evidence a map filed in the office of the County Clerk of Anderson County on June 24th, 1875, to which the defendant objected, 1st, that it was immaterial and irrelevant; 2nd, because it was the act of the International and not of the H. & G. N. Railroad; 3rd, that the I. & G. N. Railroad had moved its headquarters from Houston to Palestine at a date prior to this, and that the map was therefore immaterial. Which objections being considered by the court were by the court overruled, and over these objections the map was introduced in evidence, being set out in the Statement of Facts after page 200, marked page 221. Wherefore, the defendant presents this its Bill of Exceptions No. 32, and prays that it be allowed.

N. A. STEDMAN,
F. A. WILLIAMS,
ANDREWS, BALL & STREETMAN,
WILSON, DABNEY & KING,
Attorneys for Defendant.

Approved:
T. B. GREENWOOD,
Atty. for Plffs.

The foregoing Agreed Bill No. 32 of the defendant was this day presented to me, and is by me this 17th day of March, 1914, in all things approevd and allowed.

A. E. DAVIS,
Judge Sitting in the Trial of this Case.

DEFENDANT'S BILL NO. 33.

ANDERSON COUNTY ET AL.
vs.
I. & G. N. RAILWAY COMPANY.

Filed Mar. 18, 1914.

BE IT REMEMBERED that upon the trial of this case, the plaintiffs offered in evidence four deeds from the International Railroad Co. to various citizens of Palestine, referring to the map filed December 12th, 1872, for description of date, one, June 1st, 1872, two, June 6th, 1872, and one June 20th, 1872; to the introduction of which four deeds the defendant objected, 1st, that they were immaterial and irrelevant; 2nd, because they were the acts of the International Railroad, and not of the H. & G. N. Railroad, and that there is no contract asserted here of the International Railroad; which objections being overruled by the court, defendant then excepted, and took its Bill 33, and over these objections the deeds were troduced in evidence, being those described on page 222 of the Statement of Facts in Section 33 thereon. Wherefore, the defendant presents this its Bill No. 33, and prays that it be allowed.

N. A. STEDMAN,
F. A. WILLIAMS,
ANDREWS, BALL & STREETMAN,
WILSON, DABNEY & KING,
Attorneys for Defendant.

Approved:
T. B. GREENWOOD,
Atty. for Plffs.

The foregoing Agreed Bill No. 33 of the defendant was this day presented to me, and is by me this 17th day of March, 1914, in all things approved and allowed.

A. E. DAVIS,
Judge Sitting in the Trial of This Case.

DEFENDANT'S BILL NO. 36.

ANDERSON COUNTY ET AL.
vs.
I. & G. N. RAILWAY COMPANY.

Filed Mar. 18, 1914.

BE IT REMEMBERED that on the trial of this case the witness Ozment was called by the plaintiffs, and was asked whether, if there had been no agreement with Hoxie, "those houses would have been built," to which question and any answer thereto the defendant objected that a conclusion of the witness was involved, and that he did not know what other people would have done. Which objections were overruled by the court, and the defendant then excepted, and took its Bill No. 36, and over the objections the witness testified that the houses would certainly not have been built, all as appears in the Statement of Facts on page 228 thereon. Wherefore, the defendant presents this its Bill No. 36, and prays that it be allowed.

N. A. STEDMAN,
F. A. WILLIAMS,
ANDREWS, BALL & STREETMAN,
WILSON, DABNEY & KING,
Attorneys for Defendant.

Approved:
T. B. GREENWOOD,
Atty. for Plffs.

The foregoing Agreed Bill No. 36 of the defendant was this day presented to me, and is by me this 17th day of March, 1914, in all things approved and allowed.

A. E. DAVIS,

Judge Sitting in the Trial of This Case.

DEFENDANT'S BILL NO. 38.

ANDERSON COUNTY ET AL.

vs.

I. & G. N. RAILWAY COMPANY.

Filed Mar. 18, 1914.

Be IT REMEMBERED that upon the trial of this case, Horace Word was called by the plaintiffs, and testied that in January, 1872, he was present in the County Court of Anderson County, as a Deputy Sheriff, when Grow appeared before the court to apply for the County Bonds. He was then asked to state what was said and done there on that occasion. Whereupon, the defendant objected that the relations and obligations between the H. & G. N. R. R. and the County, and the considerations to each other had all been stated; that there would be no consideration for a new contract or new promises, and that the declarations and admissions of Grow, if any, as agent, were inadmissible after so long a time after the event, and furthermore, made the following objections:

(1) That it now developed, as shown by the contract with the County introduced by the plaintiffs that there was a complete and perfectly legal written contract between Anderson County, Texas, and the H. & G. N. R. R., required by law to be in writing, and which could only legally be formed in writing, which, as shown by the petition, it was proposed to modify, add to, change, or vary by parol testimony; and that such writing being complete in itself could not be so modified, changed, varied

or added to. (2) That the testimony offered as to what Grow said and others said was hearsay. (3) That the testimony is offered, as appears by the pleadings and the statement now made by the plaintiffs, in support of a contract alleged to have been made in behalf of the citizens of Palestine acting by Judge Reagan, upon an illegal consideration, to wit: Judge Reagan's alleged undertaking to induce and influence the voters of the county to vote a bond issue, the alleged consideration to the railroad being solely the engagement of Judge Reagan to induce and advocate such a bond issue. (4) That the evidence is offered for the purpose of showing an agreement or an alleged contract, in promotion of a County contract, and to attach to the County contract, which is in writing, an alleged promotion contract, which, if made, would be upon an illegal consideration and is prohibited by law and public policy. (5) That after the lapse of over 40 years it is not permissible to prove, in connection with a written contract with the County and the public, what were the inducements or considerations or representations outside of the written contract there were upon which it was made, nor can a written contract adopted by the voters be so modified. (6) That it appears from the pleadings, and tender of the testimony, that it is now proposed to show that Judge Reagan's services were hired to induce and influence the voters of Anderson County to vote a bond issue, on inducements outside of the writings, that the shops and general offices were to be erected in Palestine for the benefit of the people of Palestine, as contradistinguished from the people of the County, and that it would have been illegal to arrange to bestow such benefits upon the people of part of the county as contradistinguished from the people of all of the county. (7) That the proposed agreement, as plead and as proposed to be testified to in parol, if legal and provable under the law, which is denied, would have to be in writing, and comes within the terms of the statute of frauds, which is now

invoked; and therefore it is not provable in parol. (8) That after the lapse of over 40 years and after rights had been acquired and acted upon by various parties, on the basis of the written contract and agreement already introduced, it is not permissible to prove by parol the alleged contract. (8a) That a record of the transaction with the County introduced by plaintiffs, showed the judgment of the County Court settling the whole matter and the considerations for the contract, adjudged to have been performed by the railroad, whereby the matter was *res adjudicata*, and the parties estopped. (9) That there is no evidence that Grow had any authority to make any agreement, such as is proposed to be shown by parol, because the law lodged the authority to make any such agreement, if it could be made at all, wholly with the board of directors, and, furthermore, that there is no evidence whatsoever of the ratification of such an agreement, which ratification could only be by the board of directors. (10) That the testimony would be immaterial and irrelevant. (11) It appears by the decree of foreclosure of the sold out International & Great Northern Railroad Company in May, 1910, and introduced by the plaintiffs, that all of the issues involved in said proposed testimony were settled, and if not settled were reserved exclusively for the United States Court. (12) The plaintiffs rely upon the act of the Legislature of Texas of 1889, carried into articles 6423-4-5 of the present Revised Statutes of Texas, and are now claiming that by such act, long subsequent to the alleged contract which they plead in this case, a lien, burden, or servitude were fixed upon the property or properties, or some of them, of the sold out I. & G. N. R. R., which have been acquired by this defendant; without which lien or burden they can not recover; and in that by this statute and its terms they are extending and attempting to burden and add to the alleged contracts in its extensions and purported obligations, by going beyond the alleged contracts, whereby it appears, when applied to the facts of this case,

that such act of 1889, as so construed, is unconstitutional and void and violates sub-section one of section X of article one of the Constitution of the United States, prohibiting any State from passing a law impairing the obligation of contracts. The plaintiffs claiming that their alleged personal contract so became secured first in 1889, and that in 1889 the statute placed other obligations on the alleged contracts, and not included in the contracts. (13) Because said act of the legislature of 1889 violates sub-section one of section X of article one of the Constitution of the United States and impairs the obligation of contracts when, and as construed by the plaintiffs and plead by them; without which construction and application they cannot recover; in that it appears, from the decree of foreclosure and evidence introduced by them, that the I. & G. N. R. R. was sold out under a mortgage termed the second mortgage, issued in 1881; that the defendant is the assignee and holder as purchaser of all the rights whatsoever accruing to the mortgagees; and further, as to any obligations, claimed by the plaintiffs to have been imposed by the act of 1889 (all of which were additions to and burdens upon the alleged contract asserted by plaintiffs) they are, in violation of said mortgage, attempting to make prior in law rights which were junior in time, if any such rights existed, all of which is in violation of the Constitution of the United States, here and now invoked. (14) It appears that the plaintiffs rely upon said State act of 1889, as construed by them, which act is in violation, when so construed, of section one of article XIV of the Amendments to the Constitution of the United States, commonly called the XIV Amendment; in that such statute imposes great penalties; and in that the insistence that the statute is applicable to the defendant, constitutes an attempt to abridge the privileges and immunities of the defendant and to deprive it of its property without due process of law, and to deny it the equal protection of the law by penalizing or threatening to penalize it at the rate of $5,000 a day, and further

penalize it, if it should resort to the courts to resist this action and litigate its rights by refusing to obey such unconstitutional statute. (15) The plaintiffs can not recover, as admitted by them, without the aid of said State Statute of 1889, which statute, as applied by them, is void and unconstitutional and violates section one of article 14 of the Amendments to the Constitution of the United States; in that it is an undue interference with the business and obligations of the defendant, which it owes to the public in state and interstate commerce; whereby it attempts to interfere with the lawful discretion and power of the defendant to conduct its business within the limits of the law; and whereby it attempts, by subsequent statute, to place burdens and liens and additions on and securing personal contracts as claimed by the plaintiffs, thereby denying to this defendant the equal protection of the law and taking its property without due process of law by such illegal interference. (16) That the said act of 1889 of Texas, as applied, is unconstitutional and void, and yet without it the plaintiffs can not recover; in that such act is applicable only to chartered railroads and not applicable to individuals, receivers or other persons operating as railroad carriers, or to other persons or corporations whatsoever, and so violates section one of article XIV of the Amendments to the Constitution of the United States, being legislation against a species or class, not rightly classified on any legal ground; and in that it places a burden upon the species or class not placed upon other persons and corporations classifiable with it; thereby violating the prohibition of denying to any persons "the equal protection of the laws," and abridging the privileges and immunities of the defendant and depriving it of its property without due process of law. (17) The plaintiffs rely upon the said act of 1889, which is claimed by them to secure their alleged contracts in this case, which as applied, is illegal and void and contrary to the Constitution of the State of Texas: (a) because the same assesses a penalty of an

amount prohibited by the Constitution; (b) because the statute as construed and pleaded is retroactive; (c) because the plaintiffs seek to recover in violation of the obligations and terms of the alleged contracts on which they sue and in violation of the mortgage contract, of the sold out railroad, made in 1881; (d) because such statute is *ex post facto* and pronounces penalties, and therein is contrary to the Constitution of the United States, as well as that of the state; (e) because as construed by plaintiffs the statute denies to the defendant the equal protection of the law and is violative of the due process of law; (f) because such statute as construed by the plaintiffs, and without which construction they can not prevail, is an attempt to place on this defendant, never assuming the same, alleged obligations of the sold out I. & G. N. R. R. or its predecessors, and which were personal to them. (17a) Because the plaintiffs alleged and attempted to prove a contract binding "forever," the law and Constitution not permitting properties and obligations to be bound up or enforced "forever," and the alleged contracts being as claimed forever, or indeterminate, are terminable at option, if contracts at all, which is not admitted. (18) Because the plaintiffs have introduced the conveyance of the properties of the sold out railroad to this defendant, and also its charter and the decree of foreclosure under which the properties were sold, from which it appears that the defendant bought free of all the obligations now asserted by the plaintiffs. (19) Because plaintiffs have introduced the charter of the defendant, from which it appears the general offices are located at Houston, Texas, and the charter being legally issued, the defendant is bound to maintain its general offices at Houston, Texas. (20) Because it also appears that the H. & G. N. R. R.'s charter, introduced by the plaintiffs, required said offices to be at Houston, Texas, and the charter of the International, introduced by plaintiffs, not designating a definite place for the offices, and

the two roads consolidated under act of 1889, the offices are obligated to be kept at Houston, Texas.

Furthermore:

That the relations and obligations between the H. & G. N. R. R. and the County, and considerations to each other, had all been settled, and that there would be no considerations for a new contract or new promises, and that declarations and admissions of Grow, if any, as agent, were inadmissible after so long a time after the event.

Which objections being considered by the court, were by him overruled, and the defendant took its Bill of Exceptions No. 38, and over these objections the witness testified as set out on pages 238 and 239 of the Statement of Facts, commencing in the 4th line from the top of page 238, and continuing through the 3rd line from the top of page 239. Wherefore, the defendant presents this its Bill No. 28, and prays that it be allowed.

N. A. Stedman,
F. A. Williams,
Andrews, Ball & Streetman,
Wilson, Dabney & King,
Attorneys for the Defendant.

Approved:

T. B. Greenwood,
Atty. for Plffs.

The foregoing Agreed Bill No. 38 of the defendant was this day presented to me, and is by me this 17th day of March, 1914, in all things approved and allowed.

A. E. Davis,
Judge Sitting in the Trial of This Case.

CHARGE OF THE COURT NO. 1.

ANDERSON COUNTY ET AL.
vs. No. 6415.
I. & G. N. R'Y CO.

Filed the 15th day of January, A. D. 1914.

In the District Court of Cherokee County, Texas.

Gentlemen of the Jury:

By request of all parties, without either plaintiffs or defendant waiving any right to a peremptory instruction, this cause will be submitted to you upon special issues, raised by the pleadings and evidence.

This means that the court will submit to you distinct and separate questions, to each of which you should return a distinct and separate answer.

The court will give you such instructions, in connection with each question, as may be deemed necessary to enable you to properly determine same.

Question No. One:

Do you find from the preponderance of the evidence that the Houston and Great Northern Railroad Company, acting by its President, Galusha A. Grow, on or about the 15th day of March, 1872, contracted and agreed, with the citizens of Palestine, acting by John H. Reagan, to extend its line of railroad to intersect the International railroad at Palestine, and to establish a depot within a half mile of the Court House at Palestine, and to commence running cars regularly thereto by July 1st, 1873, and to thereupon locate, and forever thereafter maintain, the general offices, machine shops and roundhouses of the Houston and Great Northern Railroad, at the City of Palestine, for and in consideration of an agreement by John H. Reagan, to make a thorough canvass of Anderson County, to induce the electors of that County to authorize the issuance of interest bearing bonds of the County in the principal sum of $150,000, and upon the further consideration that Anderson County, on author-

ization of its electors, should issue and deliver its bonds, in the principal sum aforesaid?

Answer "Yes," or "No."

Question Number Two:

Do you find from the preponderance of the evidence that Anderson County, on authorization of its electors, issued and delivered to the Houston & Great Northern Railroad Company its interest bearing bonds in the principal sum of $150,000, within a year from the date of the contract and agreement mentioned in Question Number One, if you find there was any such contract and agreement; and that Judge John H. Reagan made a thorough canvass of Anderson County to induce the electors to vote said bonds; and that the Houston & Great Northern Railroad Company and the International & Great Northern Railroad Company, in part performance of the contract and agreement mentioned in Question Number One, if you find there was any such contract and agreement, and in compliance with said contract and agreement, if any, established and thereafter maintained at Palestine, the machine shops and round houses of the Houston & Great Northern Railroad and of the International & Great Northern Railroad?

Answer "Yes," or "No."

Question Number Three:

Do you find from the preponderance of the evidence that the Houston and Great Northern Railroad Company authorized or ratified the action of Galusha A. Grow in making (if you find that he did make) the contract and agreement mentioned in Question Number One?

Answer "Yes," or "No."

In determining whether the Railroad Company authorized or ratified the action in its behalf, if any, of Galusha A. Grow, you are instructed that the power to authorize or ratify such action was vested in the Company's board of directors, and your answer to this Question Number Three should be determined by your finding from the

evidence as to whether a board of directors of the company conferred the authority on said Grow to make the contract and agreement (if any) or, knowing of his having exercised such authority (if he did so) approved of his action.

It is not necessary, in order to bind a railroad company by the action of an assumed agent, that the board of directors should have caused to be spread upon their minutes a formal resolution expressly authorizing or approving the action claimed to have been authorized or ratified, nor is it necessary, in order to bind a railroad company by the action of an assumed agent that the board of directors should have both authorized and ratified the action of the assumed agent; but it is necessary that such action should be either authorized or ratified by the board of directors.

Question Number Four:

Do you find from the preponderance of the evidence that about the first of the year 1875 the International and Great Northern Railroad Company, acting by its general superintendent, H. M. Hoxie, contracted and agreed with the citizens of the City of Palestine, among whom were the plaintiffs Geo. A. Wright and J. W. Ozment, to fully and completely perform a previous contract and agreement, if any there was, between the Houston and Great Northern Railroad Company, acting by Galusha A. Grow, and the citizens of Palestine, acting by John H. Reagan, by at once locating the general offices of the International and Great Northern Railroad at Palestine, and by thereafter forever keeping and maintaining the general offices, machine shops, and round houses of said International and Great Northern Railroad at Palestine, for and in consideration of certain bonds of Anderson County theretofore issued to the Houston and Great Northern Railroad Company, and for the further and additional consideration that said citizens should at once construct and complete, or cause to be constructed and completed, at their

own cost and expense, any and all houses at Palestine, Texas, which might be demanded by said Company, in accordance with such plans or directions as might be furnished by the Company, through its officers, for occupancy, at reasonable rentals, by employees of said Company and their families, and especially by general officers, their families and clerks?

Answer "Yes," or "No."

Question Number Five:

Do you find from the preponderance of the evidence that the citizens of Palestine did, in the early part of the year 1875, and within twelve months from the date of the contract between certain citizens of said City and the International and Great Northern Railroad Company (if such contret there was), construct and complete, or cause to be constructed and completed, at their own cost and expense, certain houses at Palestine, Texas, and that the same, if any, were all the houses which were demanded by the International and Great Northern Railroad Company, and that said houses, if any, were constructed and completed, in accordance with the plans or directions furnished therefor (if any) by said company, through an officer of same, for occupancy, at reasonable rentals, by the employees of said Company, including general officers, their families and clerks?

Answer "Yes," or "No."

Question Number Six:

Do you find from the preponderance of the evidence that the International and Great Northern Railroad Company authorized or ratified the action of H. M. Hoxie in making (if you find he did make) the contract and agreement, of date early in 1875, mentioned in Question No. Four?

Answer "Yes," or "No."

In this connection, you are charged that if you find from the preponderance of the evidence in this case that the International and Great Northern Railroad Com-

pany, after its formation by the consolidation of the Houston and Great Northern Railroad Company with the International Railroad Company, and early in the year 1875, did, through its general superintendent, H. M. Hoxie, contract and agree with certain citizens of the City of Palestine, including plaintiffs Wright and Ozment, that in consideration of the bond theretofore issued to the Houston and Great Northern Railroad Company, and in consideration that the citizens of Palestine should at once construct and complete, or cause to be constructed and completed at their own cost and expense, such houses at Palestine, as might be demanded by said Company, in accordance with plans or directions to be furnished by the Company, through its officers, for occupancy, at reasonable rentals, by employees of said Company and their families and clerks, the said International and Great Northern Railroad Company, on its part, would at once locate the general offices of said Company at Palestine and forever thereafter keep and maintain the general offices, machine shops and roundhouses of said International and Great Northern Railroad at Palestine, and would thereby fully and completely carry out and perform the contract between the Houston and Great Northern Railroad Company, acting by Galusha A. Grow, and the citizens of Palestine, acting by John H. Reagan (if any such contract there was), and if you further find, from the preponderance of the evidence, that the International and Great Northern Railroad Company had full knowledge of said contract between the citizens of Palestine and the Houston and Great Northern Railroad Company, if any, and of its terms, if any, and of said contract and agreement between certain citizens of Palestine and said general superintendent, H. M. Hoxie, if any, and of its terms, if any, and if you further find that in pursuance of said last mentioned contract and agreement, if any, certain citizens of Palestine at once constructed and completed, or caused

to be constructed and completed, at their own cost and expense, any and all houses demanded under said contract and agreement (if any), in full compliance with their obligations to said Company under said contract and agreement, if any, to the satisfaction of said Company; and if you further find that the International and Great Northern Railroad Company, acting by its board of directors, in pursuance of said contract and agreement of date early in the year 1875 (if any there was), and with the intention to adopt same (if any), and to perform the obligations imposed by said contract and agreement (if any) on said Company, did locate and establish the general offices of the International and Great Northern Railroad at Palestine, then you should answer this Question Number Six with the word "Yes"; but, if you fail to so find, then you should answer this Question Number Six with the word "No."

The form of your verdict, which you should write on a separate sheet of paper, will be as follows:

"Anderson County et al.

vs. No. 6415.

"International & Great Northern Railway Company.

"In the District Court of Cherokee County.

"Verdict on Special Issues.

"To Question Number One, we answer.....

"To Question Number Two, we answer.....

"To Question Number Three, we answer.....

"To Question Number Four, we answer.....

"To Question Number Five, we answer.....

"To Question Number Six, we answer.....

"To Question Number Seven, we answer.....

(Signed) "..... "*Foreman.*"

You will fill in each blank in each answer with the word "Yes" or the word "No," as you may find from the evidence.

Let your verdict be signed by your foreman, whom you

will select.

You are the exclusive judges of the facts proved, the weight of the evidence and the credibility of the witnesses.

A. E. DAVIS,
Judge Presiding.

OBJECTIONS TO THE COURT'S CHARGE.

ANDERSON COUNTY ET AL.
vs. No.
INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.

Filed Jan. 15, 1914.

In the District Court of Cherokee County, Texas.

The defendant submits to the Court the following objections to the charge submitted to them by the Court, and to the issues therein stated:

To the submission of any special issues contained in the charge submitted by the Court the defendant objects that the Court should peremptorily charge for it, and that it will submit the peremptory charge which should be given. Subject to its contention that a peremptory charge should be given in its behalf, defendant objects to charge submitted by the Court as follows:

To Question No. One, defendant objects—

1st. That it submits an issue based on conversations between Reagan and Grow, which did not contain the elements of a contract between them, or between the Railroad Company and the citizens of Palestine, but were merely preliminary negotiations intended to state a proposition to be submitted to the voters of Anderson County for their decision upon the issuance of bonds of the County to the Company.

2nd. The first question in the charge assumes that there may have been a contract, as alleged, which implies that there was a consideration to Reagan and the citizens of Palestine distinct from that to be received by the County or the citizens of the County at large for the bonds, in return for the services of Reagan and the citizens of Palestine in inducing the voters of the County to vote for the proposed bond issue, and this would render any such contract illegal and void as against public policy.

3rd. The question stated does not require the jury to find facts constituting a contract, but merely requires them to find that the parties contracted, thereby mingling with each other issues which should be submitted separately and distinctly.

4th. The question stated submits to the jury questions of law intermingled with questions of fact, in that it leaves to the jury to determine whether or not the parties named contracted, whether or not the citizens of Palestine were acting by Reagan, and whether or not there was consideration for Reagan's and Grow's promises without further definition or instruction.

5th. The question stated attempts to engraft on a contract formed between the railroad company and the County another and different contract between the railroad company and other persons, of which the bonds to be voted by the County was a part of the consideration.

ANDERSON COUNTY ET AL.

vs. No.

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.

In the District Court of Cherokee County, Texas.

The defendant submits to the Court the following objections to the charge submitted to its counsel by the Court, and to the issues therein stated.

To Special Issue No. Two defendant objects—

1st. The question stated submits together several dis-

tinct issues, viz: (*a*) Whether or not Reagan canvassed the County. (*b*) Whether or not the County granted the bonds. (*c*) Whether or not the Railroad Companies established and maintained offices and shops &c. at Palestine. (*d*) Whether or not this was done in part performance of the agreement between Reagan and Grow.

ANDERSON COUNTY ET AL.
vs. No.
INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.

In the District Court of Cherokee County, Texas.

The defendant's counsel submits to the Court the following objections to the charge submitted to them by the Court, and to the issues therein stated.

To Special Issue No. Three defendant objects—

1st. It submits to the jury the question of authority for Grow's action, and also of ratification of that action, when there is no competent evidence for either authority or ratification.

2nd. The question stated submits as one, the distinct issues of authority and ratification.

3rd. To the direction proposed in the charge of the Court in connection with Question Three, the defendant objects that it is incomplete and misleading in that it is not therein stated that in order to bind the railroad it was necessary that the Board of Directors should act as a body, and in that it is not stated that the separate action of the majority or all of the Board not acting as a body is insufficient.

ANDERSON COUNTY ET AL.
vs. No.
INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.

In the District Court of Cherokee County, Texas.

The defendant objects to Question No. Four submitted by the Court for the following reasons:

1. The pleading and evidence do not show the essen-

tials of a contract in the transaction referred to in the question.

2. If a contract is alleged, and if there is evidence sufficient to support it, it was not in writing, was not to be performed within a year, and was within the Statute of Frauds.

3. The question assumes that there may have been a contract with the private citizens of Palestine, based on a previous contract with, and a consideration moving from, Anderson County, such consideration having already been received by the County, as was called for by the railroad company's contract with it.

4. The question submits questions of law intermingled with questions of fact, in that it leaves the jury to say whether or not the parties "contracted," without informing them of the legal elements of a contract.

The defendant also objects to question No. 6, submitted by the Court, for the following reasons:

1. There is no evidence of authority to Hoxie to make the alleged contract.

2. There is no evidence of a ratification of Hoxie's acts in making such a contract.

3. The question gives no instructions as to how authority could have been conferred or ratification accomplished.

The defendant also objects to the construction given in the charge submitted by the Court following question No. Six, the objections being the same as those above made to Question No. Four.

THE INTERNATIONAL AND GREAT
NORTHERN R'Y CO.,
By Its Atty's,
F. A. WILLIAMS,
ANDREWS, BALL & STREETMAN,
N. A. STEDMAN,
WILSON, DABNEY & KING,
NORMAN & SHOOK.

The above and foregoing exceptions were presented to me by the attorneys for defendant, and were by the court overruled before the charge of the court was read to the jury, and to all of which the defendant in open court excepted.

A. E. Davis,
Judge Presiding.

SPECIAL CHARGE NO. 2, REQUESTED BY DEFENDANT.

ANDERSON COUNTY ET AL.
vs. No. 6415.
INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.

Filed Jan. 15, 1914.

In the District Court of Cherokee County, Texas.

The defendant requests the Court to give the following instructions:

Gentlemen of the Jury:

You are instructed to return a verdict for the defendant.

Andrews, Ball & Streetman,
F. A. Williams,
N. A. Stedman,
Wilson, Dabney & King,
Norman & Shook,
Donley,
Guinn,
Attorneys for Defendant.

Presented and refused before the reading of the charge of the Court to the jury, this Jany. 15th, 1914.

A. E. Davis,
Judge Judicial District, Presiding.

SPECIAL CHARGE NO. 2, REQUESTED BY DEFENDANT.

ANDERSON COUNTY ET AL.
vs. No. 6415.
INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.

Filed Jan. 15, 1914.

In the District Court of Cherokee County, Texas.

The defendant requests the Court to give the following instructions:

Gentlemen of the Jury:

You are instructed that the evidence in this case warrants no recovery by the plaintiffs upon the alleged agreement between Grow, representing the Houston & Great Northern Railroad Company, and Reagan, representing the citizens of Palestine, alleged to have been made in March, 1872. You will, therefore, leave that transaction out of consideration in coming to a verdict.

ANDREWS, BALL & STREETMAN,
F. A. WILLIAMS,
N. A. STEDMAN,
WILSON, DABNEY & KING,
NORMAN & SHOOK,
DONLEY,
GUINN,
Attorneys for Defendant.

Presented and refused before the reading of the charge of the Court to the jury, this Jany. 15th, 1914.

A. E. DAVIS,
Judge 1st Judicial District, Presiding.

SPECIAL CHARGE NO. 3, REQUESTED BY DEFENDANT.

ANDERSON COUNTY ET AL.

vs. No. 6415.

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.

Filed Jan. 15, 1914.

In the District Court of Cherokee County, Texas.

The defendant requests the Court to give the following instructions:

Gentlemen of the Jury:

You are instructed that the record of the election proceedings in which the voters of Anderson County voted in favor of the issuance of bonds in the sum of one hundred fifty thousand dollars to the Houston & Great Northern Railroad Company, and of the action thereon taken by the Commissioners' Court, is the exclusive evidence of the contract between the County of Anderson and that Railroad Company, and furnishes no basis for a recovery by the plaintiffs in this case.

You are further instructed that promises alleged to have been made by Grow, or others, during the canvass preceding that election, or afterwards, when the bonds were issued and delivered to Grow, concerning the location of general offices, round houses and machine shops, constituted no contract with the County of Anderson, or with anyone else, and you cannot base a verdict upon any contract claimed to have been thus made between the Railroad Company and the County.

ANDREWS, BALL & STREETMAN,
F. A. WILLIAMS,
N. A. STEDMAN,
WILSON, DABNEY & KING,
NORMAN & SHOOK,
DONLEY,
GUINN,
Attorneys for Defendant

Presented and refused before the charge of the Court was read to the jury, this Jany. 15th, 1914.

A. E. DAVIS,
Judge 1st Judicial District, Presiding.

SPECIAL CHARGE NO. 4, REQUESTED BY DEFENDANT.

ANDERSON COUNTY ET AL.
vs. No. 6415.
INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.

Filed Jan. 15, 1914.

In the District Court of Cherokee County, Texas.

The defendant requests the Court to give the following instructions:

Gentlemen of the Jury:

You are instructed that the so-called Rent-House Contract, alleged to have been made between Hoxie for the Railroad Company and citizens of Palestine, including Wright and Ozment, of date 1875, furnishes no basis for a recovery by plaintiffs in this case, and you will base no verdict for plaintiffs upon that contract.

F. A. WILLIAMS,
N. A. STEDMAN,
ANDREWS, BALL & STREETMAN,
NORMAN & SHOOK,
DONLEY,
GUINN,
Attorneys for Defendant.

Presented and refused before the reading of the charge of the Court to the jury, this Jany. 15th, 1914.

A. E. DAVIS,
Judge 1st Judicial District, Presiding.

SPECIAL ISSUES NOS. 1, 2, 3 AND 4, REQUESTED BY DEFENDANT.

ANDERSON COUNTY ET AL.

vs. No. 6415.

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.

Filed Jan. 15, 1914.

In the District Court of Cherokee County, Texas.

In case the Court shall refuse the instruction requested by defendant, peremptorily instructing the jury to return a verdict for it, and also refuse its second special charge directing the jury to disregard the alleged Reagan-Grow contract, the defendant requests the Court to submit in lieu of question No. One, stated in the charge submitted to counsel for defendant by the Court, the following questions:

Question No. One:

Referring to the alleged contract between Reagan and Grow, of 1872, you will answer the following question on what took place between Reagan and Grow, to which this relates:

Was Reagan acting as the representative of the citizens of Palestine in promoting some interest of theirs separate from the interests of the citizens of the County at large, or was he acting merely as a citizen of Anderson County, and in the interest of the entire County? Let your answer specify how and in whose interest, and as whose representative he was acting.

Question No. Two:

Was Reagan authorized by the citizens of Palestine to represent them in concluding, at the time of his transaction with Grow, a contract for their benefit, and for the promotion of some interest of theirs other than that of the citizens of the County generally? Answer "yes" or "no," and if you answer yes, state what that other interest was.

Question No. Three:

What benefit or advantage was Reagan or the citizens of Palestine, or both, to receive under the agreement, if there was an agreement, in consideration of Reagan's promise to canvass Anderson County, to induce or influence the voters to vote for the issuance of the County bonds?

Question No. Four:

Having in mind your answers to the three preceding questions, answer the following:

Did Grow, intending then to make a contract to be in force from that time, make an offer to Reagan that the Houston & Great Northern Railroad Company would extend its road to Palestine and there form a junction with the International Railroad and establish and forever maintain at that place a depot within one-half mile of the Courthouse, and would also establish and forever maintain at Palestine the general offices, machine shops and round houses of said Company in consideration of Reagan's making a thorough canvass of the County to induce the voters to vote for the issuance of the bonds of said County to the Railroad Company, and of the voters so voting and of the County's issuing the bonds, and did Reagan, while acting especially as the representative of the citizens of Palestine, as above explained, accept said offer and agree, intending to bind himself from that time, to make such canvass of the County to induce or influence the voters to vote in favor of the granting of bonds of the County to said Railroad Company? Answer yes or no.

In connection with Question No. Four, you are instructed that the burden is on the plaintiff to prove by a preponderance of the evidence each fact inquired about in this question, and if this has been done you will answer "yes," but if you should find that what was said between Reagan and Grow did not amount to an offer and acceptance, as stated in the question,

made and accepted with the intention of forming a contract to take effect from that time forth, or if Grow and Reagan had no intention then to conclude a contract, binding on the Railroad company and on Reagan and the citizens of Palestine, you will answer "no." Conversations or negotiations intended only to agree upon a proposal or question to be submitted to the voters of the County to ascertain whether or not they would authorize the issuance of the bonds would not amount to a contract, and if that was the case, you will answer "no." Nor would mere statements by Grow that the railroad company expected or intended to locate and forever maintain its general offices, machine shops and round houses at Palestine amount to a contract to do that, if he and Reagan did not then intend and regard themselves as making a binding agreement that this should be done in case Reagan made the canvass and the election should be in favor of issuing the bonds.

Should you find that Reagan and Grow did conclude a contract, as inquired about in this question, but that it did not include the general offices, machine shops and round houses, or that it included the machine shops and round houses, but did not include the general offices, you will not answer yes, but state what was included in the contract.

F. A. Williams,
N. A. Stedman,
Andrews, Ball & Streetman,
Wilson, Dabney & King,
Guinn,
Donley,
Attorneys for Defendant.

Submitted and refused before the reading of the charge of the court to the jury, this Jany. 15th 1914.

A. E. Davis,
Judge 1st Judicial District, Presiding.

SPECIAL ISSUE NO. 5, REQUESTED BY DEFENDANT.

ANDERSON COUNTY ET AL.

vs. No. 6415.

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.

Filed Jan. 15, 1914.

In the District Court of Cherokee County, Texas.

In case the Court refuses to instruct the jury to return a verdict for defendant, and also its second Special Charge directing the jury to disregard the alleged Reagan-Grow contract, defendant requests the Court to submit to the jury the following Special Issue:

In the matter of procuring the Houston & Great Northern Railroad Company to come to Anderson County to a junction with the International Railroad, was Judge John H. Reagan acting for Anderson County as a whole and not as the special representative of the citizens of Palestine, and in the matters connected therewith, was the contract or agreement as finally consummated, that the Houston & Great Northern Railroad Company should build to Palestine within a specified time to a junction with the International Railroad at Palestine, and establish and maintain a depot within one-half mile of the Court House of Anderson County, and that Galusha A. Grow, the President of the Houston & Great Northern Railroad Company, acting for it, and Judge Reagan, acting for Anderson County, without authority from the railroad company, but believing that Palestine was the logical and proper place for the location of the general offices, machine shops and round houses of the railroad company, and that if the bonds were voted amounting to One Hundred and Fifty Thousand Dollars by Anderson County, that they would be so located and that Judge Reagan and Grow jointly or severally urged and assured the voters, pending the bond election, that they would be so located, as arguments or promises to induce said voters to vote said bonds, and that the city of Palestine, as such,

had no other part in said election than to aid in enlisting the services and influence of Judge Reagan and to participate in said campaign and election in common with the voters of Anderson County. Answer "yes" or "no."

F. A. WILLIAMS,
N. A. STEDMAN,
ANDREWS, BALL & STREETMAN,
WILSON, DABNEY & KING,
NORMAN & SHOOK,
GUINN,
DONLEY,
Attorneys for Defendant.

Submitted and refused before charge of Court was read to jury, this Jan. 15th, 1914.

A. E. DAVIS,
Judge 1st Judicial District, Presiding.

SPECIAL ISSUE NO. 6, REQUESTED BY DEFENDANT.

ANDERSON COUNTY ET AL.
vs. No. 6415.
INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.

Filed Jan. 15, 1914.

In the District Court of Cherokee County, Texas.

Should the Court refuse defendant's requested instruction for a peremptory instruction, directing a verdict for the defendant, and also refuse defendant's requested charge No. Four concerning the Rent House Contract, the defendant requests the following additional question to be submitted in addition to Question No. Four in the Charge submitted by the court to counsel for defendant:

Question No. : If you find there was an agreement between Hoxie and Wright, Ozment and others, as inquired about in Question No. Four, answer further

whether or not Wright, Ozment and others bound themselves to rent the houses referred to to officers and employes of the International & Great Northern Railway Company.

Answer "Yes" or "No."

If you answer "yes," for how long a time did they bind themselves so to rent?

F. A. WILLIAMS,
N. A. STEDMAN,
ANDREWS, BALL & STREETMAN,
NORMAN & SHOOK,
F. B. GUINN,
W. E. DONLEY,
WILSON, DABNEY & KING,
Attys. for Defendant.

Presented and refused before reading of charge of Court to jury, this Jany. 15th, 1914.

A. E. DAVIS,
Judge 1st Judicial District, Presiding.

SPECIAL ISSUE NO. 7, REQUESTED BY DEFENDANT.

ANDERSON COUNTY ET AL.
vs. No. 6415.
INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.

Filed Jan. 15, 1914.

In the District Court of Cherokee County, Texas.

In the event that the Court should refuse to charge peremptorily for the defendant, as requested, the Court is requested to submit the following:

Do you, or not, find from a preponderance of the evidence that if the International & Great Northern Railway Company was required to have its general offices

at Palestine, Texas, forever, that thereby a burden would be placed upon Interstate Commerce?

F. A. WILLIAMS,
N. A. STEDMAN,
ANDREWS, BALL & STREETMAN,
WILSON, DABNEY & KING,
F. B. GUINN,
W. E. DONLEY,
N. B. NORRIS,
NORMAN & SHOOK,
Attys. for Defendant.

Presented and refused before charge of Court was read to jury, this Jany. 15, 1914.

A. E. DAVIS,
Judge 1st Judicial District, Presiding.

ISSUE NO. 8, REQUESTED BY DEFENDANT.

ANDERSON COUNTY ET AL.
vs. No. 6415.
INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.

Filed Jan. 15, 1914.

In the District Court of Cherokee County, Texas.

In the event that the Court refuses to charge peremptorily for the defendant, as requested, the Court is requested to submit the following question to the jury:

Do you, or not, find from a preponderance of the evidence that in the event that the International & Great Northern Railway Company should be required to keep and maintain its shops at Palestine, Texas, forever, that

thereby a burden would be placeed upon Interstate Commerce?

F. A. WILLIAMS,
N. A. STEDMAN,
ANDREWS, BALL & STREETMAN,
N. B. NORRIS,
F. B. GUINN,
W. E. DONLEY,
WILSON, DABNEY & KING,
NORMAN & SHOOK,
Attys. for Defendant.

Presented and refused before charge of Court was read to jury this Jany. 15th, 1914.

A. E. DAVIS,
Judge 1st Judicial District, Presiding.

SPECIAL ISSUE NO. 9, REQUESTED BY DEFENDANT.

ANDERSON COUNTY ET AL.
vs. No. 6415.
INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.

Filed Jan. 15, 1914.

In the District Court of Cherokee County, Texas.

If the court refuses special charge No. 1, requested by defendant, the defendant requests the Court to submit to the jury the following Special Issue in addition to all those submitted in the Charge:

Question No. : Did the International & Great Northern Railway Company commit a breach of the contract or contracts by which it is claimed it was bound to keep its general offices, machine shops and round houses at Palestine by removing its general offices from Palestine in 1881, and thereafter keeping them elsewhere until 1888? Answer "Yes" or "No."

In connection with this question, you are instructed that if you find from a preponderance of the evidence that the books and records, except the Minute Book and Stock books, all of the general officers, except two or three, and all the clerks and employees employed and kept in and about the general offices, were moved and kept away, as inquired about in the above question, you will answer yes, otherwise, you will answer "No."

ANDREWS, BALL & STREETMAN,
N. A. STEDMAN,
F. A. WILLIAMS,
WILSON, DABNEY & KING,
N. B. NORRIS,
NORMAN & SHOOK,
F. A. GUINN,
W. E. DONLEY,
Attys. for Defendant.

Presented and refused before charge of Court was read to jury, this Jany. 15th, 1914.

A. E. DAVIS,
Judge 1st Judicial District, Presiding.

SPECIAL ISSUE NO. 10, REQUESTED BY DEFENDANT.

ANDERSON COUNTY ET AL.
vs. No. 6415.
INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.

Filed Jan. 15, 1914.

In the District Court of Cherokee County, Texas.

If the Court refuses special charge No. 1, requested by defendant, the defendant requests the Court to submit

to the jury the following Special Issue in addition to all those submitted in the Charge:

Question No. : Did the International & Great Northern Railway Company commit a breach of the contract or contracts by which it is claimed it was bound to keep its general offices, machine shops and round houses at Palestine by removing its general offices from Palestine in 1881, and thereafter keeping them elsewhere until 1888?

Answer "Yes" or "No."

In connection with this question, you are instructed that if you find from a preponderance of the evidence that the books and records, except the Minute Books and Stock books, all of the general officers, except two or three, and all the clerks and employees employed and kept in about the general offices, were moved and kept away, as inquired about in the above question, you will answer yes, otherwise, you will answer "No."

F. A. Williams,
N. A. Stedman,
Andrews, Ball & Streetman,
F. B. Guinn,
W. E. Donley,
N. B. Norris,
Wilson, Dabney & King,
Attys. for Defendant.

Presented and refused before the reading of the charge of the Court to the jury, this Jany. 15th, 1914.

A. E. Davis,
Judge 1st Judicial District, Presiding.

SPECIAL CHARGE NO. 1, REQUESTED BY DEFENDANT IN CONNECTION WITH QUESTION NO. ONE.

ANDERSON COUNTY ET AL.

vs. No. 6415.

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.

Filed Jan. 15, 1914.

In the District Court of Cherokee County, Texas.

Should the Court refuse to give Special Charges Nos. one and two, asked by the defendant, and also refuse to submit Questions Nos. One to Four, requested in lieu of Question One submitted in the Charge of the Court, and the instructions in connection with said Questions Nos. one to four, but should submit Question No. One stated in the Charge handed by the Court to counsel for defendant, defendant asks the Court to give, in connection with such Question, the following special instructions, each of which is separately requested:

Special Charge No. 1 in connection with Question No. One:

The defendant requests the Court to give the following Special Charge in connection with question No. one submitted in its charge to the jury:

In determining whether or not Reagan and Grow "contracted," as stated in this question, you are instructed that, in order to answer "yes," you must find that Grow intended then to make a contract, binding on the Railroad Company, to do what was promised by him, and Reagan then intended to make a contract binding on himself and the citizens of Palestine, to do what he promised for himself and them. Mere conversations or negotiations between Grow and Reagan for the starting of proceedings for, and for carrying an election in the County to authorize the issuance of bonds of the County, with no purpose on the part of Reagan and Grow at that time to bind themselves by a contract separate from that intended

to be made afterwards between the Railroad Company and the County, through such election, would not constitute a contract, and if you find the facts as just supposed, you will answer "no" to question No. One.

F. A. WILLIAMS,
N. A. STEDMAN,
WILSON, DABNEY & KING,
ANDREWS, BALL & STREETMAN,
NORMAN & SHOOK & GIBSON,
GUINN,
W. E. DONLEY,
Attys. for Defendant.

Presented and refused before reading of Court's charge to jury this Jany. 15th, 1914.

A. E. DAVIS,
Judge 1st Judicial District, Presiding.

SPECIAL CHARGE NO. 2, REQUESTED BY DEFENDANT IN CONNECTION WITH QUESTION NO. 1.

ANDERSON COUNTY ET AL.
vs. No. 6415.
INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.

Filed Jan. 15, 1914.

You are instructed that in order to answer "yes" to question No. One, you must find that in what took place between Reagan and Grow, the former was representing interests of the citizens of Palestine, as distinct and separate from his and their interests as citizens of the County. If, in what took place between Reagan and Grow the former was merely acting as a citizen of the County, or if he and other citizens of Palestine were acting together as a part of the citizens of the County, and not in the promo-

tion of the interest of the citizens of Palestine, independent of their interest as citizens of the County, you will answer "no."

WILSON, DABNEY & KING,
ANDREWS, BALL & STREETMAN,
N. A. STEDMAN,
NORMAN & SHOOK & GIBSON,
N. B. MORRIS,
GUINN,
W. E. DONLEY,
F. A. WILLIAMS,
Attys. for Defendant.

Presented and refused before charge of Court was read to jury, this Jany. 15th, 1914.

A. E. DAVIS,
Judge 1st Judicial District, Presiding.

SPECIAL CHARGE NO 3, REQUESTED BY DEFENDANT IN CONNECTION WITH QUESTION NO. ONE.

ANDERSON COUNTY ET AL.
vs. No. 6415.
INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.

Filed Jan. 15, 1914.

In order to answer "yes" to question No. One, you must find that Reagan was made by the citizens of Palestine their representative to represent some interest of their own, separate from or in addition to such interest as they had as citizens of the County, in securing a contract with Grow for their own benefit; no mere action or agreement by Reagan as a citizen of the County, and for

the benefit of the entire County, would authorize you to answer "yes" to question No. One.

WILSON, DABNEY & KING,
ANDREWS, BALL & STREETMAN,
NORMAN & SHOOK & GIBSON,
GUINN,
W. E. DONLEY,
N. A. STEDMAN,
N. B. MORRIS,
F. A. WILLIAMS,
Attys. for Defendant.

Presented and refused before reading of charge of Court to jury, this Jany. 15th, 1914.

A. E. DAVIS,
Judge 1st Judicial District, Presiding.

SPECIAL CHARGE NO. 4, REQUESTED BY DEFENDANT IN CONNECTION WITH QUESTION NO. ONE.

ANDERSON COUNTY ET AL.
vs. No. 6415.
INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.

Filed Jan. 15, 1914.

The burden is on the plaintiffs to prove by a preponderance of the evidence each fact above made essential to enable you to answer "yes" to question No. One.

WILSON, DABNEY & KING,
ANDREWS, BALL & STREETMAN,
N. A. STEDMAN,
NORMAN & SHOOK & GIBSON,
GUINN,
W. E. DONLEY,
F. A. WILLIAMS,
Attys. for Defendant.

Presented and refused before charge of Court read to the jury, this Jany. 15, 1914.

A. E. Davis,
Judge 1st Judicial District, Presiding.

SPECIAL CHARGE NO. 1, REQUESTED BY DEFENDANT IN CONNECTION WITH QUESTION NO. 2.

ANDERSON COUNTY ET AL.

vs. No. 6415.

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.

Filed Jan. 15, 1914.

In case the Court should refuse Special instruction No. One, requested by defendant, peremptorily instructing a verdict for the defendant, and special charge No. 2, concerning the Reagan-Grow contract, and submit Question No. Two, as stated in the charge submitted by the Court to counsel for defendant, the defendant requests the Court to give the following special instructions in connection with Question No. Two:

You cannot answer "yes" to question No. Two unless it is shown by a preponderance of the evidence that the establishing and keeping of the offices, shops and round houses at Palestine was done because of the alleged agreement or agreements. The Railroad Company, without any contract, had the right to establish and maintain their offices, shops, &c., at Palestine, and the mere fact that it did so is not, by itself, evidence that it was done in part performance of any contract.

Wilson, Dabney & King,
Andrews, Ball & Streetman,
N. A. Stedman,
W. E. Donley,
N. B. Morris,
Norman, Shook & Gibson,
Guinn,
F. A. Williams,

Presented and refused before charge of Court was read to jury, this Jany. 15th, 1914.

A. E. DAVIS,
Judge 1st Judicial District, Presiding.

SPECIAL CHARGE NO. 1, REQUESTED BY DEFENDANT IN CONNECTION WITH QUESTION NO. 3.

ANDERSON COUNTY ET AL.
vs. No. 6415.
INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.

Filed Jan. 15, 1914.

Should the Court refuse Special Charge No. One asked by the defendant, directing a verdict for defendant, and special charge No. 2, concerning the Reagan-Grow contract, and submit question No. Three as stated in charge of the Court submitted to counsel for defendant, defendant requests the following special charge No. Two in connection with Question No. Three:

But to grant authority, or to ratify the making of such a contract by Grow, the Board of directors must have acted, when assembled as a body, and officially. The individual directors when not so assembled and acting, could not bind the Company by anything they might say or do or omit to say or do.

ANDREWS, BALL & STREETMAN,
WILSON, DABNEY & KING,
N. A. STEDMAN,
N. B. MORRIS,
GUINN,
NORMAN, SHOOK & GIBSON,
W. E. DONLEY,
F. A. WILLIAMS,
Attys. for Defendant.

Presented and refused before charge of Court read to jury, Jany. 15th, 1914.

A. E. DAVIS,
Judge Presiding.

SPECIAL CHARGE NO. 2, REQUESTED BY DEFENDANT IN CONNECTION WITH QUESTION NO. 3.

ANDERSON COUNTY ET AL.
vs. No. 6415.
INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.

Filed Jan. 15, 1914.

Should the Court refuse defendant's Special Charge No. One, directing a verdict for the defendant, and special charge No. 2, concerning the Reagan-Grow contract, and should submit Question No. Three stated in the charge handed to counsel for defendant by the Court, the defendant requests the following charge Number 2 in connection with Question No. Three:

The burden is on the plaintiffs to prove affirmatively by a preponderance of the evidence, authority from the Houston & Great Northern Railroad Company to Grow to make the contract referred to for it, or ratification of his action in making such contract, if he did so, and unless one of these facts has been so proved you will answer "no" to question No. Three.

ANDREWS, BALL & STREETMAN,
WILSON, DABNEY & KING,
N. A. STEDMAN,
NORMAN, SHOOK & GIBSON,
N. B. MORRIS,
GUINN,
W. E. DONLEY,
F. A. WILLIAMS,
Attys. for Defendant.

Presented and refused before charge of Court read to jury, this Jany. 15, 1914.

A. E. DAVIS,
Judge 1st Judicial District, Presiding.

SPECIAL CHARGE NO. 3, REQUESTED BY DEFENDANT IN CONNECTION WITH QUESTION NO. 3.

ANDERSON COUNTY ET AL.
vs. No. 6415.
INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.

Filed Jan. 15, 1914.

Should the Court refuse Special Charge No. One, directing a verdict for defendant, and Special Charge No. Two, concerning the Reagan-Grow contract, and submit Question No. Three stated in the charge handed to counsel for defendant, by the Court, the defendant requests the following Special Charge No. Three in connection with said Question No. Three:

Neither Grow nor any other officer of any of these railroad companies could, by his own actions, ratify Grow's actions in making any contract he is alleged to have made, nor would any action of the Board of Directors amount to ratification of such contract unless it was known to them before or at the time they may have acted, if they ever did act.

The contract, as finally made, between the Houston & Great Northern Railroad Company and Anderson County, did not require the Company to locate and maintain its general offices, machine shops and round houses at Palestine, and the acceptance and keeping of the bonds and their proceeds by the Company would not constitute a ratification of Grow's action in making the contract with

Reagan and the citizens of Palestine, if Grow made such contract.

The Houston & Great Northern Railroad Company and the International & Great Northern Railroad Company had the right to establish and maintain their general offices, machine shops and round houses at Palestine without any contract, and the fact that they did so would not be, in itself, a ratification of any contract to so locate and maintain them there.

ANDREWS, BALL & STREETMAN,
WILSON, DABNEY & KING,
NORMAN, SHOOK & GIBSON,
W. E. DONLEY,
N. B. MORRIS,
N. A. STEDMAN,
GUINN,
Attys. for Defendant.

Presented and refused before charge of Court read to jury, Jany. 15th, 1914.

A. E. DAVIS,
Judge Presiding.

SPECIAL CHARGE NO. 1, REQUESTED BY DEFENDANT IN CONNECTION WITH QUESTIONS 4, 5 AND 6.

ANDERSON COUNTY ET AL.
vs. No. 6415.
INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.

Filed Jan. 15, 1914.

In the District Court of Cherokee County, Texas.

Should the Court refuse defendant's requested Special Charge No. One, directing a verdict for defendant, and also refuse defendant's requested charge No. Four, con-

cerning the so-called Rent House Contract, the defendant requests the Court to give the following Special Charges in connection with Questions Nos. Four, Five and Six stated in the Charge submitted by the Court to defendant's counsel:

You are further instructed that authority to Hoxie or Hayes or other officer to make a contract binding the International & Great Northern Railway Company to locate and forever maintain its offices, shops, etc., at Palestine, must have been given by the Board of Directors as above instructed with reference to Grow. Neither Hoxie nor Hayes nor other officer could ratify such a contract made either by himself or by another officer without such authority.

Likewise, ratification of such a contract, if a contract was made without authority, must have been made by the Board of Directors as above instructed with reference to Grow; and to constitute a ratification by the Board, the action taken by it and claimed to be such ratification, must have been taken with knowledge by the Board of the existence of the contract. Moving the offices, shops, etc., to Palestine, and occupancy by officers and employees of houses furnished by the citizens would not constitute ratification by the Company of the alleged contract with reference to such houses, unless such action was taken with knowledge on the part of the Board that such contract had been made, and unless such moving and occupancy were done in recognition of the contract.

F. A. Williams,
N. A. Stedman,
Andrews, Ball & Streetman,
F. B. Guinn,
W. E. Donley,
Norman & Shook,
N. B. Morris,
Wilson, Dabney & King,
Attys. for Defendant.

Presented on this the 15th day of Jany., A. D. 1914, before the charge was read to the jury, and refused, to which defendant excepted.

A. E. DAVIS,
Judge Presiding.

CHARGE REQUESTED BY DEFENDANT.

ANDERSON CO. ET AL.

vs. No. 6415.

I. & G. N. R'Y CO.

Filed Jan. 15, 1914.

In the District Court of Cherokee County, Texas.

Should the Court refuse defendant's Special Charge No. One, directing a verdict for the defendant, and special charge No. 2, concerning the Reagan-Grow contract, and should submit Question No. Three stated in the charge handed to counsel for defendant by the Court, the defendant requests the following charge in connection with Question No. Three:

The burden is on the plaintiffs to prove affirmatively, by a preponderance of the evidence, authority from the Houston & Great Northern Railroad Company to Grow to make the contract referred to for it, or ratification of his action in making such contract, if he did so, and unless one of these facts has been so proved you will answer "no" to question No. Three.

Given.

A. E. DAVIS,
Judge Presiding.

CHARGE REQUESTED BY DEFENDANT.

ANDERSON CO. ET AL.

vs. No. 6415.

I. & G. N. R'Y CO.

Filed Jan. 15, 1914.

In the District Court of Cherokee County, Texas.

Should the court refuse defendant's requested Special Charge No. One, directing a verdict for defendant, and also refuse defendant's requested charge No. Four, concerning the so-called Rent House Contract, the defendant requests the Court to give the following Special Charges in connection with Questions Nos. Four, Five and Six stated in the Charge submitted by the Court to defendant's counsel.

You are further instructed that authority to Hoxie or Hayes or other officer to make a contract binding the International & Great Northern Railway Company to locate and forever maintain its offices, shops, etc., at Palestine, must have been given by the Board of Directors as above instructed with reference to Grow. Neither Hoxie nor Hayes nor other officer could ratify such a contract made either by himself or by another officer without such authority.

Likewise, ratification of such a contract, if a contract was made without authority, must have been made by the Board of Directors as above instructed with reference to Grow; and to constitute a ratification by the Board, the action taken by it and claimed to be such ratification, must have been taken with knowledge by the Board of the existence of the contract. Moving the offices, shops, etc., to Palestine, and occupancy by officers and employees of houses furnished by the citizens would not constitute ratification by the Company of the alleged contract with reference to such houses, unless such action was taken with knowledge on the part of the Board that such con-

tract had been made, and unless such moving and occupancy were done in recognition of the contract.

Given.

A. E. DAVIS,
Judge Presiding.

CHARGE OF THE COURT NO. 2.

ANDERSON CO. ET AL.

vs. No. 6415.

I. & G. N. R'Y CO.

Filed Jan. 15, 1914.

In District Court of Cherokee County, Texas.

In response to, and in lieu of, the instructions requested by defendant, the court charges you as follows:
Gentlemen of the Jury:

You are instructed that the record of the election proceedings in which the voters of Anderson County voted in favor of the issuance of bonds in the sum of one hundred and fifty thousand dollars to the Houston & Great Northern Railroad Company and of the action thereon taken by the Commissioners' Court, is the exclusive evidence of the ontract between the County of Anderson and that Railroad Company, and you are further instructed that the declarations or promises alleged to have been made by Grow, or others, during the canvass preceding that election, or afterwards, when the bonds were issued and delivered to Grow, concerning the location of general offices, round houses and machine shops, constituted no contract with the County of Anderson, and such promises of Grow, if any, can only be considered by you in connection with all other evidence in determining whether the contract alleged to have been made by

Grow with Reagan, acting for the citizens of Palestine (if he did so act), had in fact theretofore been made.

Given.

A. E. DAVIS,
Judge Presiding.

CHARGE OF THE COURT NO. 3.

ANDERSON CO. ET AL.

vs. No. 6415.

I. & G. N. R'Y CO.

Filed Jan. 15, 1914.

In the District Court of Cherokee County, Texas.

In response to and in lieu of instructions requested by defendant, the Court charges the jury:

You cannot answer "yes" to question No. Two unless it is shown by a preponderance of the evidence that the establishing and keeping of the offices, shops and round houses at Palestine was done because of the alleged agreement or agreements.

The Houston & Great Northern Railroad Company and the International & Great Northern Railroad Company had the right to establish and maintain their general offices, machine shops and round houses at Palestine without any contract, and the fact that they did so would not be, in itself, a ratification of any contract to so locate and maintain them there.

But if you find that such agreement or agreements had been made, then you may consider the establishment and maintenance of the shops and offices at Palestine, along with all other evidence in the case in determining whether or not the company knowingly asquiesced in or ratified such agreement or agreements, if any were made.

Given.

A. E. DAVIS,
Judge Presiding.

CHARGE OF THE COURT NO. 4.

ANDERSON CO. ET AL.
vs. No. 6415.
I. & G. N. R'Y CO.

Filed Jan. 15, 1914.

In the District Court of Cherokee County, Texas.

Special Charge in connection with Question No. One:

In order to answer "yes" to question No. One, you must find that Reagan was made by the citizens of Palestine their representative to represent them in making a contract, if any, between them and the Houston and Great Northern Railroad Company, which contract, if any, was more comprehensive than that sought from Anderson County, and was intended by all parties to be of especial benefit to the citizens of Palestine.

Given.

A. E. DAVIS,
Judge Presiding.

CHARGE OF THE COURT NO. 5.

ANDERSON CO. ET AL.
vs. No. 6415.
I. & G. N. R'Y CO.

Filed Jan. 15, 1914.

In the District Court of Cherokee County, Texas.

In response to and in lieu of special charges requested by the defendant, the court charges you as follows:

Special Charge in connection with Question No. One:

In determining whether or not Reagan and Grow "contracted," as stated in this question, you are instructed that in order to answer "yes" you must find that Grow intended or purposely induced Reagan to believe that he intended then to make a contract binding on the Railroad Company to do what was promised by him, and

Reagan then intended to make a contract binding on himself and the citizens of Palestine, to do what he promised for himself and them. Mere conversations or negotiations between Grow and Reagan for the starting of proceedings for and for carrying an election in the County to authorize the issuance of bonds of the County, with no purpose on the part of Reagan and Grow at that time to bind themselves by a contract separate from that intended to be made afterwards between the Railroad Company and the County, through such election, would not constitute a contract, and if you find the facts as just supposed you will answer "no" to question No. One.

Given.

A. E. DAVIS,
Judge Presiding.

CHARGE OF THE COURT NO. 6.

ANDERSON CO. ET AL.
vs. No. 6415.
I. & G. N. R'Y CO.

Filed Jan. 15, 1914.

In the District Court of Cherokee County, Texas.

In addition to the other questions propounded to you, you will answer the following:

Question No. 7:

Do you find from a preponderance of the evidence that in the event that the International & Great Northern Railway Company should be required to keep and maintain its shops at Palestine, Texas, forever, no burden or injurious effect would thereby be placed upon or suffered by, Interstate Commerce?

Answer "Yes," or "No."

Given.

A. E. DAVIS,
Judge Presiding.

CHARGE OF THE COURT NO. 7.

ANDERSON CO. ET AL.

vs. No. 6415.

I. & G. N. R'Y.

Filed Jan. 15, 1914.

In District Court of Cherokee County, Texas.

In response to and in lieu of instructions requested by defendant, the Court charges the jury:

Neither Grow nor any other officer of any of these railroad companies could by his own actions, ratify Grow's actions in making any contract he is alleged to have made, nor would any action of the Board of Directors amount to ratification of such contract unless it was known to them before or at the time they may have acted, if they ever did act.

The contract, as finally made, between the Houston & Great Northern Railroad Company and Anderson County did not require the Company to locate and maintain its general offices, machine shops and round houses at Palestine, and the acceptance and keeping of the bonds and their proceeds by the Company would not alone constitute a ratification of Grow's action in making the contract with Reagan and the citizens of Palestine, if Grow made such contract.

Given.

A. E. Davis,
Judge Presiding.

OBJECTIONS OF DEFENDANT TO COURT'S CHARGES 2, 3, 4, 5 AND 7.

ANDERSON CO. ET AL.

vs.

I. & G. N. R'Y CO.

Filed Jan. 15, 1914.

Now, before charges of the court are read to the jury,

and before argument, the defendant's counsel comes and objects and excepts to certain parts of the special instructions given, and in addition to the issues first submitted by the court, as follows:

To the following language in special instruction No. two given in response and in lieu of special instruction requested by the defendant, such language being "And such promises of Grow, if any, can only be considered by you in connection with all other evidence in determining whether the contract alleged to have been made by Grow with Reagan, acting for the citizens of Palestine, if he did so act, had in fact theretofore been made"; such objection being that the promises of Grow referred to were not proper evidence of the existence of a previous contract, and because that part of the charge comments and is upon the weight of the evidence.

SECOND: To special charge No. four, in connection with question No. One; the objection thereto being because of the refusal of the court to give in charge the charge requested by defendant upon the same subject, and further, for the reason that the charge as given does not state the correct rule, and does not fully express the law on the subject as did the charge requested by defendant.

THIRD: To the concluding sentence of special charge No. three, given in response and in lieu of special instruction requested by the defendant, which sentence is as follows: "But if you find that such agreement had been made, then you may consider the establishment and maintenance of the shops and offices at Palestine, along with all other evidence in the case, in determining whether or not the company knowingly asquiesced in or ratified such agreement or agreements, if any were made"; the objection being that there is no other evidence of ratification or of knowledge on the part of the defendant of the alleged contract and the establishment and maintenance

of the shops is no evidence of ratification or of knowledge of the existence of the contract.

FOURTH: To the insertion in special charge No. Five, given in response and in lieu of special charge requested by defendant, of the words "or purposely induced Reagan to believe"; the objection being that there is no evidence of such purpose on the part of Grow.

FIFTH: To the insertion in special charge No. Seven, given in response and in lieu of special charge requested by defendant, or the word "alone" in the last clause of such charge; the objection being that the word thus used implies that there had been other evidence along with which the acceptance of the bonds might be considered evidence of ratification.

ANDREWS, BALL & STREETMAN,
N. A. STEDMAN,
F. A. WILLIAMS,
WILSON, DABNEY & KING,
Attys. for Defendant.

DEFENDANT'S BILL OF EXCEPTIONS NO. 40.

ANDERSON CO. ET AL.
vs. No. 6415.
I. & G. N. R'Y CO.

Filed Mar. 18, 1914.

In the District Court of Cherokee County, Texas.

Be it remembered that upon the trial of the above entitled cause, and before the charges of the court were read to the jury, the defendant's counsel objected and excepted to certain parts of special instructions given, and in addition to the issues first submitted by the court, as follows:

To the following language in special instruction No. two given in response and in lieu of special instruction

requested by the defendant, such language being "And such promises of Grow, if any, can only be considered by you in connection with all other evidence in determining whether the contract alleged to have been made by Grow with Reagan, acting for the citizens of Palestine, if he did so act, had in fact theretofore been made"; such objection being that the promises of Grow referred to were not proper evidence of the existence of a previous contract, and because that part of the charge comments and is upon the weight of the evidence.

SECOND: To special charge No. four, in connection with question No. One; the objection thereto being because of the refusal of the court to give in charge the charge requested by defendant upon the same subject, and further, for the reason that the charge as given does not state the correct rule, and does not fully express the law on the subject, as did the charge requested by defendant.

THIRD: To the concluding sentence of special charge No. three, given in response and in lieu of special instruction requested by the defendant, which sentence is as follows: "But if you find that such agreement had been made, then you may consider the establishment and maintenance of the shops and offices at Palestine, along with all other evidence in the case, in determining whether or not the company knowingly acquiesced in or ratified such agreement or agreements, if any were made": the objection being that there is no other evidence of ratification or of knowledge on the part of the defendant of the alleged contract and the establishment and maintenance of the shops is no evidence of ratification or of knowledge of the existence of the contract.

FOURTH: To the insertion in special charge No. Five, given in response and in lieu of special charge requested by defendant, of the words "or purposely induced Reagan to believe"; the objection being that there is no evidence of such purpose on the part of Grow.

FIFTH: To the insertion in special charge No. Seven, given in response and in lieu of special charge requested by defendant, of the word "Alone" in the last clause of such charge; the objection being that the word thus used implies that there had been other evidence along with which the acceptance of the bonds might be considered evidence of ratification.

And defendant now tenders to the court this his bill of exceptions No. 40, and asks that it be approved and filed and made a part of the record in this cause.

ANDREWS, BALL & STREETMAN,
F. A. WILLIAMS,
N. A. STEDMAN,
WILSON, DABNEY & KING,
Attys. for Defendant.

Approved:

T. B. GREENWOOD,
Atty for Plffs.

This Bill No. 40 was this day presented to me, and being agreed to, is in all things approved this March 17th, 1914.

A. E. DAVIS,
Judge.

DEFENDANT'S BILL NO. 41.

ANDERSON COUNTY ET AL.
vs. No. 6415.
I. & G. N. RAILWAY COMPANY.

Filed Mar. 18, 1914.

(1) Be it remembered that upon the trial of the above described case, the evidence being closed, and all parties having rested, and before the argument of the case was begun, the court submitted to the respective parties and their attorneys, for inspection, the charge which he pro-

posed to give in the case, submitting the case upon special issues; whereupon came the defendant and presented its objections in writing thereto, and in these objections the defendant stated that a peremptory charge should be given for it, and that it would submit such peremptory charge for it, which was then and there submitted to the court; whereupon the court overruled all of said objections, and to the action of the court in overruling these objections filed herein January 15th, 1914, the defendant excepted.

(2) And be it further remembered that, in pursuance of the above, the defendant presented next its special charge No. 1, requesting the court to charge peremptorily for the defendant as follows: "You are instructed to return a verdict for the defendant," which instruction the court then refused to give, endorsing its refusal on the requested charge, to which refusal of the court the defendant then and there excepted.

(3) The above action having been taken by the court, the defendant presented to the court Special Charge 2, which Special Charge 2 directed the jury not to consider the alleged agreement between Grow and Reagan alleged to have been made in March, 1872, and the court refused to give such special charge, and endorsed his refusal thereon; whereupon the defendant excepted to such action of the court.

(4) And the court having ruled as set out above, the defendant, subject thereto, requested the court to give Special Charge No. 3, which the court refused, and endorsed his refusal thereon, to which action of the court the defendant excepted.

(5) And the court having ruled as set out above, and subject to the same, the defendant requested the court to give its Special Charge No. 4, which the court refused, and endorsed his refusal thereon; whereupon the defendant excepted to such refusal.

(6) The court having taken the above action, and

made the ruling stated, the defendant requested the court to submit in lieu of Question 1 stated in the charge submitted by the court certain questions or special issues numbered 1, 2, 3 and 4, with a certain instruction attached thereto, all as appears in the request to submit special issues 1, 2, 3 and 4, requested by the defendant, which request having been submitted to the court, were by him by endorsement thereon refused; whereupon the defendant excepted to this refusal of these requests.

(7) The court having made the above rulings, the defendant presented to the court its request to submit the special issue numbered by it No. 5, which special issue the court refused and overruled by endorsement thereon. Whereupon, the deefndant excepted to this ruling.

(8) The court having made the above rulings, the defendant presented to the court special issue No. 6, which special issue No. 6 as formulated by the defendant the court refused to give and overruled; whereupon, the defendant excepted to this action of the court.

(9) The court having made the above ruling, the defendant submitted to the court Special Issue No. 7, requested by it, and the court endorsed his refusal thereon to give the same, and to the refusal of the court to submit this issue as requested, the defendant then excepted.

(10) The Court having ruled as above, the defendant requested the court to submit to the jury Special Issue No. 8, requested by it, and the court refused to submit such Special Issue and endorsed thereon his refusal, and the defendant then excepted to the action of the court in refusing to submit such Special Issue.

(11) The court having ruled as above, the defendant presented to the court Special Issue No. 9 prepared by it, and requested the court to submit the same to the jury; whereupon, the court refused to submit this Special Issue so requested, and endorsed his refusal thereon, to which action of the court the defendant then excepted.

(12) The Court having ruled as above, the defendant presented to the court Special Issue requested by it No. 10, requested in the event that the court refused to charge peremptorily for the defendant, and the court refused to submit this Special Issue No. 10, and endorsed his refusal thereon; whereupon, the defendant excepted to such action of the court.

(13) The court having ruled as above, the defendant requested the court to charge the jury in connection with Question No. 1 contained in the charge submitted by the court, as requested in Special Charge No. 1, requested by the defendant in connection with Charge 1, defendant asked the court to give this charge, which the court refused, and endorsed his refusal thereon; whereupon the defendant excepted to such refusal.

(14) The defendant next presented to the court Special Charge 2, in connection with Question 1, and after the court had ruled as above, that is, this Special Charge was requested only after the court had made all of the rulings set out above; whereupon, the court refused to give Special Charge 2 requested in connection with Question 1, and endorsed his refusal thereon, to which action of the court the defendant then excepted to such refusal.

(15) The Court having ruled as above, the defendant presented to the court Special Charge 3, in connection with Question 1, contained in the charge submitted by the court, and requested the court to give the same, which Special Charge No. 3, in connection with Question 1 so requested, the court refused and endorsed his refusal thereon; whereupon the defendant excepted to this action of the court.

(16) The Court having ruled as set out above, the defendant requested the court to give Special Charge No. 4, in connection with Question 1, contained in the General Charge submitted by the court; whereupon the court refused to give this charge, and endorsed his refusal there-

on, and the defendant excepted to this action of the court.

(17) The court having ruled as set out above, the defendant next in order presented to the court its Special Charge No. 1, in connection with Question No. 2 in the charge submitted by the court, and requested the court to give the same; whereupon, the court refused to give the same, and endorsed his refusal thereon, and thereupon, the defendant excepted to such refusal.

(18) The defendant next presented to the court, after the court had ruled as set out above, its Special Charge No. 1, in connection with Question 3 in the court's charge submitted by him, and requested the court to submit the same, whereupon the court refused to submit such charge and endorsed his refusal thereon, and thereupon the defendant excepted to such action of the court.

(19) The defendant next presented to the court, after he had made all of the rulings set out above, Special Charge No. 2, in connection with Question 3 in the Charge submitted by the court, and requested the court to submit the same; whereupon the court refused and endorsed his refusal thereon, and the defendant thereupon excepted to such action of the court.

(20) The court having made all of the rulings set out above, the defendant presented to him Special Charge No. 3, in connection with Question 3 of the Charge submitted by the court; whereupon the court refused to give such charge, and endorsed his refusal thereon, and the defendant thereupon excepted to such action of the court.

(21) The court having made all of the rulings set out above the defendant presented to the court Special Charge No. 1 requested by it in connection with Questions 4, 5 and 6 in the charge submitted by the court, which Special Charge was refused by the court, and he endorsed his refusal thereon, to which action of the court in refusing the same the defendant thereupon excepted.

(22) The defendant presented to the court Charges

POOR COPY

marked "A" and "B," the court having taken the action set out above, Charge "A" being in connection with Question No. 3 submitted by the court in his charge, and conditionally requested as appears therein, and Charge "B" being in connection with Questions 4, 5 and 6 in the charge submitted by the court, and being conditionally requested as appears therein, and the court accepted these charges.

(23) The court next submitted to the counsel for the plaintiffs and the defendant additional charges, which he submitted for their consideration, and which are numbered Court's Charges 2, 3, 4, 5, 6 and 7; whereupon, the defendant objected to such charges, stating its objections in writing, and exceptions thereto, to wit: To No. 2 and to No. 4, to No. 3, to No. 5 and to No. 7 as in the exceptions and objections duly shown; which objections were in writing.

And these objections being each considered by the court, were each by him overruled, and to the court's action in overruling each of these objections the defendant then excepted.

(24) The various requests for instructions, and the various instructions which the court refused, as set out above, and which he decided to give, were all duly filed on the 15th of January, 1914, and the various objections of defendant were made in writing and then filed, and all of the above proceedings were had in open court before the argument of the case, and after the conclusion of the evidence; and thereafter the case was argued; whereupon, the court having previously settled the charges as set out above, over the objections of the defendant as hereinabove set out, read to the jury the charge of the court submitted by the court numbered Charge of the Court No. 1, and also Charges "A" and "B" requested by the defendant, and the charges 2, 3, 4, 5, 6 and 7 mentioned above as charges of the Court, and these were the charges by which the jury were in-

structed. All of the Charges mentioned above were submitted by the Court to the counsel for all of the parties in this case, before the court ruled thereon, and the charges requested by the defendant were each submitted to the counsel for the opposing parties before the court ruled thereon; and counsel for all parties had a reasonable opportunity to prepare and state their objections and exceptions to all of said charges requested, or given, and to examine the same before the court ruled thereon; and the court received and considered the charges in the order and as stated above.

Wherefore, the defendant presents this its Bill of Exceptions No. 41, in order to preserve the history of these matters, and its rights thereupon, and prays that it may be allowed.

F. A. Williams,
N. A. Stedman,
Wilson, Dabney & King,
Andrews, Ball & Streetman,
Attorneys for the Defendant.

Approved:

T. B. Greenwood,
Atty for Plffs.

The foregoing and Agreed Bill of Exceptions No. 41 was this day presented to me, and is by me in all things approved this 17th day of March, 1914.

A. E. Davis,
Judge.

JUDGMENT.

ANDERSON COUNTY ET AL.
VS. No. 6415.
I. & G. N. R'y CO.

Filed Jan. 17th, 1914.

Recorded in Vol. "M," pages 191-192-193-194.

On this the 7th day of January, 1914, the above entitled

cause came on to be heard before the Hon. A. E. Davis, Judge of the first Judicial District of Texas, presiding as judge of the District Court of Cherokee County, Texas, he having exchanged districts with the Hon. Lee D. Guinn, Judge of the Second Judicial District of Texas, and holding court at Rusk, instead of the said Hon. Lee D. Guinn, this being deemed expedient by both of said Judges.

And, now on this the 7th day of January, 1914, came on for hearing the plea to the jurisdiction and the plea in abatement contained in defendant's first amended original answer, together with the replication thereto contained in plaintiffs' first supplemental petition, when the plaintiffs and defendant, by their attorneys, agreed that the court should pass upon and determine the issues presented by said plea to the jurisdiction and plea in abatement and said replication, without a jury, and the court, after considering said plea to the jurisdiction and plea in abatement, and the replication thereto, and the evidence thereon, finds that said plea to the jurisdiction and plea in abatement should not be sustained; and, it is therefore ordered and decreed by the court that the plea to the jurisdiction and the plea in abatement contained in defendant's First Amended Original Answer, be and the same are hereby overruled, to which ruling of the court the defendant duly excepted.

And, now on this the 7th day of January, 1914, came on to be heard the general demurrer and the eighteen special exceptions contained in defendant's first amended original answer to plaintiff's first amended original petition, and the court having carefully considered said petition, and said general demurrer and special exceptions, finds that said general demurrer and each and all of said special exceptions should not be sustained, and it is therefore ordered by the court that said general demurrer and each and all of said special exceptions be and the same

are hereby overruled, to which findings and rulings of the court the defendant duly excepted.

And now on this the 8th day of January, 1914, the above entitled and numbered cause was regularly called for trial, when the plaintiffs appeared by their attorneys and announced ready for trial, and the defendant appeared by its attorneys and announced ready for trial, and thereupon came a jury of good and lawful men, to wit: J. M. Meador, foreman, and eleven others, to whom were submitted seven distinct and separate questions, after they had been duly impaneled and sworn, to which questions after hearing the pleadings, evidence, argument of counsel, and instructions of the court, the jury on this the 17th day of January, 1914, returned into open court, on their oaths, seven distinct and separate answers, in writing, duly signed by their foreman, which questions and answers were as follows, to wit:

Question Number One: Do you find from the preponderance of the evidence that the Houston and Great Northern Railroad Company, acting by its President, Gaiusha A. Grow, on or about the 15th day of March, 1872, contracted and agreed, with the citizens of Palestine, acting by John H. Reagan, to extend its line of railroad to intersect the International Railroad at Palestine, and to establish a depot within a half mile of the Court House at Palestine, and to commence running cars regularly thereto by July 1st, 1873, and to thereupon locate and forever thereafter maintain, the general offices, machine shops and roundhouses of the Houston and Great Northern Railroad, at the City of Palestine, for and in consideration of an agreement (if any), by John H. Reagan to make a thorough canvass of Anderson County, to induce the electors of that County to authorize the issuance of interest bearing bonds of the county in the principal sum of $150,000, and upon the further consideration that Anderson County, on authorization of its electors, should

issue and deliver its bonds, in the principal sum aforesaid?

Answer to Question Number One:

"Yes."

"Question Number Two:

"Do you find from the preponderance of the evidence that Anderson County, on authorization of its electors, issued and delivered to the Houston & Great Northern Railroad Company its interest bearing bonds in the principal sum of $150,000, within a year from the date of the contract and agreement mentioned in Question Number One, if you find there was any such contract and agreement; and that Judge John H. Reagan made a thorough canvass of Anderson County to induce the electors to vote said bonds; and that the Houston & Great Northern Railroad Company and the International & Great Northern Railroad Company, in part performance of the contract and agreement mentioned in Question Number One, if you find there was any such contract and agreement, and in compliance with said contract and agreement, if any, established and thereafter maintained at Palestine, the machine shops and round houses of the Houston & Great Northern Railroad and of the International & Great Northern Railroad?"

Answer to Question Number Two:

"Yes."

"Question Number Three:

"Do you find from the preponderance of the evidence that the Houston and Great Northern Railroad Company authorized or ratified the action of Galusha A. Grow in making (if you find that he did make), the contract and agreement mentioned in Question Number One?

"In determining whether the Railroad Company authorized or ratified the action in its behalf, if any, of Galusha A. Grow, you are instructed that the power to authorize or ratify such action was vested in the Company's board of directors, and your answer to this Question Num-

ber Three should be determined by your finding from the evidence as to whether a board of directors of the company conferred the authority on said Grow to make the contract and agreement (if any), or, knowing of his having exercised such authority (if he did so), approved of his action.

"It is not necessary, in order to bind a railroad company by the action of an assumed agent, that the board of directors should have caused to be spread upon their minutes a formal resolution expressly authorizing or approving the action claimed to have been authorized or ratified, nor is it necessary, in order to bind a railroad company by the action of an assumed agent, that the board of directors should have both authorized and ratified the action of the assumed agent; but it is necessary that such action should be either authorized or ratified by the board of directors."

Answer to Question Number Three:

"Yes."

"Question Number Four:

"Do you find from the preponderance of the evidence that about the first of the year 1875 the International and Great Northern Railroad Company, acting by its general superintendent, H. M. Hoxie, contracted and agreed with the citizens of the City of Palestine, among whom were the plaintiffs Geo. A. Wright and J. W. Ozment, to fully and completely perform a previous contract and agreement, if any there was, between the Houston and Great Northern Railroad Company, acting by Galusha A. Grow and the citizens of Palestine, acting by John H. Reagan, by at once locating the general offices of the International and Great Northern Railroad at Palestine, and by thereafter forever keeping and maintaining the general offices, machine shops, and round houses of said International and Great Northern Railroad at Palestine, for and in consideration of certain bonds of Anderson County theretofore issued to the Houston and Great Northern Railroad

Company, and for the further and additional consideration that said citizens should at once construct and complete, or cause to be constructed and completed, at their own cost and expense, any and all houses at Palestine, Texas, which might be demanded by said Company, in accordance with such plans or directions as might be furnished by the Company, through its officers, for occupancy, at reasonable rentals, by employees of said Company and their families, and especially by general officers, their families and clerks?"

Answer to Question Number Four:

"Yes."

"Question Number Five:

"Do you find from the preponderance of the evidence that the citizens of Palestine did, in the early part of the year 1875 and within twelve months from the date of the contract between certain citizens of said City and the International and Great Northern Railroad Company (if such contract there was), construct and complete, or cause to be constructed and completed, at their own cost and expense, certain houses at Palestine, Texas, and that the same, if any, were all the houses which were demanded by the International and Great Northern Railroad Company, and that said houses, if any, were constructed and completed, in accordance with the plans or directions furnished therefor (if any), by said Company, through an officer of same, for occupancy, at reasonable rentals, by the employees of said Company, including general officers, their families and clerks?"

Answer to Question Number Five:

"Yes."

"Question Number Six:

"Do you find from the preponderance of the evidence that the International and Great Northern Railroad Company authorized or ratified the action of H. M. Hoxie in making (if you find he did make), the contract and agree-

ment, of date early in 1875, mentioned in Question Number Four?

"In this connection, you are charged that if you find from the preponderance of the evidence in this case that the International and Great Northern Railroad Company, after its formation by the consolidation of the Houston and Great Northern Railroad Company with the International Railroad Company, and early in the year 1875, did, through its general superintendent, H. M. Hoxie, contract and agree with certain citizens of the City of Palestine, including plaintiffs Wright and Ozment, that in consideration of the bonds theretofore issued to the Houston and Great Northern Railroad Company, and in consideration that the citizens of Palestine should at once construct and complete, or cause to be constructed and completed, at their own cost and expense, such houses at Palestine, as might be demanded by said Company, in accordance with plans or directions to be furnished by the Company, through its officers, for occupancy, at reasonable rentals, by employees of said Company and their families and clerks, the said International and Great Northern Railroad Company, on its part, would at once locate the general offices of said Company at Palestine and forever thereafter keep and maintain the general offices, machine shops and roundhouses of said International and Great Northern Railroad at Palestine, and would thereby fully and completely carry out and perform the contract between the Houston and Great Northern Railroad Company, acting by Galusha A. Grow, and the citizens of Palestine, acting by John H. Reagan (if any such contract there was), and if you further find, from the preponderance of the evidence, that the International and Great Northern Railroad Company had full knowledge of said contract between the citizens of Palestine and the Houston and Great Northern Railroad Company, if any, and of its terms, if any, and of said contract and agreement between certain citizens of Palestine and said gen-

eral superintendent, H. M. Hoxie, if any, and of its terms, if any, and if you further find that in pursuance of said last mentioned contract and agreement, if any, certain citizens of Palestine at once constructed and completed, or caused to be constructed and completed, at their own cost and expense, any and all houses demanded under said contract and agreement (if any), in full compliance with their obligations to said Company under said contract and agreement, if any, to the satisfaction of said Company; and if you further find that the International and Great Northern Railroad Company, acting by its board of directors, in pursuance of said contract and agreement of date early in the year 1875 (if any there was), and with the intention to adopt same (if any), and to perform the obligations imposed by said contract and agreement (if any), on said company, did locate and establish the general offices of the International and Great Northern Railroad at Palestine, then you should answer this Question Number Six with the word 'Yes'; but, if you fail to so find, then you should answer this Question Number Six with the word 'No.' "

Answer to Question Number Six:

"Yes."

"Question Number Seven:

"Do you find from a preponderance of the evidence that in the event that the International and Great Northern Railway Company should be required to keep and maintain its shops at Palestine, Texas, forever, no burden or injurious effect would thereby be placed upon, or suffered by, Interstate Commerce?"

Answer to Question Number Seven:

"Yes."

And, now, on this the 17th day of January, 1914, the court does in all things approve the verdict and findings of the jury, in answer to the questions submitted to them, and it is thereupon considered, ordered, adjudged and

decreed by the court that the plaintiffs Anderson County, City of Palestine, Geo. A. Wright, J. W. Ozment, A. L. Bowers, Jno. R. Hearne, Z. L. Robinson, E. W. Link, R. C. Sewell, Jno. M. Colley and P. H. Hughes, for and on behalf of all citizens of the City of Palestine, do recover judgment against the defendant, International and Great Northern Railway Company, as follows, to-wit:

It is considered, ordered, adjudged and decreed by the court that the defendant International and Great Northern Railway Company shall forever keep and maintain the general offices, machine shops, and round houses, for the operation of the International and Great Northern Railroad, in the City of Palestine, in the County of Anderson, in the State of Texas, where the Houston and Great Northern Railroad Company and the International and Great Northern Railroad Company have contracted and agreed to forever keep same, for valuable considerations received.

It is also considered, ordered, adjudged and decreed by the court that the defendant International and Great Northern Railway Company be and it is hereby perpetually enjoined and restained from changing the location of the machine shops and round houses of the International and Great Northern Railroad, as operated by defendant, from the City of Palestine, and that the defendant International and Great Northern Railway Company be and it is hereby perpetually enjoined and restrained from keeping or maintaining the general offices of the vice-president and general manager, secretary, treasurer, auditor, general freight agent, traffic manager, general superintendent, general passenger and ticket agent, chief engineer, master of transportation, fuel agent, general claim agent, superintendent of motive power and machinery, and master mechanic, engaged in the operation of the International and Great Northern Railroad, at any other place than the City of Palestine.

It is also adjudged and decreed by the court that the

559

plaintiffs do have and recover of and from the defendant all costs herein, for which let execution issue.

It is further adjudged and decreed by the court that the officers of court do have and recover of each party hereto all costs incurred by each respectively, for which execution may issue.

To all of which judgment defendant excepted.

A. E. DAVIS,
Judge Presiding.

AGREEMENT.

ANDERSON COUNTY ET AL.
VS.
INTERNATIONAL & GREAT NORTHERN RAILROAD COMPANY.

It is hereby agreed that the defendant's First Motion for a New Trial filed January 17th, 1914, be omitted from the record, having been substituted by its amended Motion for a New Trial filed the same day under leave of the court.

A. G. GREENWOOD,
CAMPBELL, SEWALL & STRICKLAND,
THOS. B. GREENWOOD,
JOHN C. BOX,
R. O. WATKINS,
JOHN B. GUINN,
PERKINS & PERKINS,
Attorneys for Plaintiffs.

F. A. WILLIAMS,
N. A. STEDMAN,
ANDREWS, BALL & STREETMAN,
WILSON, DABNEY & KING,
Attorney for Defendant.

and that the verdict of the jury be omitted being correctly copied in the judgment.

ORDER.

ANDERSON COUNTY ET AL.
VS. No. 6415.
INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.

Filed Jan. 17th, 1914.

Recorded in Vol. "M," page 195.

District Court of Cherokee County, January 17th, 1914.

In this case on motion of the defendant, International & Great Northern Railway Company, it is ordered that the defendant have leave to file an amended Motion for the New Trial here now presented in lieu of its original Motion for a New Trial.

A. E. DAVIS,
Judge of said Court, and sitting in this case.

AMENDED MOTION FOR A NEW TRIAL.

ANDERSON COUNTY ET AL.
VS. No. 6415.
INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.

Filed Jan. 17th, 1914.

In the District Court of Cherokee County.

To the Honorable Judge of said Court, and sitting in this case:

Now comes the defendant, the International & Great Northern Railway Company, and with leave of the court, presents this its amended motion for a new trial herein, and in support thereof now states and specifies the grounds why this motion should be granted.

I.

The Judge of the District Court of Anderson County,

before the venue was changed in this case, erred in maintaining that there was a venue in Anderson County, and in overruling defendant's plea to the venue; all as appears by the defendant's plea to the venue in that connection stated, and Bill of Exception to such action of the court taken.

II.

The court erred in overruling the plea to the abatement in this suit contained in the defendant's first amended answer and filed January 7th, 1914, on which the trial was held and numbered I. in said answer, it thereby appearing that this court had no jurisdiction, and that the jurisdiction in this case, if any case there was, was in the United States District Court for the Northern District of Texas; all of the facts alleged in such plea to the jurisdiction being completely proved without controversy before the court, and the trial of such issue to the jurisdiction and of the plea in abatement being held before the court by agreement, the jury being waived on this issue by the agreement of the parties.

III.

The court erred in not sustaining the plea to the jurisdiction contained in Section I. of the amended answer, wherein it was set out that certain proceedings were had and foreclosure in the United States Circuit Court for the Northern District of Texas, and wherein the decree of foreclosure of the second mortgage was recapitulated and alleged and set forth, being the mortgage of 1881 of the International & Great Northern Railroad Company, which was sold out thereunder and bought by Nicodemus under the terms of this decree and proceedings thereunder, and conveyed to the defendant under the terms of this decree, all as completely set out in the plea in abatement, the facts therein plead being shown in evidence without controversy, and whereby it appeared that the United States Circuit Court for the Northern District of Texas, now succeeded by the United States Dis-

trict Court for the Northern District of Texas, and such District Court alone had jurisdiction to try any of the issues involved in this case, having reserved jurisdiction over the same, if any case should exist thereon; wherefore, it appears that this court erred in overruling such plea to the jurisdiction:

(a) Because this court has no jurisdiction, and because the sole jurisdiction of issues tried here and determining this cause is in the United States District Court for the Northern District of Texas.

(b) Because the United States Circuit Court for the Northern District of Texas directly and by implication by its decree in consolidated Cause No. 2501, and set out with the answer, of date May 10th, 1910, reserved jurisdiction to hear and determine this cause, or any such cause as this, upon any of the alleged issues tendered for litigation herein, being questions not disposed of, if they still be open, in the United States Circuit Court, and reserved to such court and its successor, the District Court.

(c) Because the United States District Court of the Northern District of Texas is open to entertain this action of the plaintiffs, if any they have, and if any action can be maintained by them under the terms of such decree of foreclosure.

(d) Because it appears upon the face of the proceedings and the matters proved to have occurred in the United States Court and set out in the plea in abatement, that to further litigate this case in the State Court would invade the jurisdiction and decrees of the United States Court, and that a Federal question is now presented and tendered for litigation, and that the plaintiffs are now attempting in this case, in collision with the decrees of the United States Court set out in the plea in abatement, and with full notice of all those proceedings, to litigate; it being only for that court to determine whether or not this litigation can proceed, and it having reserved

jurisdiction of such litigation as this, by the decree of foreclosure, for itself; and having decreed the properties to be sold, which the defendant has bought, as appears by the plea in abatement, not subject to any such claim growing out of any act of the International & Great Northern Railroad Company or its constituents forming it; unless such case be sustained by the United States Court directing the sale of the property. Furthermore, this defendant has invoked, and does now invoke, not limiting the above, section 709 of the Rev. Stats. of the United States carried into Section 237 of the Acts of Congress of March 3rd, 1911 (36 Stat., 1087), in protection of the title, right, privileges, and immunities, acquired by and under the authority of the decree of foreclosure and proceedings of the U. S. Court and the undertakings of that court, and the lawful reservation of that court of jurisdiction over the matters herein attempted to be litigated to the exclusion of every other court.

Wherefore, upon all of the above the court erred in overruling such plea in abatement and to the jurisdiction.

IV.

The court erred in overruling the defendant's general demurrer contained in its amended answer, being Section 1 of Section II thereof.

V.

The court erred in overruling defendant's demurrer No. 2 in Section II. of its amended answer.

VI.

The court erred in overruling demurrer No. 2, contained in Section II. of the amended answer; because the alleged agreement and contract set out in the amended petition as made by John H. Reagan representing the citizens of Palestine and the citizens of Palestine with Grow, or with the Houston & Great Northern Railroad

Company acting through Grow, was illegal and void and contrary to public policy, because:

(1) The consideration to the Railroad is alleged to have been an engagement of John H. Reagan's service to induce, or influence, and canvass the electors of Anderson County in favor of a bond issue; it being illegal and contrary to public policy to found any contract upon such an engagement to induce, canvass and influence the voters to adopt a contract for a bond issue.

(2) Because the consideration for John H. Reagan's services, to be given by the Railroad, is alleged to have been promised to the citizens of Palestine, a portion of Anderson County, not to the whole of such citizens; whereby the consideration would move to a portion of the voters and be a means of influencing and procuring their votes for a bond issue to be voted by the whole of the county.

VII.

The court erred in overruling demurrer No. 3 contained in Section II. of the amended answer.

VIII.

The court erred in overruling demurrer No. 3 contained in Section II. of said answer, because:

(1) Any agreements, promises and representations made by Grow, or other agents of the Railroad in promotion of a canvass of the county are irrelevant and immaterial.

(2) Because the contract with the County was required by law to be in writing, and could not be proved except by such writing, and was necessarily complete of the whole transaction.

(3) Because no testimony or matters could be received in evidence going to show or prove such promises, agreements and representations.

IX.

The court erred in overruling demurrer No. 4 contained in Section II. of the amended answer, because:

(1) It is not now a matter of proof to determine what motives, if any, outside of the written contract, caused the voters to vote for the bond issue, and,

(2) The law required the contract with the County to be a proposition to be submitted to the voters for their approval, which writings necessarily stated all of the considerations.

X.

The court erred in overruling demurrer No. 5 contained in Section II. of the amended answer, because:

(1) The only legal evidence of the considerations for the issue of the bonds was required to be in writing and of record, and,

(2) Because such records are not set forth and their contents in no way stated, and could not be subject to amendment, if subject to amendment at all by parol, until they have been stated.

XI.

The court erred in overruling demurrer No. 6 in Section II. of the amended answer, because the allegations at which the demurrer is directed relate to matters which were required to be in writing, which writings are suppressed and left out of the pleadings.

XII.

The court erred in overruling the demurrer numbered 7 contained in Section II. of the amended answer.

(1) Because neither Grow, nor the County Court could form a new contract after the election.

(2) Because there would be no new consideration, or consideration for the alleged representations of Grow to procure the delivery of the bonds.

(3) Because the contract could only be formed by an election and was not subject to variation or condition by

an understanding between Grow and the County Court after election.

XIII.

The court erred in overruling demurrer No. 8 contained in Section II. of the answer because the allegations of the transactions between Hoxie and the citizens of Palestine, including Wright and Ozment, are insufficient to show the formation of a contract.

XIV.

The court erred in overruling demurrer numbered 9 in Section II. of the amended answer, because it was not alleged that the agreement stated to have been formed by Hoxie was in writing, it being essential that the same should be in writing under the statute of Frauds.

XV.

The court erred in overruling demurrer No. 10 in Section II. of the amended answer.

(1) Because it was not alleged how long, and for what period the houses were to be rented,

(2) Because it was not stated what houses were constructed, on what specifications, who were the owners, and what has become of them.

XVI.

The court erred in overruling demurrer No. 11 contained in Section II. of the amended answer.

XVII.

The court erred in overruling demurrer No. 11 in Section II. of the amended answer, because the defendant refused to allege the particulars of the ratifications of the alleged agreement, or the particulars of any acquiescence therein.

XVIII.

The court erred in overruling demurrer numbered 12 in Section II. of the amended answer.

XIX.

The court erred in overruling demurrer numbered 13 in Section II. of the amended answer.

XX.

The court erred in overruling demurrer No. 14 in Section II. of the amended answer, and in overruling each of the sections thereof.

XXI.

The court erred in overruling demurrer numbered 15 in Section II. of the amended answer.

XXII.

The court erred in overruling demurrer numbered 16 in Section No. II. of the amended answer.

XXIII.

The court erred in overruling demurrer numbered 17 in Section II. of the amended answer, and in overruling each of the grounds assigned therefor.

XXIV.

The court erred in overruling demurrer No. 18 in Section No. II. of the amended answer.

XXV.

The court erred in overruling demurrer No. 19 in Section II. of the amended answer.

XXVI.

The Court erred, as shown in Bill of Exceptions No. 3, in refusing to subject to the rule Wright, Ozment, Bowers and Hughes, witnesses in this case, and in overruling the defendant's contention that they should be subject to the rule and removed from the Court Room.

XXVII.

The Court erred in admitting evidence on matter in regard to the executive board and executive officers of the railroad or railroads, over the defendant's objection, as shown by Bill of Exceptions No. 4.

XXVIII.

The Court erred in admitting in evidence, over the defendant's objection as shown by its Bill of Exception No. 5, the matter therein stated.

XXIX.

The Court erred in admitting in evidence from the minutes of the Railroad Company direction in regard to paying draft of Grow, President of the International and Houston and Great Northern Railroad Companies, to an amount not exceeding $25,000.00 to be credited to Grow for extra services and expenses in procuring private donation of lands and county bonds to the International and Houston and Great Northern Railroad Companies, all as shown in defendant's Bill of Exceptions No. 6.

XXX.

The Court erred in admitting in evidence the resolution of the Railroad or Railroads or Executive Committee, as shown in Bill of Exceptions No. 6, authorizing payment to Grow of $25,000.00 to be credited to him for extra services and expenses in procuring private donation of lands and county bonds to the International and Houston and Great Northern Railroad Companies, all as shown by Bill of Exceptions No. 6.

(a) Because such evidence introduced is in modification of and in addition to the written contract with the County, and which the law required to be in writing.

(b) Because the contract in question was passed on by a vote of the people in 1872; more than forty years has elapsed since that time and such collateral matters are now inadmissible in evidence to modify the deed to or in any way change the original written contract, after the lapse of such a great length of time.

(c) The plaintiffs have announced that they would introduce the record made by the County, and its contracts subject to the vote of the people, which record

they have handed to the counsel for the defendant and it appears therefrom that the document offered, and the purpose for which it is offered, would be in direct conflict with the written document now exhibited, which is complete within itself and made a part of the Bill of Exceptions.

(d) Because it appears from the written record exhibited by the plaintiffs, and which they state they will introduce, that it contains a proper adjudication of the consideration, and the adjudication of the County Court of Anderson County itself showing that all matters were settled and accounted for about the date the order was made.

(e) Because if the plaintiffs had any right at all it was a personal right against the Houston and Great Northern Railroad Company now sold out, as appears by the pleadings in this case and the admissions made by the plaintiffs, and in their pleadings; and because it is not possible, as contended by the plaintiffs, that their rights were fixed against the property or properties by the subsequent act of 1889, and prior to the mortgage of 1881, whereby, as claimed, the plaintiffs would obtain a prior right to the mortgage and to the defendants holding thereunder, and because the claim of plaintiffs is that the act of 1889 would fix and procure, by a subsequent and retroactive act, security to the previous alleged contract of 1872, all of which would be unconstitutional and void.

XXXI.

The Court erred in admitting in evidence, over the defendant's objection, that portion of the by-laws of the International and Great Northern Railroad Company relating to an executive committee, all as appears by the defendant's Bill of Exception No. 7.

XXXII.

The Court erred in admitting in evidence the resolu-

tion read from the minutes of the Railroad of date July 21, 1874, allowing Grow a credit of $5,000.00 in addition to previous amounts, all as appears in the defendant's Bill of Exception No. 8.

XXXIII.

The Court erred in admitting in evidence, over the objection of the defendant, resolution of the stockholders of the International and Great Northern Railroad, relating to the leasing of the property of that company for 99 years to the Missouri, Kansas and Texas Railroad Company, all as appears in the defendant's Bill of Exception No. 9.

XXXIV.

The Court erred in admitting in evidence, over the objection of the defendant as shown in its Bill of Exception No. 10, minutes of a resolution of the International and Great Northern Railroad Company in regard to the appointment of Eddie as General Manager, and in regard to authorizing him to make a formal confession of judgment, all as appears in said bill.

XXXV.

The Court erred in refusing to grant the defendant's motion to exclude from the Court room Bowers, Ozment and Hughes, announced to be witnesses in this case, during the period while George A. Wright was testifying and while he should be testifying, and in refusing to exclude from the Court Room all of these four persons except the one testifying while any of them should be testifying, as shown in defendant's Bill of Exception No. 11.

XXXVI.

The Court erred in refusing to exclude from evidence the testimony of Wright in regard to the alleged Reagan-Grow contract, and in admitting the same in evidence over defendant's objections, all as shown by defendant's Bill of Exception No. 12.

XXXVII.

The Court erred in admitting in evidence the testimony of the witness Wright in regard to the speeches of Judge Reagan in canvassing the County for the bond issue, over the objections of the defendant, all as shown by its Bill of Exception No. 13.

XXXVIII.

The Court erred in admitting in evidence the testimony of the witness Wright in regard to the speeches made by Judge Reagan and Grow at Palestine before or during the bond election, over the objections of the defendants, all as shown in Bill of Exceptions No. 14.

XXXIX.

The Court erred in admitting in evidence the testimony of the witness Wright as to what was done or said by Grow after the election, in connection with Grow's procuring the county bonds from the County Court, over the objections of this defendant, all as shown in Bill of Exception No. 15.

XXXX.

The Court erred in admitting in evidence, over the objections of the defendant, the testimony of the witness Wright in regard to the grounds of the International and Great Northern Railroad Company at Palestine, and the alleged reservation there of such grounds, all as shown in the defendant's Bill of Exception No. 16.

XXXXI.

The Court erred in admitting in evidence the testimony of the witness Wright over the objections of the defendant, in relation to the buildings of the International and Great Northern Railroad and describing same, at Palestine, all as shown in the Defendant's Bill of Exceptions No. 17.

XXXXII.

The Court erred in admitting in evidence the statements of the witness Wright in regard to an alleged con-

tract with H. M. Hoxie, a railroad officer, and in permitting him to testify in this connection to conversations with and statements had with Hoxie in the presence of Hayes, or with Hayes and in the presence of other persons, at the time such conversations are testified to have occurred with Hoxie, all as is shown in Bill of Exceptions No. 18 of the defendant.

XXXXIII.

The Court erred in admitting in evidence the testimony of the witness Wright in regard to a statement detailed by him as having been made by Hoxie concerning and involving a letter from Grow, over the objections of this defendant, all as shown in its Bill of Exceptions No. 18-A.

XXXXIV.

The Court erred in admitting in evidence, over the objections of the defendant, the testimony of Mrs. John H. Reagan in regard to a conversation, as stated by her, between Judge John H. Reagan and Grow and with or in the presence of others on or about March, 1872, at Judge Reagan's house, bearing upon the alleged Reagan-Grow contract, and in regard to any statement of any matter about said alleged contract—all as appears in defendant's Bill of Exceptions No. 19.

XXXXV.

The Court erred in admitting in evidence the testimony of the witness Jacobs to statements made in the speech or speeches by Grow, or Grow and Reagan, in 1872 in Palestine, all as appears by the defendant's Bill of Exceptions No. 20.

XXXXVI.

The Court erred in admitting in evidence, over the defendant's objections, the testimony of the witness Hughes to a speech or speeches of Grow, made in Palestine in 1872, all as appears in defendant's Bill of Exceptions No. 21.

XXXXVII.

The Court erred in admitting in evidence the testimony of the witness Watts, over the objections of the defendant, to a speech or speeches of Grow, or Grow and Reagan, made in Palestine in 1872, all as appears in defendant's Bill of Exceptions No. 22.

XXXXVIII.

The Court erred in admitting in evidence the testimony of the witness McClure, over the defendant's objections, to a speech, or speeches, of Grow, or Grow and Reagan, all as shown in defendant's Bill of Exception No. 23.

XXXXIX.

The Court erred in admitting in evidence the testimony of the witness Ozment, over the objections of the defendant, to a speech or speeches of Grow and Reagan, all as shown in defendant's Bill of Exceptions No. 24.

L.

The Court erred in admitting in evidence the testimony of the witness Ozment, over the defendant's objections, to a conversation with Hoxie in 1875 in Hoxie's private car, at which Hayes and Wright, and perhaps others, were present, all as shown in defendant's Bill of Exception No. 25.

LI.

The Court erred in admitting in evidence, over the defendant's objections, the testimony of the witness Ozment as to a statement detailed as made by Hoxie of a letter he had received from Grow, all as appears by defendant's Bill of Exception No. 26.

LII.

The Court erred in admitting in evidence, over the defendant's objections, the testimony of Judge Stedman in regard to a certain newspaper article and his action and advice and statements made thereon, all as shown in defendant's Bill of Exceptions No. 27.

LIII.

The Court erred in admitting in evidence, over the defendant's objections, a certain newspaper article published in the "Daily Visitor," a Palestine paper of date May 16, 1899, and signed John H. Reagan, etc., all as appears in defendant's Bill of Exceptions No. 28.

LIV.

The Court erred in overruling the objections to the charge submitted to counsel for defendant, the first of which is without number, but in substance is: To the submission of any special issues contained in the charge; because the court should peremptorily instruct a verdict for defendant, and give the peremptory instruction requested.

LV.

The Court erred in overruling objection No. 1 to question No. 1 submitted in the charge of the court to the jury.

LVI.

The Court erred in overruling objection No. 2 to the first question submitted in the charge to the jury.

LVII.

The Court erred in overruling Objection No. 3 to question No. 1 submitted in the charge to the jury.

LVIII.

The Court erred in overruling Objection No. 4 to the first question submitted in the charge to the jury.

LIX.

The Court erred in overruling Objection No. 5 to the first question submitted in the charge to the jury.

LX.

The Court erred in overruling the first objection to question No. 2 submitted in the charge to the jury.

LXI.

The Court erred in overruling Objection No. 1 to question No. 3 submitted in the charge to the jury.

LXII.

The Court erred in overruling Objection No. 2 to question No. 3 submitted in the charge to the jury.

LXIII.

The Court erred in overruling Objection No. 3 to question No. 3 submitted in the charge to the jury.

LXIV.

The Court erred in overruling Objection No. 1 to Question No. 4 submitted in the charge to the jury.

LXV.

The Court erred in overruling Objection No. 2 to Question No. 4 submitted in the charge to the jury.

LXVI.

The Court erred in overruling Objection No. 3 to Question No. 4, submitted in the charge to the jury.

LXVII.

The Court erred in overruling Objection No. 4 to Question No. 4 submitted in the charge to the jury.

LXVIII.

The Court erred in overruling Objection No. 1 to Question No. 6 submitted in the charge to the jury.

LXIX.

The Court erred in overruling Objection No. 2 to Question No. 6 submitted in the charge to the jury.

LXX.

The Court erred in overruling Objection No. 3 to Question No. 6 submitted in the charge to the jury.

LXXI.

The Court erred in inserting in special instruction No. 2 given in response to and in lieu of special instructions

requested by defendant the language: "And special promises of Grow, if any, can only be considered by you in connection with all other evidence in determining whether the contract alleged to have been made by Grow with Reagan, acting for the citizens of Palestine, if he did so act, had theretofore been made," and in overruling the defendant's objection to such insertion made before the reading of the charge to the jury, as shown by Bill on file.

LXXII.

The Court erred in giving special charge No. 4 in connection with question No. 1, and in refusing to give the charge requested by defendant on the same subject, for the reason that the charge, as given, does not state the correct rule and does not fully express the law upon the subject as did the charge requested by the defendant, as shown by bill.

LXXIII.

The Court erred in giving the concluding sentence of special charge No. 3 given in response to and in lieu of special instruction requested by defendant, which sentence is as follows: "But if you find that such agreement had been made, then you may consider the establishment and maintenance of the shops and offices at Palestine along with all other evidence in the case in determining whether or not the company knowingly acquiesced in or ratified such agreements, if any were made." The objection being that there is no other evidence of ratification or of knowledge on the part of the defendant of the alleged contract, and the establishment and maintenance of shops and offices is no evidence of ratification or of knowledge of the existence of the contract, as shown by bill.

LXXIV.

The Court erred in inserting in special charge No. 5, given in response to and in lieu of special charge requested by the defendant, the words, "Or purposely in-

duced Reagan to believe," the objection being that there was no evidence of such purpose on the part of Grow; as shown by bill.

LXXV.

The Court erred in inserting in special charge No. 7 given in response to and in lieu of special charge requested by the defendant, the word "alone," the objection being that the word thus used implies that there had been other evidence along with which the acceptance of the bonds might be considered evidence of ratification; as shown by bill.

LXXVI.

The Court erred in refusing special charge No. 1 requested by the defendant instructing a verdict for the defendant.

LXXVII.

The Court erred in refusing said special charge No. 1 for the following reasons:

(a) A peremptory charge should have been given in this case in that the evidence conclusively and indisputedly shows that in the years 1881-1888 the general offices of the International & Great Northern Railroad Company were in St. Louis, Missouri, whereby it appears that the right of the plaintiffs, if right they have, and of each of them, was barred by the statutes of limitation, plead by the defendants; whereby plaintiffs cannot recover either as to the general offices or as to the shops.

(b) In that the statute of Frauds was plead in this case by the defendants, and it was conclusively proved that the contracts upon which the plaintiffs rely, if contracts at all, were in parol when the law required them to be in writing.

(c) In that the plaintiffs stand upon an alleged contract represented to have been made between Grow and Reagan, and another alleged contract carrying forward the Reagan-Grow agreement, alleged to have been made between Hoxie, representing the railroad, and Wright and

others, in relation to rent houses; the evidence not being sufficient to show a contract between Reagan and Grow, which, however, even if shown, would be upon void and illegal considerations.

(d) In that the evidence in this case did not show that Reagan was representing the citizens of Palestine as differentiated from the citizens of the county, it being necessary on the pleadings, if there be any contract, to show such differentiation.

(e) In that the evidence as to the rent-house agreement did not show any consideration for the making of such agreement.

(f) In that no contract was shown between Reagan and Grow.

(g) In that no contract was shown between Hoxie, representing the railroad, and the citizens of Palestine.

(h) In that the consideration alleged for the alleged contract between Reagan and Grow representing the citizens of Palestine and the railroad, respectively, was not exclusively Judge Reagan's agreement to induce the voters to vote for the bond issue and to advocate the election, but also the actual conclusion of a contract between the railroad company and the county through the voting of bonds, from which it results that there was no concluded contract between Reagan and Grow, but merely the arrangement of preliminaries of a contract between the county and the railroad company, the terms of which contract must necessarily be determined from the record of the election, through which this was made and into which all such preliminaries were merged.

(i) In that the testimony of plaintiffs, in regard to the formation of the alleged contract between Grow and Reagan, representing their principals, detailed mere matters of conversation and negotiation, and did not state any agreement whatsoever, which amouned to a contract.

(j) In that the contract with the County of Anderson was in writing and was complete of all considerations

and unambiguous; and could not be added to or modified legally, and in that the issues submitted went entirely outside of such written contract which the law required to be in writing.

(k) In that as to the alleged rent-house contract, there was no allegation or proof of any obligation to rent the houses for any definite time, and no proof that they had been rented for any definite time.

(l) In that the alleged rent-house contract was wholly without consideration, and under the allegations and proof, constituted no obligation upon the part of the railroad company, by which it could be bound, and no obligation upon which Ozment and other citizens could be bound either to take, occupy or pay for such houses, if supplied and constructed, and was incapable of being specifically enforced at law or to sustain an action for damages for the breach thereof; and the evidence conclusively showed that the alleged rent contract was with the officers and stockholders exclusively of a private land and building corporation for profit, and not with the citizens of Palestine.

(m) In that no authority was shown in the evidence to Grow to form the alleged contract represented to have been executed between himself and Reagan, and in that no ratification of the same was shown.

(n) In that, as to the alleged contract between Hoxie and the citizens of Palestine, no authority was shown to Hoxie to bind the railroad by making such contract and no ratification of the same was shown.

(o) In that in its special plea No. VIII in the Amended Answer defendant set up and proved in evidence, without contradiction, the history of the foreclosure of the International and Great Northern Railroad Company under its second mortgage, being the mortgage of 1881, and the decree of foreclosure of the same, whereby it appeared that all causes of action now asserted had been disposed of and were barred by such proceedings

and whereby it also appeared that if not so barred every matter tendered for litigation herein had been reserved and only could be litigated in the United States Court, all as set out in such plea and the grounds therein stated.

(p) In that various matters were alleged in plea No. IX in the Amended Answer, all of which were proved in evidence and are undisputed and conclusively shown, whereby it appeared that defendant is not personally bound on the alleged contracts sued on and acquired its property free from all of the obligations asserted by the plaintiffs, all as more particularly appears in said special plea No. IX, and the defenses stated thereon.

(p-1) In that the plaintiffs have no right to recover herein under the grounds and deductions stated in the Special Plea 9 contained in defendant's Amended Answer on which the trial was had, each of which is now presented separately. All of the allegations in Section 9 of said Amended Answer being absolutely and conclusively shown, and because the plaintiffs claim under the act of 1889 which has no application to this case; but if the act of 1889 is applicable to this case, as construed and asserted by them, then the same in its application to the facts of this case is unconstitutional and void.

(q) In that it was set out in Section X of the Amended Answer specially plead that the defendant was chartered in August, 1911, on the terms of the charter therein stated, and after the construction by the Supreme Court of Teras of the Act of 1889 upon which the plaintiffs rely to fix a burden or claim against the properties of the defendant, all of the matters alleged in Section X being fully proved, whereby there would be no claim against the properties of the defendant, and it would take the same free of all claims thereon and itself would not be subject to the alleged contracts herein asserted; all as more specifically set out in Plea X and the deductions made thereon in the answer.

(r) In that, as set out in Special Plea No. XI-a, it

was proved without dispute that Anderson County was estopped to litigate questions herein propounded, having previously litigated the same, whereby none of the plaintiffs could have an action, and whereby the defendant was entitled to a peremptory instruction.

(s) In that all of the facts alleged in special plea XII were conclusively shown and without dispute, whereby it was shown that the plaintiffs to assert any right, if right they have, would have to redeem and pay to the defendant over twelve millions of dollars, which they do not offer to pay; and whereby it appears without dispute that their rights, if rights they have, are of less value than such sum of money. Wherefore, it appeared that they did not and could not make any redemption and that all of their rights should be barred, if rights they have.

LXXVIII.

The Court erred in refusing special charge No. 2 instructing the jury to leave out of consideration in coming to a verdict the alleged agreement between Grow, representing the Houston & Great Northern Railroad Company, and Reagan representing the citizens of Palestine.

LXXIX.

The Court erred in refusing said special charge No. 2 for all the reasons assigned in the last preceding ground of this motion but one, in relation to the Reagan-Grow contract.

LXXX.

The Court erred in not giving without qualification special charge No. 3 requested by defendant, concerning the contract between Anderson County and the Houston & Great Northern Railroad Company.

LXXXI.

The Court erred in refusing special Charge No. 4 requested by defendant, concerning the alleged contract be-

tween Hoxie for the railroad company and the citizens of Palestine, including Wright and Ozment, of date 1875.

LXXXII.

The Court erred in refusing the said special charge No. 4 for the reasons assigned in ground No. LXXVII above relating to the alleged contract mentioned in said special charge.

LXXXIII.

The Court erred after refusing special charges Nos. 1, 2, 3, and 4 above referred to in refusing to submit to the jury Question No. 1 requested by defendant.

LXXXIV.

The Court erred after refusing the said Charges Nos. 1, 2, 3 and 4 in refusing to submit to the jury Question No. 2 requested by the defendant.

LXXXV.

The Court erred, after refusing Special Charges Nos. 1, 2, 3 and 4, in refusing to submit to the jury Question No. 3, requested by the defendant.

LXXXVI.

The Court erred, after refusing special charges Nos. 1, 2, 3 and 4 in refusing to submit to the jury Question No. 4 requested by the defendant; and in refusing the instructions requested in connection with Question No. 4 so requested.

LXXXVII.

The Court erred in refusing to submit to the jury Special Issue No. 5 requested by defendant.

LXXXVIII.

The Court erred in refusing to submit to the jury Question No. 6 requested by defendant.

LXXXIX.

The Court erred in refusing to submit to the jury Question No. 7 requested by defendant.

LXXXX.

The Court erred in refusing to submit to the jury Question No. 8 requested by defendant.

LXXXXI.

The Court erred in refusing to submit to the jury Question No. 9 requested by defendant.

LXXXXII.

The Court erred in refusing to submit to the jury Question No. 10 requested by defendant.

LXXXXIII.

The Court erred in refusing Special Charge No. 1 requested by defendant in connection with Question No. 1 submitted by the court to the jury.

LXXXXIV.

The Court erred in refusing Special Charge No. 2 requested by defendant in connection with Question No. 1 submitted by the court to the jury.

LXXXXV.

The Court erred in refusing Special Charge No. 3 requested by defendant in connection with Question No. 1 submitted by the Court to the jury.

LXXXXVI.

The Court erred in refusing Special Charge No. 4 requested by defendant in connection with Question No. 1 submitted by the court to the jury.

LXXXXVII.

The Court erred in refusing Special Charge No. 1 requested by defendant in connection with question No. 2 submitted by the Court to the jury.

LXXXXVIII.

The Court erred in refusing Special Charge No. 2 requested by defendant in connection with Question No. 2 submitted by the Court to the jury.

LXXXXIX.

The Court erred in refusing Special Charge No. 1 requested by defendant in connection with Question No. 3 submitted by the court to the jury.

C.

The Court erred in refusing Special Charge No. 2 requested by defendant in connection with Question No. 3 submitted by the court to the jury.

CI.

The Court erred in refusing Special Charge No. 3 requested by defendant in connection with Question No. 3 submitted by the court to the jury.

CII.

The Court erred in refusing Special Charge No. 1 requested by defendant in connection with Questions 4, 5 and 6 submitted by the court to the jury.

CIII.

The verdict of the jury is without evidence to support it, and is against the great weight and preponderance of the evidence and so manifestly so as to show prejudice or bias upon the part of the jury in this:

1.

The jury answered question No. 1 "Yes," whereas:

(a) It was shown in the evidence that John H. Reagan in any dealings with Grow, was acting for Anderson County and not for the citizens of Palestine as differentiated from the citizens of the county.

(b) It was not shown in the evidence that Grow, in the alleged transaction, was representing the Houston and Great Northern Railroad Company and contracted for it and was authorized by it.

(c) It was not shown in the evidence that any mention or discussion of the general offices, machine shops and round-houses went beyond a mere negotiation, but

it was shown in the evidence that any mention of the same did not go beyond a mere negotiation.

(d) It was not shown in the evidence that any contract was made to erect and forever thereafter maintain the general offices, machine shops and round-houses of the Houston and Great Northern Railroad at Palestine, but it was shown in the evidence that no such contract or agreement was made.

(e) It was not shown in the evidence that any agreement was made by John H. Reagan to make a thorough canvas of Anderson County to induce electors to authorize the issue of the bonds in consideration of an agreement by the railroad with the citizens of Palestine through Reagan, but it was shown in the evidence that no such agreement was made.

2.

The jury answered question No. 2 "Yes," whereas,

(a) It was not shown in the evidence that the Houston and Great Northern Railroad Company, and the International & Great Northern Railroad Company, in part performance of the contract mentioned in question No. 1, and in compliance with said alleged contract, if any, established and maintained at Palestine machine shops and round-houses of the Houston and Great Northern Railroad Company and of the International and Great Northern Railroad Company, but it was shown in evidence that they did not so do.

(b) It was not shown in evidence that the Houston and Great Northern Railroad Company had made a contract and agreement mentioned in question No. 1, but it was shown in evidence that the Houston and Great Northern Railroad had made no such contract.

3.

The jury answered Question No. 3 "Yes," whereas,

(a) It was not shown in evidence that Grow made any such contract as is alleged.

(b) It was not shown in the evidence that the Houston and Great Northern Railroad Company authorized the making of any such contract by Grow.

(c) It was not shown in the evidence that the Houston and Great Northern Railroad Company ratified any such contract.

4.

The jury answered question No. 4 "Yes," whereas,

(a) It was not shown in the evidence that Hoxie contracted and agreed with the citizens of Palestine, including Wright and Ozment, to perform a previous contract alleged to have been made through Grow and Reagan, but it was shown in the evidence that he did not so contract and agree.

(b) It was not shown in the evidence that Hoxie made any such alleged contract or agreement as last mentioned for the further and additional consideration that the citizens of Palestine should at once construct and complete, or cause to be constructed at their own cost, all houses which might be demanded by the Company at reasonable rentals for use by employes of the Company, but the contrary was shown in the evidence.

(c) It was not shown in the evidence that Hoxie contracted and agreed with the citizens of Palestine, as submitted in question No. 4, in that the only testimony was to a dealing with a private corporation, organized for profit, at Palestine, for the purpose of owning etc. real estate and houses, and which was shown only to represent itself and not the citizens of Palestine.

(d) It was not shown in the evidence that Hoxie contracted and agreed with the citizens of Palestine, on the basis submitted in question No. 4, in that there was nothing shown in the evidence in support of any consideration to Hoxie representing the Railroad whereby any contract could exist.

(e) It was not shown in the evidence that there was any contract by Hoxie, representing the Railroad, with

the citizens of Palestine, in that there was no evidence that the citizens of Palestine, or anyone whatever, agreed to rent, or did rent the houses, or ever rented them for any definite time, or agreed to rent them for any definite time.

(f) There was no evidence that Hoxie ever contracted with the citizens of Palestine to forever keep and maintain general offices, machine shops and round-houses of the Railroad at Palestine in that there was no consideration shown in the evidence whatsoever of such alleged contract.

5.

The verdict of the jury in response to question No. 4 is insufficient to form a basis for any judgment based upon the contract referred to in question No. 4; for the reason that it finds an entirely different contract from that alleged in plaintiffs' petition in this: That the verdict finds a contract in which a part of the consideration for the promises made by Hoxie was the existence of a pre-existing contract between the Houston and Great Northern Railroad Company and the citizens of Palestine; whereas, the petition alleges a contract in which a part of the consideration for the promises of Hoxie was a pre-existing contract not merely with the citizens of Palestine but with Anderson County, and the existence of this pre-existing contract is not found in the verdict of the jury.

6.

The jury answered question No. 5 "Yes," whereas,

(a) It was not shown in evidence that the citizens of Palestine had constructed and completed, or caused the same to be done, certain houses at Palestine, being all the houses demanded by the Railroad, but it was shown in evidence that if any such houses were constructed, which is not admitted, they were not constructed by the citizens of Palestine, or on their account, or for their benefit, in the performance of any contract; but merely

by or on account of a private corporation organized for its own profit.

(b) It is not shown in the evidence that such houses, if any, were constructed in accordance with plans or direction or demands of the Railroad Company.

7.

The jury answered question No. 6 "Yes," whereas,

(a) It was not shown in evidence that the International and Great Northern Railroad Company authorized Hoxie to make any contract, such as is offered in this case.

(b) It was not shown in evidence that the International and Great Northern Railroad Company ratified any action of Hoxie in making any contract alleged in this case.

(c) There was no evidence that the International and Great Northern Railroad Company, through its Board of Directors, either authorized or ratified the alleged action of Hoxie.

8.

The jury answered question No. 7 "Yes," submitted separately by the Court, thereby finding that no burden or injurious effect would be suffered by the defendant in interstate commerce if required to keep and maintain its shops at Palestine, Texas, forever; whereas, it was shown in the evidence that such burden would exist.

CIV.

The Court erred in entering a judgment for the plaintiffs, or any of them, in this case; in that it was conclusively proven, and in that it is indisputably in evidence that the cause of action, if any there was, arose to the plaintiffs, and each of them, when the International and Great Northern Railroad Company in 1881 moved its general offices to St. Louis, Missouri, maintaining them there until in the year 1888, whereby they were barred.

CV.

The Court erred in entering judgment in this case because it was conclusively shown in the evidence, and without dispute, that the alleged contracts upon which plaintiffs sued were in parol, whereas they were required to be, by law, in writing, in accordance with the defendant's plea in that regard.

CVI.

The Court erred in entering any judgment upon the special issues found by the jury in that all of the facts plead in Section VIII of the Amended Answer, were proved without dispute and were and are indisputable, whereby it appears that the matters herein attempted to be litigated had been disposed of by the United States Court, and, whereby, it appears that if such matters were not so disposed of in the United States Court, they had been reserved by that Court for its sole disposition in case of any future litigation; and, whereby, it appears that the defendant had purchased these properties upon an understanding and undertaking that all such issues as now attempted to be litigated were reserved for said United States Court.

CVII.

The Court erred in entering a judgment in this case in that all the matters plead in Section VIII of the Amended Answer were conclusively proved and are shown to be true without controversy, whereby it was conclusively shown that this Court has no power or right to place itself in conflict with the decree of the United States Circuit Court for the Northern District of Texas, and the jurisdiction of the United States District Court for the Northern District of Texas, they having first acquired jurisdiction and reserved jurisdiction of the issues herein involved, which jurisdiction is now invoked by this defendant under such Section VIII in support of this action, and also Section 237 of the Act of Congress of

March 3, 1911 (36 Stats. 1087), in protection of the right, title, privileges and immunities established by and carried under the authority of the decree and proceedings of said United States Court.

CVIII.

The Court erred in entering judgment for the plaintiffs, and in entering judgment for any of them, upon the special issues found by the jury, in that all of the matters alleged in special pleas 8 and 9 of the defendant, contained in its Amended Answer, were indisputably proven and are uncontroverted in evidence, and are not in conflict with the answers given by the jury. Whereby it is indisputably proven that the plaintiffs are attempting to burden and add to the obligations of the alleged contracts on which they sue in violation of the Constitution of the United States and of the State of Texas.

CIX.

The Court erred in entering judgment upon the special issues found by the jury in that: In Section VIII of the Amended Answer it was set out that a certain suit was brought by the Mercantile Trust Company on the 25th of February, 1908, against the International & Great Northern Railroad Company, in the Circuit Court of the United States, for the Northern District of Texas, stating that on March 1st, 1892, the defendant had executed a certain mortgage, all of which is completely set out and alleged in said answer, and that this suit was transferred from the Fort Worth Division to the Dallas Division, and that the Farmers Loan and Trust Company, under permission, filed its Bill in the same Court against the Railroad Company and others to foreclose the mortgage of 1881, commonly known as the second mortgage executed by the railroad company for the principal amount of $10,391,000, upon all properties as in said answer alleged, and that the bonds were duly issued, it being proved on the trial that the bonds for the whole principal

amount were issued on or about the date of the Mortgage of June 15th, 1881; and that George J. Gould and others filed a bill in said court against the International & Great Northern Railroad Company for the collection of certain judgments held by them as in their bill set out, and that a receiver was appointed and his appointment extended as in the answer stated, and these cases all consolidated and a supplemental bill filed by the Farmers Loan & Trust Company, alleging certain matters as in the answer stated, and that the court having entered various administrative orders, did foreclose the lien of the second mortgage upon all of the properties, tangible and intangible, together with all the corporate rights, privileges, immunities and franchises of the Defendant International & Great Northern Railriad Company and all the properties, as in the decree stated, decreeing in such decree that all of the right, title, estate and equity of all parties and of all persons claiming under them, or either of them, in and to the premises, properties and franchises and every part and parcel thereof, should be forever barred and foreclosed, and that the lien of the second mortgage upon these properties was prior and superior to any other lien, and subordinate only to the lien of the first mortgage, and binding the Commissioner to make sale of the properties providing that the sale should be made for not less than $100,000.00 cash, the balance to be paid in bonds and coupons, secured by the second mortgage and the decree, at a valuation equal to the amount the same would be entitled to receive out of the amount bid for the property on the conditions stated, and that the property should be offered for sale subject only to the first mortgage and any unpaid indebtedness and liabilities contracted and incurred by the defendant in operation, which the court might thereafter order or decree to be prior or superior to the lien of the second mortgage, and subject only to such other debts, liens or demands of whatever nature incurred by

the receiver under orders of the court, and that the purchasers or purchaser or successor should have the right within six months after completion of the sale or delivery of the deed to elect whether or not to assume or adopt any lease or contract made by the defendant, and should not be held to have assumed any of the same if it should file its election not to assume same with the Clerk of the United States Court within such period of six months; and furthermore, it was decreed that all questions not disposed of by the United States Court were reserved by the court for future adjudication, as in the decree and answer set out. All of the above facts and other matters set forth in Section VIII, sub-sections 1 to 10, inclusive, of the Amended Answer were completely and absolutely proved, and all of the decrees and proceedings and documents plead were proved in evidence without controversy on the trial of this case.

It was further alleged that the sale was deferred by the court, and that it was finally made under the order of the court on June 13th, 1911, at Palestine, Texas, to Frank C. Nicodemus, Jr., and duly reported, and in all things confirmed; and furthermore, that on the 8th of August, 1911, this defendant, the International & Great Northern Railway Company, was incorporated as an independent company, according to the terms of its charter exhibited and included in the answer, and that due conveyance was made to the International & Great Northern Railway Company, a copy of which was exhibited with the Answer, being made by Nicodemus and others under order of the court, and duly confirmed; that the amount bid at the sale by Nicodemus was $12,645,000.00, which was paid to the extent of $244,253.45 in cash, the balance being paid with the bonds foreclosed, whereby a deficit resulted to the foreclosing second mortgage bond holders, and that the defendants purchased upon the faith and guarantee of the decree, and denounced all of the alleged contracts sued on under the terms of the decree, as pro-

vided by the decree, by filing its denunciation thereof in the United States Court. And all of these facts and all facts and allegations set out in Section VIII of such answer were completely and absolutely proved upon the trial, and were proved without controversy, and these facts are not in conflict with any issue found by the jury or with any finding of the jury thereon; and these matters were all presented to the court as a special plea in defense of this case, and were all admitted in evidence and proved without the slightest contradiction or controversy as to the truth thereof.

And in that in Section IX of its pleadings, being a special plea, the defendant alleged all of the matters alleged in Section VIII last above referred to, and proved the existence of the same without controversy and without conflict, and certain other matters below stated in the brief outline, all of which were completely proved, and no one of which, or the deductions thereon, are in conflict with the answers given by the jury on special issues submitted to it.

In Special plea IX, it was set out that various corporations had been chartered, afterwards consolidated into the Houston & Great Northern Railroad Company; that it was incorporated in 1866 by a charter exhibited and proved, wherein it was provided that when contracts signed by the president and countersigned by the Secretary or other authorized officer, were authorized by the Board under seal of the company in execution of an order of the Board, the same should be valid, and wherein it was also provided "that the annual meeting of the stockholders of this company shall be held at the principal office in the City of Houston, on the first Monday in December of each year, which shall be a day for the transaction of business by the stockholders, at which time the annual election of directors shall take place." It was also alleged that by the provisions of the charter and of the by-laws and of

those of the International & Great Northern Railroad Company the control and execution of contracts was lodged with the Board of Directors; that the International Railroad was incorporated in and consolidated with the Houston & Great Northern Railroad under provisions of the charters recognized by the Legislature, and that the Legislature had provided that all acts done in the name of either company should bind the consolidated company, and rights and liabilities against either company should be against the consolidated International & Great Northern Company. It was alleged that the International Railroad Company moved its offices to Houston, and consolidated with the Houston & Great Northern Railroad Company to form the International & Great Northern Railroad Company, where the general offices remained until in June, 1875, when they were removed to Palestine; that certain mortgages had been executed by the International Railroad Company, and the Houston and Great Northern Railroad Company, with which the International & Great Northern Railroad Company was chargeable, and that these mortgages had been foreclosed and the properties sold out in 1879, and purchased by Kennedy & Sloan, who conveyed the same to the International & Great Northern Railroad Company, all as more particularly set out in Sections VIII and IX of the Amended Answer, wherein the proceedings of said foreclosure sales, the foreclosure of the mortgage of 1881, foreclosed and sold out under the decree of the United States Circuit Court of the Northern District of Texas, as above stated, are all completely shown. All of the facts and allegations of Sections VIII and IX were completely proved and were uncontroverted in evidence, but none of them were submitted to the jury, nor any defense thereunder, and all of said matters being uncontroverted, are now submitted to the court as a complete defense in this case, and as a ground for the entering of judgment

in favor of the defendant, notwithstanding the matters found by the jury.

Wherefore, upon all of the above, the defendant represents that the Court erred in entering such judgment, because:

(*a*) The proceedings in the United States Circuit Court for the Northern District of Texas, and foreclosure and sale thereunder of the second mortgage of 1881, and the reservations of the decree did constitute a complete bar to this suit; because they show that this court has no jurisdiction to proceed herein, and because they show that all such alleged causes of recovery as are propounded by the plaintiff are barred herein by such proceedings.

(*b*) Because by the decree of foreclosure in the United States Circuit Court of the Mortgage of 1881, commonly called the second mortgage, if all matters herein propounded for litigation are not barred, they are reserved for the United States Court, and cannot now be litigated as matters therein not disposed of.

(*c*) Because it appears from the undoubted facts set out in Sections VIII and IX of the Amended Answer, and proved without controversy that the defendant holds under purchase by Nicodemus, who purchased as an agent and representative, and with the second mortgage bonds foreclosed and carried into the decree, except to the extent of $244,253.55 paid in cash; second, such mortgage bond holders being the owners of the decree; and because it appears that they purchased to their loss something over $300,000, that is, that amount short of their decree, and subject to the obligations and liabilities of the receiver and decree of foreclosure to their further loss.

(*d*) The plaintiffs rely upon the act of the Legislature of 1889, approved March 27th, entitled "An act to require all railroad companies to keep and maintain permanently their general offices, machine shops and round-

houses within the State of Texas at a certain place, and to keep all book accounts, etc., at such offices, and to provide penalties for failure to comply therewith," which act was substantially carried into Art. 6423, 6424 and 6425 of the Revised Statutes of the State of Texas of 1911, and plaintiffs claim that by force of such act they acquired a burden or lien upon the properties, intangibles and franchises of the defendant as a security and servitude against the same, and that they have a right of performance against and out of said property so sold and acquired by this defendant by the retroactive act of 1889, thereby having acquired, as they claim, such rights and securities by said act of 1889 as an addition to their alleged contracts of 1872 and 1875, upon which they sue and which were claimed to be personal merely until such subsequent act of 1889 gave such rights *in rem* or security and servitudes.

(*e*) If there were any contracts made such as the plaintiffs claim, they were contracts made upon the definitions and general statements in evidence, which do not include or state the burdens and additions and obligations thereafter attempted to be stated by the act of 1889, carried into R. S. 1911, 6423, 6424 and 6425, which act puts additions and burdens on said alleged contracts and makes modifications thereof; whereby the obligation of a contract or contracts, if they ever existed, is violated.

(*g*) The mortgage of 1881 foreclosed in the United States Court under the decree set out, and under which the defendant by sale has acquired the properties and franchises of the International & Great Northern Railroad Company, preceded the act of 1889, and the trustee and bondholders thereon did not know and could not have known of the existence of any such alleged contracts as are sued on in this case, and if they did know of same, they were then purely personal, but the plaintiffs now insist that they were secured *in rem* and by the

retroactive act of 1889. Therefore, the International & Great Northern Railway Company respectfully represents that it is entitled to judgment herein upon all of such allegations and facts which were completely proved and are contained in Sections VIII and IX of its special pleading, because of the seasonably presented Federal Questions, presented in its pleading and founded upon the Constitution of the United States of America, and for the following reasons:

(*a*-1) The act of 1889, and carried into Articles 6423, 6424 and 6425 of the Revised Statutes of Texas, as relied on and applied by the plaintiffs in this case, is unconstitutional and void and violative of sub-section 1 of Section 10 of Art. 1 of the Constitution of the United States of America, prohibiting any State from passing a law impairing the obligations of contracts; in that the attempt to enforce the act of 1889, above mentioned, of the Legislature of the State of Texas, against this defendant as giving a lien and fixing a burden and service upon the properties and adding to the obligations, if any, of the alleged contracts, and attempting to attach and add to those alleged contracts duties and conditions as set out in the statute, is null and void when applied to the prior contracts alleged in this case, and violates their obligations.

(*b*-1) Because of the act of the Legislature of 1889, and Articles 6423, 6424 and 6425 of the Revised Statutes of the State of Texas, are violative of sub-section 1 of Section 10 of Art. 1 of the Constitution of the United States, and impair the obligation of contracts, therein prohibited to be done by the law of any State, because they violate the contract and mortgage duly executed between the International & Great Northern Railroad Company, now sold out, and of the trustee of the second mortgage and the bondholders therein secured; which mortgage had been settled, ascertained and declared by the decree of foreclosure of the United States Court,

all as set out above; in that said act of 1889, and as carried into the present Revised Statutes of the State of Texas, adopted in 1911, and as asserted and claimed to be by the plaintiffs, adds to and places burdens on the original contracts, if any, stated by them, and as claimed by them secured such contracts by subsequent law as against the properties or property or some of them now held by the defendant and owned by it under foreclosure sale, as set out above; and in that such statutes as claimed by the plaintiffs by such subsequent act of 1889, convert what were before, at most, merely personal contracts into secured contracts and obligations as a burden upon the property, and running with the same in violation of the contract, being the mortgage executed in 1881, and in the accomplishment, as claimed, of a preference created by such statute, to be prior in law, though junior in time, to the obligations of the contracts secured by the mortgage and bonds of the International & Great Northern Railroad Company, whereby, as so applied, the statute is unconstitutional and void.

(*c*-1) And also, this said statute of 1889, and as carried into the Revised Statutes of Texas of 1911, is unconstitutional and void and in violation of sub-section 1 of Section 10 of Art. 1 of the Constitution of the United States of America; in that, by such sub-section every *ex post facto* law of the State is prohibited, and in that, by said statute of the State of Texas for a violation thereof, forfeiture of charter and a penalty of $5,000 per day, is denounced to be recovered by the State; whereby, under the construction of plaintiffs, *ex post facto,* there has been given a penalty to be made prior in law, though junior in fact, to the mortgage under which this defendant holds, so that such immense penalties shall be collected as contended by plaintiffs out of the properties of this defendant, whereby such act, so violating the Constitution of the United States, is unconstitutional and void.

(*d*-1) Furthermore, said statute of the State of Texas, as construed and attempted to be enforced by the plaintiffs, is unconstitutional and void and violative of Section I of Art. 14 of the Amendments to the Constitution of the United States of America, commonly called the 14th Amendment, in that, as plaintiffs construe and attempt to enforce said statute by the denunciation of the penalties stated above, and the insistence that the statute and its penalties are applicable to the defendant, an attempt is made to abridge the privileges and immunities of the defendant, and to deprive it of its property without due process of law, and to deny to it the equal protection of the laws by penalizing or threatening to penalize it, should it resort to the courts to resist this action, and to litigate its rights in the premises; whereby, such act is unconstitutional and void by reason of the immensity of the penalties and the attempt thereby to shut the doors of the courts to the defendant in its attempt to test the legality of the claims of the plaintiffs and the constitutionality of said statute.

(e-1) Furthermore, the said statute of the State of Texas as construed by plaintiffs and sought to be applied by them is unconstitutional and void and violative of Section 1 of Art. 14 of the Amendments to the Constitution of the United States; in that, under its terms and burdens, it is an undue interference with the business and the obligations of the defendant, which it owes to the public, both in State and interstate commerce, whereby by meddling and dictating to the defendant it attempts to interfere with the discretion and power of the defendant, although a public carrier, to conduct its business within its own discretion, in obedience to constitutional laws of the State and of the United States; in that it denounces the forfeiture provided above and attempts by subsequent statute to place burdens and liens as claimed by the plaintiffs; and in that it prescribes where a great number of persons in the service of the defendant must

conduct their business and their offices and reside; thereby denying to this defendant the equal protection of the laws and depriving it of its property, without due process of law; by such illegal interference with its just and legal discretion to carry on its duties to the public and to perform its obligations to its stockholders and to other persons.

(f-1) Said act of 1889 of the Legislature of Texas, as originally enacted, and as contained in the Revised Statutes of the State and construed by the plaintiffs, is unconstitutional and void and violative of Section 1 of Art. 14 of the Amendments of the Constitution of the United States of America, in that such act is applicable only to chartered railroad companies and is not applicable to individuals, associations, receivers or other persons operating railroad carriers in the State of Texas or to other persons or corporations other than railroads, whatsoever. Whereby, such act constitutes legislation against a species or class not classifiable on any ground, or reason, or law, and places upon such species or class a burden not placed upon other persons in the same course or line of business or upon other corporations and associations doing business in the State of Texas; thereby violating the inhibition of said Section 1 against the passage of laws denying to any person within the jurisdiction of the State "the equal protection of the laws" and abridging the privileges and immunities of the defendant and depriving it of its property without due process of law.

CIX-a.

The defendant now repeats and states Sections "a" to "g" inclusive last above, and sections a-1, b-1, c-1, d-1, e-1 and f-1, last above, and recites each of them independently without making them dependent on the other statements contained in Section CIX above, and assigns each of the same as showing that the court erred in entering judgment herein.

CX.

The Court erred in entering a judgment upon the special issues found by the jury, and in holding the defendant and its property subject to performance of the duties required to be performed by the judgment; because the plaintiffs rely upon the act of 1889, which act is unconstitutional and void for the following reasons:

(a) Because the act of 1889 inserts a penalty and a fine in an amount prohibited by the Constitution of the State of Texas, and is therefore null and void.

(b) Because that statute as construed and applied by the plaintiffs is retroactive and unconstitutional on its application to the facts of this case.

(c) Because the plaintiffs seek to recover in violation of the obligations of the contracts, which they plead, by adding to and burdening the same, and in violation of the mortgage of 1881 by the force of the subsequent statute of 1889, which in such application violates the Constitution of the State of Texas.

(d) Because the act of 1889 is ex post facto and denounces penalties as a burden upon the defendant and its property and because the statute of 1889 denies to the defendant the equal protection of the law and is violative of due process of law.

(e) Because by the foreclosures of 1879, above stated, and completely proved, and sales thereunder, every right of plaintiffs, if right they had, was eliminated.

(f) Because since the plaintiffs rely upon the act of the Legislature of 1889, carried into the Revision of 1911, Sections 6423, 6424 and 6425, they are attempting to enforce such act as giving a lien or burden upon the properties of the defendant in violation of sub-section 1 of Sec. 10 of Art. 1 of the Constitution of the United States of America, prohibiting any State from passing a law impairing the obligation of contracts, in that the attempt to enforce the Act of 1889, above mentioned, as giving a lien and fixing a burden and servitude upon the prop-

erties and adding to the obligations of the alleged contracts, is null and void, because such properties have been passed free and clear, and because by the sales, decrees and foreclosures made in 1879 every obligation, personal or otherwise of the International & Great Northern Railroad Company had been eliminated.

(g) Because the plaintiffs are attempting under the act of 1889 and as construed by them to revive obligations which had ceased under the law of the land to be obligations binding upon the International Railroad Company, or any of its properties, in that the statute so construed and applied is unconstitutional and void and in conflict with Section 1 of Art. 14 of the Amendments to the Constitution of the United States, whereby the plaintiffs by the attempted revival of such dead contracts and by the burdens attempted to be placed on them are attempting to deprive the defendant of its property without due process of law, and whereby it denies to the defendant the equal protection of the law.

(h) Because the charter of the Houston & Great Northern Railroad Company, the obligations of which were assumed by the consolidated International & Great Northern Railroad Company, provided that the domicile and the principal office of the railroad should be at Houston, Texas, and that said general offices should be at Houston, Texas; whereby, under the act of 1889 relied on by the plaintiffs, such alleged contracts as those asserted by the plaintiffs could not be enforced, because in said act of 1889 it was provided that the general offices should be kept at the place stated in the charter, and that the contract might be enforecable when no place is specified in the charter; whereby, as to the general offices, upon the grounds stated in this Section "h," the judgment should be for the defendant; and also should be generally for the defendant.

CXI.

The Court erred in entering a judgment upon the spe-

cial issues found, because the statute of 1889 carried into the Revised Statutes of the State of Texas of 1911, Sections 6423, 6424 and 6425 was construed by the Supreme Court of Texas before the charter of defendant was taken out, which charter was acquired on various considerations, all as alleged in Section 10 of the Amended Answer of the defendant, all the allegations of which were proved without dispute and are indisputedly in evidence; whereunder it was shown that the alleged contracts sued on were, if they existed, personal, and as was held by the Supreme Court of Texas before the taking out of said charter, which was acquired under burdens and conditions and at an expense of over a million dollars; wherefore the Court erred in entering such judgment because:

(a) Having purchased its charter under the onerous conditions of the act of September 1st, 1910, and paid the large sums of money in numerous cash payments in discharge of the obligations therein assumed, and said charter being approved by the authorities of the State of Texas, and locating its domicile and general offices in the City of Houston, Harris County, Texas, and the Supreme Court of Texas, as set out above, having finally determined that the act of 1889 did not impose as a burden on the properties or franchises any obligation to perform such alleged contracts as are asserted in this case, the attempt now to change the decision of the Supreme Court of Texas is an attempt by retroactive decision, after a contract and charter have been acquired, to change the purport, obligation and intent of the statute into which the construction of the Supreme Court of Texas entered; and is an attempt to violate sub-section 1 of Section 10 of Article 1 of the Constitution of the United States, prohibiting the States from passing any ex post facto law or law impairing the obligation of contracts, and also is in violation of, and attempt to violate Art. 14 of Section 1 of the Amendments of the Constitution of the United States of America, whereby an at-

tempt is made to deprive the defendant of its property without due process of law and to deny to it the equal protection of the laws.

(b) Because the above contract, the charter of this defendant, of August 8th, 1911, having been approved by the officers of the State of Texas and providing for its domicile, headquarters and general offices at the City of Houston, in Harris County, Texas, is now attempted to be violated under the circumstances stated and as a contract in contravention of the provisions of the Constitution of the United States of America, last above stated in sub-section "a."

(c) And for these reasons, stated in sub-section "a" and "b" above and in this Section of these pleadings, the International & Great Northern Railway Company now invokes the protection of the Constitution of the United States of America on the grounds stated and now pleads and represents that these Federal Questions are raised in this case which cannot be over-ridden by the plaintiffs, and that because of them the plaintiffs cannot recover herein.

CXII.

The Court erred in entering judgment in this case upon the special issues found by the jury in favor of the plaintiffs, and in favor of any of them; in that it was conclusively proved that Anderson County was estopped and could not litigate any claim asserted in this case, by the previous litigation as set up in Section 11-A between the Houston & Great Northern Railroad Company and the County of Anderson, and the judgment as rendered in that cause; all as set out in Section 11-A. The facts set out were completely and indisputably shown, whereby it was *res adjudicata;* that no contract, such as is asserted herein, could be recovered on or be established, between the County of Anderson and the Houston & Great Northern Railroad Company; and that the bond contract in this case could not be modified, changed or

added to outside of the writings and considerations therein stated.

CXIII.

The Court erred in entering judgment in this case upon the special issues found by the jury; in that all of the allegations section 12 of the Amended Answer were completely proved, it being shown, without controversy, that any right or claim of the plaintiffs, or any of them, if any they had, were subject to an obligation to redeem from the defendant such rights and to redeem and pay off the second mortgage of 1881 and decree thereon under which the defendant claims, and of which it is the assignee by purchase under the decree of the United States Court, the payment of which great sum of money, and the other amounts due the defendant under said proceedings the plaintiffs did not offer to pay, and cannot pay; the value of plaintiffs' rights, if any, being far below such sums; whereby the plaintiffs should have been barred from any judgment in this case.

CXIV.

The Court erred in rendering the judgment entered herein upon the special issues, because all of the facts alleged in Section 13 of the defendant's Amended Answer were completely and absolutely proved without controversy. And because the plaintiffs, if entitled, were entitled only subject to the right of the defendant to foreclose the mortgage of the International & Great Northern Railroad Company of 1881 and the decree of the Federal Court foreclosing the same, under which the defendant holds its properties and rights, and of which it is the equitable assignee and subject to which the rights of the plaintiffs are, if any they have.

Wherefore the defendant protesting that the plaintiffs should have no judgment, and preserving all of its rights in that regard, yet now contends that the Court erred, if it entered any judgment for the plaintiffs, in not fore-

closing such mortgage and decree and in not sustaining and settling the same in favor of the defendant as against the plaintiffs, and each of them.

CXV.

The Court erred in admitting in evidence, over the objections of the defendant, a copy of a deed from the International & Great Northern Railroad Company to Hatfield, Jr., all as shown in defendant's Bill of Exceptions No. 29.

CXVI.

The Court erred in admitting in evidence, over the objections of the defendant, a deed from the Texas Land Company to the International & Great Northern Railroad Company, all as shown by defendant's Bill of Exceptions No. 30.

CXVII.

The Court erred in admitting in evidence a certain map of record in volume "P," page 540 of the Record of Deeds of Anderson County, all as is shown in defendant's Bill of Exceptions No. 31.

CXVIII.

The Court erred in admitting in evidence the map filed in the office of the County Clerk of Anderson County, on June 24th, 1875, all as shown by the defendant's Bill of Exceptions No. 32.

CXIX.

The Court erred in admitting in evidence certain deeds from the International Railroad Company, over the objections of the defendant, all as shown in defendant's Bill of Exceptions No. 33.

CXX.

The Court erred in admitting in evidence the testimony of the witness Ozment, over the objections of the defendant, as to the construction of buildings in Palestine under an alleged agreement with Hoxie, and as to mat-

ters connected with such buildings, all as shown in defendant's Bill of Exceptions No. 34.

CXXI.

The Court erred in admitting in evidence, over the objections of the defendant, the testimony of the witness Wright as to the construction of certain buildings in Palestine and in relation to such buildings, all as shown in defendant's Bill of Exceptions No. 35.

CXXII.

The Court erred in admitting in evidence the testimony of the witness Ozment as to what would have been done about building the houses, etc., under the alleged agreement with Hoxie if there had been no such agreement, all as shown by the defendant's Bill of Exceptions No. 36.

CXXIII.

The judgment of the Court is not sustainable herein and was erroneously entered because it was conclusively shown in the evidence, and is also a legal consequence, that the maintenance of any judgment by the defendant would constitute a burden upon interstate commerce and upon the duties which the defendant owes in interstate commerce.

CXXIV.

The judgment of the Court and the verdict of the jury are contrary to the manifest and clear preponderance of the evidence, and are also entirely unsupported in the evidence in that:

No authority was shown for the execution of the alleged contracts sued on emanating from the Board of Directors of the railroad, and in that no ratification of the alleged contracts sued on was shown by said Board of Directors.

CXXV.

The judgment of the Court is unsupported and is entirely contrary to the fundamental principles, because:

(a) These alleged contracts are represented to be

binding forever and are not of that class which can be made to last forever under the fixed principles of law and the Constitution of the State of Texas, if any such contract there were.

(b) If the alleged contracts were contracts indeterminate in time then they rested in and on the discretion of either party, and have been terminated by the defendant if they were ever binding upon it or its property, which is not admitted but denied, or have been terminated by its predecessor; all of which conclusively appears in the evidence without controversy.

CXXVI.

The judgment of the Court and the verdict of the jury are contrary to the clear and absolute preponderance of the evidence, or are unsupported in the evidence, and such verdict could only have been reached by passion or prejudice, because:

(a) It was shown that the alleged Reagan-Grow contract if ever made, was made not for the sole benefit of the people of Palestine as differentiated from the people of the County.

(b) Because no consideration whatsoever is shown by the plaintiffs to have moved from the citizens of Palestine in connection with the alleged rent-house contract, the only evidence being that a private corporation in Palestine, for its own profit, constructed some houses for the use of employes of the Railroad.

CXXVII.

The Court erred in admitting in evidence the testimony of the witness Word, over the objections of the defendant, and relating to certain matters occurring in the County Court, as stated by him, in connection with the issue of bonds of Anderson County, all as shown in defendant's Bill of Exceptions No. 38.

CXXVIII.

The Court erred in refusing to compel the witness Bowers to answer the question of the defendant, all as appears by defendant's Bill of Exceptions No. 39.

CXXIX.

The Court erred in refusing to give the peremptory charge No. 1 requested by the defendant, because: The proceedings in the United States Circuit Court for the Northern District of Texas, and foreclosure and sale thereunder of the second mortgage of 1881, and the reservations of the decree did constitute a complete bar to this suit; because they show that this court has no jurisdiction to proceed herein, and because they show that all such alleged causes of recovery as are propounded by the plaintiff are barred herein by such proceedings.

CXXX.

The Court erred in refusing to give the peremptory charge No. 1 requested by the defendant, because by the decree of foreclosure in the United States Circuit Court of the Mortgage of 1881, commonly called the second mortgage, if all matters herein propounded for litigation are not barred, they are reserved for the United States Court and cannot now be litigated as matters therein not disposed of.

CXXXI.

The Court erred in refusing to give the peremptory charge No. 1 requested by the defendant, because it appears from the undoubted facts set out in Sections VIII and IX of the Amended Answer and proved without controversy that the defendant holds under purchase by Nicodemus, who purchased as an agent and representative, and with the second mortgage bonds foreclosed and carried into the decree, except to the extent of $244,253.55 paid in cash; second, such mortgage bonds holders being the owners of the decree; and because it appears that they purchased to their loss of something over $300,000.00

that is, that amount short of the amount of their decree, and subject to the litigations and liabilities of the receiver and decree of foreclosure to their future loss.

CXXXII.

The Court erred in refusing to give the peremptory charge No. 1 requested by the defendant, because the plaintiffs rely upon the act of the Legislature of 1889, approved March 27th, entitled "An act to require all railroad companies to keep and maintain permanently their general offices, machine shops and round-houses within the State of Texas at a certain place, and to keep all book accounts, etc., at such offices, and to provide penalties for failure to comply therewith" which act was substantially carried into Arts. 6423, 6424 and 6425 of the Revised Statutes of the State of Texas of 1911, and plaintiffs claim that by force of such act they acquired a burden or lien upon the properties, intangibles and franchises of the defendant as a security and servitude against the same, and that they have a right of performance against and out of said property so sold and acquired by this defendant by the retroactive act of 1889, thereby having acquired, as they claim, such rights and securities by said act of 1889 as an addition to their alleged contracts of 1872 and 1875, upon which they sue and which were claimed to be personal merely until such subsequent act of 1889 gave such rights *in rem* or security and servitudes.

CXXXIII.

The Court erred in refusing to give the peremptory charge No. 1 requested by the defendant, because if there were any contracts made such as the plaintiffs claim, they were contracts made upon the definitions and general statements in evidence, which do not include or state the burdens and additions and obligations thereafter attempted to be stated by the act of 1889, carried into R. S. 1911, 6423, 6424 and 6425, which act puts additions and

burdens on said alleged contracts and makes modifications thereof; whereby the obligation of a contract or contracts, if they ever existed, is violated.

CXXXIV.

The Court erred in refusing to give the peremptory charge No. 1 requested by the defendant, because the mortgage of 1881 foreclosed in the United States Court under the decree set out and under which the defendant by sale has acquired the properties and franchises of the International & Great Northern Railroad Company, preceded the act of 1889, and the trustee and bondholders thereon did not know and could not have known of the existence of any such alleged contracts as are sued on in this case, and if they did know of the same, they were then purely personal, but the plaintiffs now insist that they were secured *in rem* and by the retroactive act of 1889. Therefore, the International & Great Northern Railway Company respectfully represents that it is entitled to judgment herein upon all of such allegations and facts which were completely proved and are contained in Sections VIII and IX of its special pleading, because of the seasonably presented Federal Questions, presented in its pleading and founded upon the Constitution of the United States of America.

CXXXV.

The Court erred in refusing to give the peremptory charge No. 1 requested by the defendant, because the act of 1889, and carried into Articles 6423, 6424 and 6425 of the Revised Statutes of Texas, as relied on and applied by the plaintiffs in this case, is unconstitutional and void and violative of sub-section 1 of Section 10 of Art. 1 of the Constitution of the United States of America, prohibiting any State from passing a law impairing the obligations of contracts; in that the attempt to enforce the act of 1889 above mentioned, of the Legislature of the State of Texas, against this defendant as giving a lien

and fixing a burden and service upon the properties and adding to the obligations, if any, of the alleged contracts, and attempting to attach and add to those alleged contracts duties and conditions as set out in the statute, is null and void when applied to the prior contracts alleged in this case, and violates their obligations.

CXXXVI.

The Court erred in refusing to give the peremptory charge No. requested by the defendant, because of the act of the Legislature of 1889 and Articles 6423, 6424 and 6425 of the Revised Statutes of the State of Texas, are violative of sub-section 1 of Section 10 of Art. 1 of the Constitution of the United States and impair the obligation of contracts, therein prohibited to be done by the law of any State, because they violate the contract and mortgage duly executed between the International & Great Northern Railroad Company, now sold out, and of the trustee of the second mortgage and the bondholders therein secured; which mortgage had been settled, ascertained and declared by the decree of foreclosure of the United States Court, all as set out above; in that said act of 1889 and as carried into the present Revised Statutes of the State of Texas, adopted in 1911, and as asserted and claimed to be by the plaintiffs, adds to and places burdens on the original contracts, if any, stated by them, and as claimed by them secured such contracts by subsequent law as against the properties or property or some of them now held by the defendant and owned by it under foreclosure sale, as set out above; and in that such statutes as claimed by the plaintiffs by such subsequent act of 1889, convert what were before at most merely personal contracts into secured contracts and obligations as a burden upon the property and running with the same in violation of the contract, being the mortgage executed in 1881, and in the accomplishment, as claimed, of a preference created by such statute, to be prior in

law though junior in time, to the obligations of the contracts secured by the mortgage and bonds of the International & Great Northern Railroad Company, whereby, as so applied, the statute is unconstitutional and void.

CXXXVII.

The Court erred in refusing to give the peremptory charge No. 1 requested by the defendant, because this said statute of 1889 and as carried into the Revised Statutes of Texas of 1911, is unconstitutional and void and in violation of sub-section 1 of Section 10 of Art. 1 of the Constitution of the United States of America; in that, by such sub-section every *ex post facto* law of the State is prohibited; and in that, by said statute of the State of Texas for a violation thereof, forfeiture of charter and a penalty of $5,000 per day is denounced to be recovered by the State; whereby under the construction of plaintiffs, *ex post facto* there has been given a penalty to be made prior in law, though junior in fact, to the mortgage under which this defendant holds, so that such immense penalties shall be collected as contended by plaintiffs out of the properties of this defendant, whereby such act, so violating the Constitution of the United States, is unconstitutional and void.

CXXXVIII.

The Court erred in refusing to give the peremptory charge No. 1 requested by the defendant, because said statute of the State of Texas as construed and attempted to be enforced by the plaintiffs, is unconstitutional and void and violative of Section 1 of Art. 14 of the Amendments to the Constitution of the United States of America, commonly called the 14th Amendment; in that, as plaintiffs construe and attempt to enforce said statute by the denunciation of the penalties stated above, and the insistence that the statute and its penalties are applicable to the defendant, an attempt is made to abridge the priv-

ileges and immunities of the defendant and to deprive it of its property without due process of law, and to deny to it the equal protection of the laws by penalizing or threatening to penalize it, should it resort to the courts to resist this action, and to litigate its rights in the premises; whereby, such act is unconstitutional and void by reason of the immensity of the penalties and the attempt thereby to shut the doors of the courts to the defendant in its attempt to test the legality of the claims of the plaintiffs and the constitutionality of said statute.

CXXXIX.

The Court erred in refusing to give the peremptory charge No. 1 requested by the defendant, because the said statute of the State of Texas as construed by plaintiffs and sought to be applied by them is unconstitutional and void and violative of Section 1 of Art. 14 of the Amendments to the Constitution of the United States; in that, under its terms and burdens, it is an undue interference with the business and the obligations of the defendant, which it owes to the public, both in State and interstate commerce, whereby by meddling and dictating to the defendants it attempts to interfere with the discretion and power of the defendant, although a public carrier, to conduct its business within its own discretion, in obedience to constitutional laws of the State and of the United States; in that it denounces the forfeiture provided above and attempts by subsequent statute to place burdens and liens as claimed by the plaintiffs; and in that it prescribes where a great number of persons in the service of the defendant must conduct their business and their offices and reside; thereby denying to this defendant the equal protection of the laws and depriving it of its property, without due process of law; by such illegal interference with its just and legal discretion to carry on its duties to the public and to perform its obligations to its stockholders and to other persons.

CXXXX.

The Court erred in refusing to give the peremptory charge No. 1 requested by the defendant, because said act of 1889 of the Legislature of Texas, as originally enacted, and as contained in the Revised Statutes of the State and construed by the plaintiffs, is unconstitutional and void and violative of Section 1 of Art. 14 of the Amendments of the Constitution of the United States of America, in that such act is applicable only to chartered railroad companies and is not applicable to individuals, associations, receivers of other persons operating railroad carriers in the State of Texas or to other persons or corporations other than railroads, whatsoever. Whereby, such act constitutes legislation against a species or class not classifiable on any ground, or reason, or law, and places upon such species or class a burden not placed upon other persons in the same course or line of business or upon other corporations and associations doing business in the State of Texas; thereby violating the inhibition of said Section 1 against the passage of laws denying to any person within the jurisdiction of the State "the equal protection of the laws," and abridging the privileges and immunities of the defendant and depriving it of its property without due process of law.

CXXXXI.

The Court erred in refusing to give the peremptory charge No. 1, requested by the defendant, because the charter of the Houston & Great Northern Railroad Company, the obligations of which were assumed by the consolidated International & Great Northern Railroad Company, provided that the domicile and the principal office of the railroad should be at Houston, Texas, and that said general offices should be at Houston, Texas; whereby, under the act of 1889 relied on by the plaintiffs, such alleged contracts as those asserted by the plaintiffs could not be enforced, because in said act of 1889 it was pro-

vided that the general offices should be kept at the place stated in the charter, and that the contract might be enforceable when no place is specified in the charter; whereby, as to the general offices, upon the grounds stated in this section, the judgment should be for the defendant, and also should be generally for the defendant.

CXXXXII.

The Court erred in permitting Mr. Albert Greenwood to make certain statements and representations to the jury, all as shown by defendant's Bill of Exceptions No. taken by Mr. Ball, counsel for the defendants.

CXXXXII-a.

The Court erred in its judgment in failing to define and restrict the injunction and command as to shops at Palestine and round houses there to those the subject-matter in litigation, and in refusing and failing to state that the judgment did not apply to other shops and round houses not at Palestine, or require them to be closed or to go out of operation. There is no ground in the pleading or evidence for the judgment so stated. It is insisted that no judgment should be entered for the plaintiffs, and subject to this contention this error is pointed out.

CXXXXII-b.

The Court erred in its judgment in the sweeping terms applicable to all of the shops and round houses of the defendant in that:

A—There was no basis for the same in that the pleadings merely asserted that there had been a contract between Reagan and Grow, reaffirmed by Hoxie, for the location of the shops and round houses of the Houston and Great Northern Railroad Company forever at Palestine, which would not cover all of the shops and round houses of the defendant and its predecessor in title, which was composed of the consolidation of various roads;

B—Because there was no basis in the evidence what-

soever and no evidence to support the injunction as to all of the shops and round houses and repairs of the I. & G. N. R'y Co., but the only claimed basis in the evidence related to the shops and round houses of the Houston and Great Northern Railroad Company, which were consolidated with the International Railroad and other roads forming a system of which the Houston & Great Northern was a small part.

The above error is pointed out, subject to the unwaived contention of the defendant, that there is no basis for a verdict whatsoever.

No. . The court should grant a new trial in this case because that court erred in entering the judgment in favor of Anderson County, in that the contract with Anderson County was evidenced by judgments of the County Court, which specified the purposes for which the bond issue was made, it being specified in said judgments in substance and effect that the bonds were issued in consideration of the railway company's agreement to build its railway from the boundaries of the county into Palestine, and to establish and maintain a depot within half a mile of the court house at Palestine; and because the consideration for which said bonds were issued being so evidenced by said judgments and orders of the County Court, and being required to be submitted to a vote of the people, and being so submitted the contract between the railroad company and the County of Anderson could be neither added to nor subtracted from by any other evidence, either oral or written, and could be nowise modified from the contract as contained in the orders of the court and other documents which were the record of the bond issue; and further, defendant excepts to said judgment, because there is no foundation either in the issues found by the jury or in the facts for the recovery by Anderson County included in the judgment.

For all the reasons above set out the defendant urges that a new trial should be granted in this case, and the

verdict and judgment heretofore rendered should be set aside.

INTERNATIONAL & GREAT NORTHERN RAILWAY CO.,
By its Attys.
F. A. WILLIAMS,
N. A. STEDMAN,
ANDREWS, BALL & STREETMAN,
WILSON, DABNEY & KING,
NORMAN, SHOOK & GIBSON,
F. B. GUINN,
W. E. DONLEY,
N. B. MORRIS,
Attorneys for Defendant, International & Great Northern Railway Company.

ORDER OVERRULING MOTION FOR NEW TRIAL, ETC.

ANDERSON COUNTY ET AL.
VS. No. 6415.
THE INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.

Filed Jan. 28th, 1914.

Recorded in Vol. "M," page 195.

In the District Court of Cherokee County, Texas.

This day came on to be heard in open court the Amended Motion, filed by the defendant January 17, 1914, under leave given by the order of the court, to set aside the verdict rendered and judgment entered in this case on the 17th of January, 1914, and to grant a New Trial in this case; and the Court having heard the argument of counsel; and being of the opinion that the Motion should not be sustained, does now adjudge the same to be in all respects overruled; to which action of the court in so

overruling the motion the defendant, the International & Great Northern Railway Company excepts, and it now here in open court gives notice of appeal to the Court of Civil Appeals of the State of Texas of the Sixth Supreme Judicial District, sitting at Texarkana, Texas.

And further upon motion of the defendant, it is now adjudged that the judgment entered in this case, of date January 17, 1914, be in all things superseded, pending the appeal of defendant, or writs of error sued out by defendant, provided that the defendant give a bond, with two or more good and sufficient sureties, to be approved by the Clerk of this Court, and to be payable to the plaintiffs, in the amount of Ten Thousand Dollars ($10,000.00), and to be filed in this court within twenty (20) days after this date, and for the additional amount of not less than double the costs herein; conditioned that the defendant shall prosecute its appeal with effect, and in case the judgment of the Supreme Court or the Court of Civil Appeals shall be against it that it shall perform said judgment sentence or decree, and pay all such damages as said Court may award against it, and provided however, that the temporary injunction granted herein, as modified by the Court of Civil Appeals of the First Supreme Judicial District of Texas shall continue in full force pending defendant's appeal, or writs of error, and to the proviso last stated the defendant duly excepted.

Further, on the motion of the defendant, it is adjudged that for good cause shown the defendant have up to the 20th day of March, 1914, within which to prepare or cause to be prepared and file a statement of facts and bills of exceptions in this case. In open court, this 28th day of January, 1914.

A. E. Davis,
Judge.

MOTION TO CHANGE VENUE.

ANDERSON COUNTY ET AL.

vs. No. 6415.

I. & G. N. R'Y COMPANY.

Filed 7 day of July, 1913.

Filed Sept. 20, 1913.

In the District Court of Anderson County, Texas.

Now comes the defendant herein, not waiving its plea of personal privilege, but insisting on same as heretofore filed, and most respectfully represeents to this Honorable Court that there exists in Anderson County, where this suit is pending, so great a prejudice against it on account of the nature of this suit, that it cannot obtain a fair and impartial trial.

This defendant further represents that there is a combination against it in said Anderson County, instigated by influential persons, by reason of which it cannot expect a fair and impartial trial in said county.

This defendant further represents that the plaintiffs in this suit are suing for an injunction to perpetually restrain the defendant Company from removing out of the City of Palestine its machine shops, roundhouses and the like, and to compel said defendant Company to remove back to Palestine and perpetually maintain its General Offices which are now situated in Harris County, Texas; the plaintiffs allege that Anderson County, by vote of the people, have paid to the defendant more than $150,000.00 as a consideration for maintaining forever said General Offices and machine shops and the like in the City of Palestine, besides other valuable and sufficient considerations, the large sum of money having been raised by an ad valorem tax on the people throughout said county. The Commissioners' Court of said county, the City government of the City of Palestine, the individual plaintiffs named in this cause, and many other good citizens of said county have combined together, and are acting in concert with each other for the purpose of

prosecuting this cause to the successful termination in favor of the plaintiffs, and by reason of such concert of action, the payment of such taxes by the people throughout the county, and the general consensus of opinion that the plaintiffs should win, the merits of the case have been prejudged, and if it should be tried in Anderson County, the defendant in this cause cannot expect a fair and impartial trial on the issues of fact.

This defendant represents that the Court House at Rusk, the county seat of Cherokee County, is the nearest Court House to the Court House of Anderson County, in which this suit is pending.

Premises considered, this defendant prays that a change of venue be granted in this cause, and that it have an order changing the same to Cherokee County, and that the Clerk of this Court be directed to immediately make out a correct transcript of all the orders made in this cause, certify thereto officially under the seal of this Court and transfer the same with the original papers in this cause to the Clerk of the District Court of Cherokee County, Texas, at Rusk.

N. A. Stedman,
F. A. Williams,
Andrews, Ball & Streetman,
Wilson, Dabney & King,
N. B. Morris,
Attorneys for Defendant.

I, John M. King, one of the attorneys for the defendant herein, and one of the General Attorneys for said defendant Company, solemnly swear that the facts stated in the above Motion to Change the Venue are true and correct.

John M. King,

Sworn to and subscribed before me this the 7th day of July, A. D. 1913.

SEAL.

V. D. Wilson,
Notary Public in and for Harris County, Texas.

We and each of us do solemnly swear that we are resident citizens of Anderson County, in which the above suit is pending, and that the facts stated in the above and foregoing motion for change of venue are, within our knowledge, true and correct.

G. B. ATTERSALL,
WM. TREWIG,
G. K. SAUNDERS.

Sworn to and subscribed before me this the 7th day of July, A. D. 1913.

SEAL.

V. D. WILSON,
Notary Public in and for Anderson County, Texas.

SUPERSEDEAS AND APPEAL BOND.

ANDERSON COUNTY ET AL.
VS. No. 6415.
INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.

Filed Feb. 3rd, 1914.

In the District Court of Cherokee County.

WHEREAS, in the above entitled cause there was, on January 17th, 1914, on a verdict of the Jury, entered a judgment in favor of the plaintiffs therein as in said judgment fully set out; the plaintiffs being Anderson County (an organized county of the State of Texas), the City of Palestine (a municipal corporation of the State of Texas), and George A. Wright, J. W. Ozment, A. L. Bowers, John R. Hearne, Z. L. Robinson, E. W. Link, R. C. Sewell, John M. Colley and P. H. Hughes, suing for and having judgment for and on behalf of all citizens of the City of Palestine; and

WHEREAS, a Motion and an Amended Motion for a

New Trial were duly filed by the defendant, the International & Great Northern Railway Company; and

WHEREAS, thereafter, on January 28th, 1914, said Amended Motion was considered by the court and the court thereupon entered thereon the following judgment:

"This day came on to be heard in open court the Amended Motion, filed by the defendant January 17, 1914, under leave given by the order of the court, to set aside the verdict rendered and judgment entered in this case on the 17th of January, 1914, and to grant a New Trial in this case; and the Court having heard the argument of counsel; and being of the opinion that the Motion should not be sustained, does now adjudge the same to be in all respects overruled; to which action of the court in so overruling the motion the defendant, the International & Great Northern Railway Company excepts, and it now here in open court gives notice of appeal to the Court of Civil Appeals of the State of Texas of the Sixth Supreme Judicial District, sitting at Texarkana, Texas.

"And further upon motion of the defendant, it is now adjudged that the judgment entered in this case, of date January 17, 1914, be in all things superseded pending the appeal of defendant, or writs of error sued out by defendant, provided that the defendant give a bond, with two or more good and sufficient sureties, to be approved by the Clerk of this Court, and to be payable to the plaintiffs, in the amount of Ten Thousand Dollars ($10,000.00), and to be filed in this court within twenty (20) days after this date, and for the additional amount of not less than double the costs herein; conditioned that the defendant shall prosecute its appeal with effect, and in case the judgment of the Supreme Court or the Court of Civil Appeals shall be against it that it shall perform said judgment sentence or decree, and pay all such damages as said Court may award against it, and provided however, that the temporary injunction granted herein,

as modified by the Court of Civil Appeals of the First Supreme Judicial District of Texas shall continue in full force pending defendant's appeal, or writs of error, and to the proviso last stated the defendant duly excepted.

"Further, on the motion of the defendant, it is adjudged that for good cause shown the defendant have up to the 20th day of March, 1914, within which to prepare or to cause to be prepared and file a statement of facts and bills of exceptions in this case. In open court, this 28th day of January, 1914.

"A. E. DAVIS,
"Judge."

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS that we, the International & Great Northern Railway Company, a corporation incorporated under the laws of the State of Texas, as principal, and we, J. E. McAshan and B. D. Harris, as sureties, do hereby acknowledge ourselves bound to pay to the above mentioned plaintiffs, and to their successors, heirs and personal representatives, and to all persons entitled under them, Ten Thousand Dollars ($10,000.00) as provided for in the above set out judgment, and also the additional amount of Three Thousand Dollars ($3000.00), being not less than double the amount of estimated costs herein; CONDITIONED that the International & Great Northern Railway Company, the Appellant, shall prosecute its appeal with effect, and in case the judgment of the Supreme Court, or the Court of Civil Appeals, shall be against it, that it shall perform such judgment, sentence or decree and pay all such damages as said court may award against it; whereupon this bond shall be of no further effect, otherwise to remain in full force and effect.

To the due performance of this obligation we hereby

respectively bind ourselves, our successors, heirs and personal representatives.

Witness our hands this 31st day of January, 1914.

THE INTERNATIONAL AND GREAT NORTHERN RAILWAY COMPANY, *Principal,*

By WILSON, DABNEY & KING, *Its Attorneys of Record.*

J. E. MCASHAN, *Surety.*

B. D. HARRIS, *Surety.*

ANDERSON COUNTY ET AL.
VS. No. 6415.
INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.

In the District Court of Cherokee County.

The foregoing bond executed by the International & Great Northern Railway Company and its sureties was this day presented to me for approval, and I do now estimate the costs in this case accrued, and to accrue in all courts not to exceed the sum of Fourteen Hundred Dollars ($1400.00), and I do now approve the foregoing bond in all respects.

Witness my hand this 3rd day of February, 1914, and the seal of said court.

(Seal) J. J. BOLTON,
Clerk of the District Court of Cherokee County, Texas.

The State of Texas,
County of Harris.

I, Henry Albrecht, Clerk District Court Harris County, Texas, do hereby certify that J. E. McAshan and B. D. Harris, whose names appear signed to the annexed Bond, are, in my opinion, good and ample security for the amount herein specified, and that if said bond was offered to me for approval, the same would be accepted and approved.

To certify which I hereunto set my hand and official

seal, at office in Houston, Harris County, Texas, this the 2nd day of February, A. D. 1914.

[SEAL.]

HENRY ALBRECHT,
Clerk District Court, Harris County, Texas,
By A. J. SCHWEIKART, *Deputy.*

Bill of Costs.

No. 6415.

ANDERSON COUNTY et al.
vs.
I. & G. N. RY. COMPANY.

Issued March 26th, 1914.

In District Court of Cherokee County, Texas.

To Officers of Court, Dr.

Cost Incurred in Anderson County District Court Before Transferred.

2/ 7/12.	Filing & Docketing	.35
	Citation & Copy	1.25
	Citation & Copy	1.25
	Copy of Petition	20.00
	Injunction & Copy	1.25
	Injunction & Copy	1.25
2/17/12.	Fil. & Approving Bond	1.65
	Assignment of Error	.15
	Filing Motion	.15
2/24/12.	Filing Answer	.15
	Filing Paper	.15
4/21/13.	Filing 2 Papers	.30
7/ 7/13.	Motion Change Ven	.15
	Filing Bill of Exc	.15
	Order overruling plea	1.00
	Order Change Venue	1.00
	Sheriff'- Fee	.85
	Total cost in District Court Anderson County	$31.05

To Costs Accrued in Above Entitled Cause to Adjournment of December Term, 1913.

CLERK'S FEES.

9/20/13.	File & D'k't	.35
"	" (13) Papers	1.95
1/ 6/14.	" Pl't'ff's 1st Sup. Pet	.15
"	" (3) Depositions	.45
1/15/14.	" (39) Papers	5.85
" 16 "	" Court's Charge	.15
" 17/ 2.	" Verdict	.35
" 7 "	Empaneling Jury	.35
" 17 "	" (2) Motions	.30
"	Swearing (16) Wit	1.60
"	Appearance	.15
"	Judgment (Excess)	4.50
"	Order for New Trial	1.00
"	" Amended Motion, New Trial	1.00
"	" Court overruling Motions	1.00
2/ 3/14.	Fil. & Approv. Bond	1.50
1/30/14.	Fil. (2) Orders	.30
3/18/14.	Fil. Statement Facts	.15
"	" (41) Bills Except	6.45
" 26 "	Taxing Cost	.25
"	Stenographer's Fees	3.00
		$30.80

Transcript, 15 per hundred words	312.84
Stenographer's fee	3.00

Sheriff's Fees.

Jury Fee	5.00
Jury Tax	.50
Miscellaneous Costs	5.50
Clerk's Costs	340.64
Stenographer's fee for transcript of evidence	185.00
Costs of District Court of Anderson Co	31.05
Total	$570.69

THE STATE OF TEXAS,
County of Cherokee:

In District Court, Cherokee County.

I, J. J. Bolton, Clerk of the Dist. Court in and for said County and State, hereby certify the above to be a correct account of the costs in above entitled and numbered suit up to this date.

Given under by hand and official seal, the 26th day of March. A. D. 1914.

[SEAL.]

J. J. BOLTON,
Clerk District Court Cherokee County.

No. 6415.

ANDERSON COUNTY et al.
vs.
INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.

I, J. J. Bolton, Clerk of the District Court in and for Cherokee County, Texas, do hereby certify that the foregoing pages numbered i-vii, and 1-628, inclusive, contain a true copy of all of the proceedings in this cause, and is a true and correct transcript of all of the proceedings held therein.

Witness my hand and the seal of the District Court of Cherokee County, Texas, this 27 day of April, 1914.

[L. S.]

J. J. BOLTON,
Clerk of the District Court of Cherokee County.

The foregoing record was applied for by Wilson, Dabney & King, Attorneys for International & Great Northern Railway Company, on the 3 day of February, 1914, and delivered to Wilson, Dabney & King on the 27 day of April, 1914.

[L. S.]

J. J. BOLTON,
Clerk of the District Court of Cherokee County, Texas.

THE STATE OF TEXAS,
County of Bowie:

I, E. T. Rosborough, Clerk of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, do hereby certify that the foregoing 629 pages of printed matter is a true and correct copy of the original Transcript from the District Court of Cherokee County, Texas, Filed in my Office on the 28th day of April A. D. 1914, in the

case of International & Great Northern Railway Company, Appellant, vs. Anderson County et al., Appellees, No. 1351 on the Docket of said Court.

In testimony whereof I hereunto set my Official signature and the seal of said Court at Texarkana, Texas, this the 24th day of July 1916.

[Seal Court of Civil Appeals of the State of Texas.]

E. T. ROSBOROUGH,
Clerk Court of Civil Appeals for the Sixth Supreme Judicial District of Texas.

ANDERSON COUNTY ET AL.,

vs.

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.

No. 6415

Be it remembered that this case, being called for trial before rulings on demurrers thereon on the 7th of January, 1914, came the defendant and demanded a trial of its Plea in Abatement, and to the jurisdiction of this court; whereupon it was agreed, as appears in the judgment in this case, between the plaintiffs and defendant in open court, that the court, without a jury, should pass upon and determine the issues presented by said Plea to the Jurisdiction and in Abatement, and the replication of the plaintiffs thereto, contained in their first supplemental petition, the Plea of Jurisdiction and Abatement being numbered I in the defendant's first amended original answer, and both parties waived a jury for the trial of such Plea in Abatement and to the Jurisdiction; whereupon the defendant introduced in evidence the following matters, all introduced upon the trial of this case before the jury, after such plea was disposed of, and set out in the Statement of Facts hereinafter, and now restated, or referred to by proper references, for the purpose of avoiding repetition; the same matters having been again introduced on the jury trial:

(1) The Bill of the Mercantile Trust Company vs. the I. & G. N. Railroad Company (this being an abbreviation used herein for the International & Great Northern Railroad Company), filed on February 25th, 1908, in the Circuit Court of the United States for the Northern District of Texas, the gist of which is stated, and, as far as relevant, on pp. 241-242 of the Statement of Facts of the trial before the jury, hereinafter.

The references to the Statement of Facts below are to the following Statement of Facts in the trial before the jury.

(2) It was proved that the suit instituted by the Bill of Complaint of Mercantile Trust Company was trans-

ferred on March 7th, 1908, from the Ft. Worth Division to the Dallas Division of the United States District Court.

(3) The Bill of Complaint of the Farmers Loan & Trust Company vs. the I. & G. N. R. R. Company et al., filed in the United States Circuit Court for the Northern District of Texas, numbered 2514, Equity, including the mortgage of the I. & G. N. R. R. Co. of 1881 sought to be foreclosed, and set out on pp. 243 to 274 of said Statement of Facts hereinafter.

(4) It was proved that in said cause 2514 Thomas J. Freeman had been appointed Receiver on the 20th of April, 1908, and that he had been appointed Receiver on the Bill of the Mercantile Trust Company in No. 2501 above, on the 25th of February, 1908.

(5) It was proved that George J. Gould and others had obtained permission to file their Bill of Complaint in said Circuit Court on the 14th of May, 1908, and on the 2nd of June, 1908, had filed the same in Equity Cause No. 2525, the gist of which Bill is set out in said Statement of Facts, p. 275, hereinafter.

(6 and 7) It was proved that in No. 2525 Equity, a decree was entered appointing Thomas J. Freeman Receiver on that Bill, and extending the previous appointments of him as Receiver on the two previous Bills, whereby his receivership covered all the properties of the defendant.

(8) It was proved that Thomas J. Freeman had in all three cases, as Receiver, filed his application in said Circuit Court, for the consolidation of the cases, and that they were directed to be consolidated by the court, under the style and as appears in the Statement of Facts hereinafter, pp. 275-276.

(9) The defendant introduced the amendment to the Bill, in the United States Court in Equity 2501, of the Farmers Loan & Trust Company filed June 7th, 1909, and set out in the Statement of Facts hereinafter, pp. 276-282.

(10) The defendant introduced the decree of foreclosure of the United States Circuit Court, entered May 10th,

1910, set out in the Statement hereinafter, pages 8 to 28, and 283. This is Exhibit "H" attached to defendant's amended answer.

(11) It was proved that said court entered an order deferring this sale.

(12) It was proved that on November 28th, said court made an order directing the case of the Marshall Car Wheel & Foundry Company vs. The I. & G. N. R. R. Co. should be consolidated with the previously consolidated cause.

(13) It was proved that the court finally directed that the sale should be made June 13th, 1911, by the Master Commissioner, under the terms and as directed by the Decree of Foreclosure of May 10th, 1910.

(14) It was proved that the sale of all the properties of the I. & G. N. Railroad Company upon notices given as prescribed by the decree of foreclosure, and in accordance with the decree, had been made, and that the sale had been in all things approved by the decree of the court, as appears by the Report of Sale of the Master Commissioner, and the approval thereof, being Exhibits "J" and "J-1" attached to the amended answer, and set out in the Statement hereinafter, at pages 35-45, 48-52.

(15) Next was introduced the charter of the defendant, of date August 8th, 1911, set out hereinafter at pp. 67-74, 284.

(16) Next was introduced a deed executed by the Master Commissioner making the sale to the defendant, and in which various others joined, being Exhibit "L" attached to the answer, which deed is set out in the Statement hereinafter, at pp. 52-67, and 284, and it was shown that the defendant, by acquiring the properties by such deed, had been operating the same under its charter and the laws of Texas.

(17) It was next shown that the amount at which the properties were bid in at the Master Commissioner's sale was $12,645,000.00, whereby there was a deficit of $317,387.72 on the decree, all as appears in the Statement hereinafter, at pp. 39-40, 285-286.

except a duly certified copy of the decree of the United States Circuit Court confirming the final report of the Master Commissioner and of the Receiver, dated Sept. 20, 1911, which is attached as Exhibit "A" to plaintiffs' first supplemental petition and which is copied on pages 48 to 52 of the Statement of Facts.

(18 and 19) It was shown that the defendant had purchased all of the properties of the sold-out I. & G. N. R. R. Company conveyed to it by the above set out deed, upon proceedings held in the United States Court, and under the decree thereof, and on faith thereof.

(20) It was shown that all notices provided for in the decree of foreclosure as conditions for the making of the sale had been given and published.

(21) The defendant introduced in evidence resolutions of itself not to adopt certain contracts, and denunciations of the same, all set out on pages 287-297 of the Statement hereinafter, and proved that the original of such denunciations had been filed with the Clerk of the United States Circuit Court at Dallas within six months after the completion of the sale and delivery of the deed of the Master Commissioner, and also, it introduced in evidence two notices which it caused within said time to be served on the Commissioners' Court of Anderson County, and the City Council of the Town of Palestine, by reading and delivering the same to said bodies at regular meetings, all of which are set out in the Statement of Facts on pages 297-298, hereinafter.

(22) The defendant proved that the bonds authorized by the mortgage of June, 1881, had all been issued on or about the date of the mortgage, and that such mortgage was authorized, being the moregage forclosed by the decree of May 10th, 1910, above.

Having introduced the above matters in evidence, the defendant rested on its Plea in Abatement and to the Jurisdiction, and the plaintiffs introduced nothing in evidence thereon, whereupon the court considered the same and overruled such Plea, to which action of the court the defendant excepted and took its Bill of Exceptions No. 2a. Thereafter, the trial proceeded, and the court having ruled on demurrers as appears in the judgment, the jury was impaneled and the trial proceeded before the jury; the above being all the facts whatsoever proved on the trial of the Plea to the Jurisdiction and in Abatement, and all matters in evidence bearing upon any controverted issue of fact thereon.

IN THE
District Court of Cherokee County

ANDERSON COUNTY ET AL.,

VS.

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.

Be it remembered that the following is a true and correct statement of all the facts proved on the trial of this case, and of all matters in evidence bearing upon any controverted issues of fact.

ABBREVIATIONS.

In this Statement the sold out International & Great Northern Railroad Company is designated as the "I. & G. N. R. R. Co.," and the Houston & Great Northern Railroad Company is designated as the "H. & G. N. R. R. Co.," and the defendant herein, the International & Great Northern Railway Company, chartered in August, 1911, is designated as the "I. & G. N. R'y Co."

PLAINTIFFS' EVIDENCE.

1. Plaintiffs introduced the charter of the Houston, Tap and Brazoria Railway Company. This was a legislative charter of date September 1st, 1856; and provided that the corporation might have a stock of not over one million dollars, and be authorized to construct and maintain a railroad commencing at or in the City of Houston, and thence to such points on the Brazos River and County of Brazoria and on the Colorado River as might be found

suitable, that the immediate control and direction of the corporation shall be vested in a board of not less than five directors, and that whenever Seventy-five thousand Dollars of the capital stock of the corporation, should be subscribed, and five per cent. paid in, the commissioners appointed to open books and receive subscriptions "shall cause an election to be held by said subscribers at the City of Houston for not less than five directors"; also, that "a majority of the board of directors shall have the power of the full board and all conveyances and contracts executed in writing, signed by the President and countersigned by the Treasurer, or any other officer duly authorized by the directors under the seal of the Company, and in pursuance of a vote of the directors, shall be valid and binding." Also, that the company was authorized, by the vote of a majority of the stockholders, to unite with any other railroad company; converting the stock, assets and property, with that of any other company into one railroad company; and said road so united, or any portion of the same, may be managed and controlled by one board of directors and as one road, and under such name and style, as may be fixed upon by agreement; providing the name of one of said companies so uniting shall be retained. Also, "that this company shall have the right under this charter, within three years after the passage of this act, to construct a section of the road from Columbia, on the Brazos River, to such point in Wharton County as may be designated by a majority of the stockholders residing in the counties of Brazoria and Wharton. And the company building this section of the road shall keep their offices at Columbia in Brazoria County. That this act take effect from its passage, and shall expire in ninety years, unless it be renewed or extended."

2. Plaintiffs next introduced the legislative charter of the Houston & Great Northern Railroad Company of date October 26, 1866, the parts of which supposed to be relevant are as follows: Provision was made that commis-

637

sioners should meet in Houston and open books for subscription, that the subscribers to the capital stock should select directors, and should then be constituted a corporation under the name of the Houston and Great Northern Railroad Company, with ordinary corporate powers and authority to make contracts, to grant and to receive, and make by-laws for its government. The capital stock was not to exceed Six Million Dollars, and by section 4 it was provided: "The direction and control of the affairs of said corporation shall be vested in a board of not less than five, nor more than nine directors, as the by-laws may provide." The directors to be chosen by the stockholders at their annual meetings, "and to select one of their body as president, and have power to fill vacancies in their board, appoint a secretary, treasurer, and such other officers and agents as they might deem proper, and to make rules not inconsistent with the general laws," and it was provided: "They shall cause to be kept accurate books of accounts exhibiting the receipts and expenditures of the company. A majority of the directors shall constitute a quorum to do business, and shall have the power of the full board; and all conveyances and contracts in writing signed by the president, and countersigned by the Secretary, or any other officer duly authorized by the board of directors, under the seal of the company, when the same is in execution of an order of the board, shall be binding and valid." By section 6 it was provided that the company organized should be authorized to construct and build a railroad commencing at the city of Houston and running northward to Red River, connecting with the Memphis and El Paso Railroad as near Clarksville as practicable, "and passing as near the towns of Montgomery, Huntsville, Crockett, Rusk and Tyler, as cheapness of construction permitted, and the general advantages of the company will permit." By section 8 it was provided that the company might purchase or otherwise acquire and hold the land necessary for the

railway company, and necessary depots and other buildings connected therewith, and that the land taken for the road-bed should not exceed 50 yards in width and for depots and other buildings only such width as absolutely necessary. A provision was made for condemnation. By Section 11 it was provided that the Company should have the right to form a junction with any other railroad at any point between Houston and Clarksville or at either of its termini, upon such terms and conditions as might be agreed on by the companies, or in case of disagreement by arbitration. By Section 12 the company was given authority to borrow money with or without mortgage in conformity with the general laws and by-laws of the company and its charter. By Section 13 it was provided: "The annual meeting of the stockholders of this company shall be held at the principal office in the city of Houston, on the first Monday of December of each year, which shall be a day for the transaction of business by the stockholders, at which time the annual election of stockholders shall take place." Provision was made for an adjourned meeting of the stockholders, in the event that a majority of the stock should not attend at the annual meeting. By Section 14 it was provided that the company should be subject to all general laws in force or hereafter in force in regard to running over the road of one company by another when the public interest or the interests of commerce required it; "and may form a junction and connect with any other road, in such manner as may best and more certainly secure the construction of their railway." It was provided that the charter should remain in force for 50 years from the date of completing of the road, provided all conditions in the charter were complied with, and also that land donations might be received under the general laws of the State, and that the company should have the right to extend from Houston to Galveston.

3. Next was introduced the legislative charter of the

International Railroad Co., dated Aug. 5, 1870. The portions of this charter considered material are as follows: Barnes and others were constituted a body corporate to be known as the International Railroad Company, and to have succession and a common seal and capacity to make contracts and to make by-laws for its general government and management of its business; and Barnes and his associates, seventeen in number, were constituted a board of directors for the time being, a majority to be a quorum, to meet at such time and places as they may designate, with authority to elect a president and vice president from their number and to appoint a secretary and treasurer. The company was authorized to construct and operate a continuous line of railroad with single or double track, and a telegraph line from a point on Red River as nearly opposite Fulton, Arkansas, as might be expedient in forming a junction with the Cairo and Northern Railway, under construction; and thence by the most practical route across Texas by Austin and San Antonio to the Rio Grande River at a point at or near Laredo, to be selected by the company, as affording the best facilities for a continuation of the railroad to the City of Mexico and to the Pacific Ocean. Also authority to build branches. Right of way granted by the State and sites on State land. Capital stock was to be not over Twenty-Five Million Dollars. By Section 7 it was provided: "The immediate control and direction of the affairs of said company shall be vested in a board of not less than five directors, who shall elect from their number one president and one vice president." The directors were authorized to submit by-laws for the ratification of the stockholders, which should provide rules for holding meetings and all other things considered to be necessary. By Section 8 it was provided that the principal office of the Company should be established at such point on its line as might be deemed most convenient for the transaction of its business, and that it might be moved from time

to time, to such places on its lines, as the progress of the work of construction might render expedient or necessary. A donation of bonds of the State of Ten Thousand Dollars per mile was provided for. By Section 11 the company was authorized to borrow money, to purchase property upon its credit, and for the purpose of construction and maintenance, to issue its bonds payable in the lawful money of the United States, or gold, as the directors might elect, and to secure the payment of these bonds or obligations by mortgage on "its railroads, its capital stock, its corporate franchises, and any and all of its property, real and personal, or any part or portion thereof, in such manner and form as said company or its directors shall deem best or expedient." The capital stock and property of the company was exempted from taxation for five years, and the company required to commence construction within six months, and complete fifty miles of main track within eighteen months, and thereafter annually 75 miles, or 150 miles every two years. By Section 14 it was provided: "Said company shall have the right to connect itself with any other railroad company within or without the State, and under such terms as it shall deem best, to operate and maintain said railroad in connection or consolidation with any such other railroad company." The State reserved the right to regulate the rates, provided no distinction should be made between this and other railroads. The act was effective from its date.

4. The plaintiffs introduced the act of the Legislature of April 24, 1874, authorizing the I. & G. N. R. R. Co. to issue bonds, etc., and to borrow money at such rates as the directors might deem expedient, and to secure the same by mortgage or other liens upon its railroad and other property, or both; and to convert any bonds which might have been issued by either the International Railroad or by the H. & G. N. Railroad Company into stock of the I. & G. N. R. R. Co. at such rates as the directors

might deem expedient, or into new bonds issued in the name of the I. & G. N. R. R. Co.; and that all bonds, debts or liabilities incurred either by the International Railroad Co. or the H. & G. N. R. R. Co. should be of the same binding force and effect upon the I. & G. N. R. R. Co. they were upon the respective companies, and further: "All acts heretofore done in the name of either of said companies shall have the same binding force and effect upon the said I. & G. N. R. R. Co. that they had upon the respective companies; and all rights or liabilities existing between said companies, or either of them, and the State or third parties, shall inure to said Railroad Company, the same as they existed with the respective companies."

Next was introduced the act of the Legislature of March 10th, 1875, entitled "An Act for the relief of the International Railroad Company now consolidated with Houston and Great Northern Railroad Company, under the name of the I. & G. N. Railroad Co." This statute recited that on the 5th of August, 1870, the legislature had incorporated the International Railroad Company, and that it is claimed by the 9th section of this act, that the State obligated itself to donate its bonds at the rate of Ten Thousand Dollars per mile of constructed road; that two hundred miles had been constructed; and that the road had been consolidated with the H. & G. N. under the name of the I. & G. N. R. R. Company, and that there were questions as to the legal liability of the State to deliver the bonds.

Therefore, it was proposed to compromise these matters in full settlement of the claims of the International Railroad Company and the I. & G. N. R. R. Co. for the bonds of the State, and then a compromise was provided for, by the proposition to issue certificates of twenty sections of State land for each one mile of railroad completed, under the charter of August 5th, 1870, and that the lands and the properties of the railroad and its stock be

exempted from all taxes for 25 years from the 5th of August, 1875, except in counties and towns donating bonds to aid construction of the road and paying interest thereon, but these exemptions not to extend to the H. & G. N. Provision was made for the alienation of the land donation, and by Section 7 it was provided that this compromise should become effective, when a majority in amount of the stockholders of the I. & G. N. R. R. Co. should in person, or by proxy, at a meeting of the stockholders held for that purpose, accept the same, the act was effective from its date.

6. Next was introduced the decree entered by the United States Circuit Court for the Northern District of Texas of May 10, 1910, which is as follows:

IN THE UNITED STATES CIRCUIT COURT FOR THE NORTHERN DISTRICT OF TEXAS.

THE MERCANTILE TRUST COMPANY, Trustee,
THE FARMERS LOAN & TRUST COMPANY, Trustee,
GEORGE J. GOULD, ET AL.,
Complainants,
VERSUS EQUITY CAUSE No. 2501.
INTERNATIONAL & GREAT NORTHERN RAILROAD COMPANY,
Defendant.

THE FARMERS LOAN & TRUST COMPANY, Trustee,
Complainant,
VERSUS EQUITY CAUSE No. 2514.
INTERNATIONAL & GREAT NORTHERN RAILROAD COMPANY, THE MERCANTILE TRUST COMPANY and THOMAS J. FREEMAN, as Receiver of the International & Great Northern Railroad Company,
Defendants.

DECREE OF FORECLOSURE AND SALE UNDER MORTGAGE OF INTERNATIONAL AND GREAT

NORTHERN RAILROAD COMPANY TO THE FARMERS LOAN AND TRUST COMPANY, TRUSTEE, DATED JUNE 15th, 1881.

These causes came on to be heard at this term upon the pleadings and proof under the bill of complaint filed in said Equity Cause No. 2514, by The Farmers' Loan & Trust Company, Trustee, on or about April 20th, 1908, and the supplemental bill of complaint of said The Farmers' Loan and Trust Company, Trustee, filed herein on or about June 7th, 1909, and upon all the papers on file, and was argued by counsel; and upon consideration thereof, it was, on motion of Geller, Rolston & Horan and Baker, Botts, Parker & Garwood, solicitors for the complainant, The Farmers' Loan and Trust Company, Trustee, all the other parties to said Equity Cause No. 2514 appearing by counsel and no objection being made.

ORDERED, ADJUDGED AND DECREED, as follows, to-wit:

I.—That all and singular the material allegations in the said bill and supplemental bill of complaint of The Farmers' Loan and Trust Company, Trustee, are true.

II.—That on or about the first day of November, 1879, the defendant International and Great Northern Railroad Company made its two certain mortgages or deeds of trust dated that day as follows:

1. A mortgage or deed of trust known as said defendant Railroad Company's First Mortgage, whereby said Railroad Company conveyed to John S. Kennedy and Samuel Sloan, Trustees, all and singular its lands, tenements and hereditaments then owned or thereafter to be acquired, including all its railroads, franchises, income, issues and profits, in trust, for the owners and holders of bonds to be issued thereunder, bearing interest at the rate of six per centum per annum, payable semi-annually on the first days of May and November in each year, and to become due and payable on the first day of November, in the year 1919, a large number of which bonds have been issued and are now outstanding.

2. A mortgage or deed of trust made to Samuel Thorne, William Walter Phelps and John S. Barnes, as Trustees, to secure an issue of said Railroad Company's income bonds, all of which bonds have been duly retired, and which said mortgage has been duly cancelled and satisfied of record.

III.—That on or about the 15th day of June, 1881, the said defendant International and Great Northern Railroad Company did execute its certain other mortgage or deed of trust, known as its Second Mortgage, dated that day, to the Complainant, The Farmers' Loan and Trust Company, as Trustee, and therein and thereby conveyed and transferred to said complainant, as Trustee, its railroads, property and franchises, as alleged in the said bill of complaint, to secure the issue of its bonds described in the said bill of complaint. The said Second Mortgage was made and is subject to said mortgage known as said defendant Railroad Company's First Mortgage, dated November 1st, 1879.

IV.—That on or about the 1st day of March, 1892, the said defendant International & Great Northern Railroad Company made its certain other mortgage or deed of trust dated that day, known as the said defendant Railroad Company's Third Mortgage, by which it conveyed to the defendant The Mercantile Trust Company, as Trustee, all and singular its lands, tenements and hereditaments then owned or thereafter to be acquired, including all its railroads, franchises, income, issues and profits, to secure an issue of $3,000,000 of its Third Mortgage Four Per Cent. bonds, under which mortgage there have been issued and are outstanding bonds and bond scrip aggregating a face value of $2,966,052.50. The said Third Mortgage dated March 1st, 1892, was expressly made and is subject to the said First Mortgage of said defendant Railroad Company dated November 1st, 1879, and to the said Second Mortgage of said defendant Railroad Company dated June 15th, 1881, and to all of the provisions of said last-mentioned mortgages, and to the powers, rights

and privileges as well as the covenants, duties and obligations of the said defendant Railroad Company therein respectively set forth and contained.

V.—That the said mortgage or deed of trust dated June 15th, 1881, being the mortgage or deed of trust set forth and described in the said bill of complaint and supplemental bill of complaint so filed by the said The Farmers' Loan and Trust Company, Trustee, as aforesaid, is a valid and subsisting mortgage and the proper act and deed of said defendant International and Great Northern Railroad Company, duly authorized and made, executed, delivered and recorded in all respects in conformity with law, and a valid conveyance for the purposes therein specified; that the said mortgage constitutes a valid conveyance of, and a valid and subsisting lien upon, the following property, premises and franchises, and of and upon all muniments of title thereto and evidences of ownership thereof, to-wit:

All and singular the lands, tenements and hereditaments of the defendant International & Great Northern Railroad Company whether owned at the date of the execution of the said Second Mortgage, namely, on the 15th day of June, 1881, or thereafter acquired by it, including its lines of railroad in the State of Texas, extending from the town of Longview, in the County of Gregg, in said State, through said county, and through the Counties of Rusk, Smith, Cherokee, Anderson, Leon, Robertson, Milam, Williamson, Travis, Hays, Comal, Bexar, Medina, Frio, LaSalle, Encinal and Webb to Laredo, in said last mentioned county; and from the town of Mineola in Wood County to Troupe in Smith County; and from the City of Palestine in Anderson County, through the Counties of Houston, Trinity, Walker and Montgomery to Houston in Harris County; and from the town of Spring in Harris County, through the counties of Montgomery, Waller, Grimes, Brazos, Robertson, Falls, McLennan, Limestone, Hill, Navarro, Ellis and Johnson to the City of Fort Worth, Tarrant County, with branches and branch lines

from the town of Overton to the town of Henderson, in Rusk County, from the town of Round Rock to Georgetown, in Williamson County, from the town of Phelps to the town of Huntsville in Walker County; from the City of Houston in Harris County to the town of Columbia in Brazoria County; from Navasota in Grimes County to Madisonville in Madison County; from Calvert Junction to Calvert, and from Waco Junction to East Waco; also the railway and railway tracks and property appurtenant thereto, and certain tracts of land in and adjacent to the City of Houston in Harris County, State of Texas, known as the Houston Belt Terminals; a total distance of about eleven hundred and six miles of completed railroad, all in the State of Texas; also the trackage rights of the said International & Great Northern Railroad Company from Houston in Harris County to Galveston in Galveston County in said State of Texas over the railroad of the Galveston, Houston & Henderson Railroad Company of 1882 accorded to it by an agreement between said last named railroad company and said International and Great Northern Railroad Company, dated November 19th, 1895; also all and singular the said International and Great Northern Railroad Company's railroad, tracks, rights of way, main lines, branch lines, superstructures, depots, depot grounds, station houses, engine houses, car houses, freight houses, wood houses, sheds, watering places, workshops, machine shops, bridges, viaducts, culverts, fences and fixtures, together with all its leases, leasehold-interests, leased or hired lands, leased or hired railroads, and all its locomotives, tenders, cars, carriages, coaches, trucks and other rolling stock, its machinery, tools, weighing scales, turn-tables, rails, wood, coal, oil, fuel, equipment, furniture and material of every name, nature and description, together with all its corporate rights, privileges, immunities and franchises, whether held at the time of the execution of the said Second Mortgage, namely, on June 15th, 1881, or thereafter acquired (including the franchise to be a corporation), and all the

tolls, fares, freights, rents, income, issues and profits thereof, and all the reversion and reversions, remainder and remainders thereof, as well as all property purchased or held by the Receiver herein, including any balance of cash, credits and income which may remain in his hands after application thereof, as herein provided or as has been or may hereafter be directed by the Court herein, to the payment of receivership obligations and charges, and to the payment of claims which may be allowed by the Court herein against the same with priority over said Second Mortgage dated June 15th, 1881; excepting, however, all land grants, lands, land certificates, town lots, and town sites, owned or controlled by the said International & Great Northern Railroad Company, at the date of the execution of said second mortgage, namely, on June 15th, 1881, or any time prior to said date, which were not, on the first day of November, 1879, or thereafter up to the said 15th day of June, 1881, actually occupied and in use by the said Railroad Company and necessary to the occupation and maintenance of its lines of railroad; and excepting further any portions of said premises and property which may have been released from the lien and operation of said mortgage dated June 15th, 1881, and the releases for which have been duly filed for record in the proper county.

VI.—That the lien of the said mortgage dated June 15th, 1881, upon the foregoing property is prior and superior to every other lien in favor of any party to this cause, and is subject and subordinate only to the lien of the said First Mortgage dated November 1st, 1879, except as hereinafter stated and provided.

VII.—That said defendant International and Great Northern Railroad Company, under and in accordance with the provisions of the said mortgage or deed of trust dated June 15th, 1881, duly made, executed and delivered, and the Complainant The Farmers Loan and Trust Company, as Trustee, in the manner therein provided duly certified and delivered, and the said defendant Railroad

Company duly issued and negotiated for value, ten million, three hundred and ninety-one thousand dollars ($10,391,000), face value, of the bonds mentioned and described in said mortgage or deed of trust, in and by each of which bonds said defendant Railroad Company promised to pay to the bearer, or, if registered, to the registered holder thereof, on the first day of September, 1909, the principal sum therein named, in United States gold coin, and interest thereon in the meantime at the rate of six (6) per centum per annum from the first day of March, 1881, payable in like gold coin, semi-annually, on the first days of March and September in each year. All of said $10,391,000 of bonds were at the time of the filing of the said bill of complaint and now are, outstanding and valid obligations of the said defendant Railroad Company entitled to the lien and security of the said mortgage or deed of trust dated June 15th, 1881.

VIII.—That on or about the twenty-seventh day of January, 1892, by an agreement between the said defendant Railroad Company and (among others) the holders of all said bonds then outstanding under the said mortgage or deed of trust dated June 15th, 1881, the interest upon said bonds was reduced to four and one-half per centum per annum for the period of six years from and after September 1st, 1891, such reduction to extend to and include the interest payable on September 1st, 1897, and it was further agreed that after September 1st, 1897, and until the maturity of said bonds, the same should bear interest at the rate of five per centum per annum; provided, however, that in case of default continued for the period of ninety days in the payment of any coupons upon said bonds unmatured at the date of said agreement, the original rate of interest, namely, six per centum per annum, should be restored and such coupons should be collectible and enforceable at such original rate of interest. All the said bonds outstanding at the time of the making of said agreement, as well as those thereafter issued under said mortgage or deed of trust by the said

defendant Railroad Company, bore interest in accordance with the provisions of the said agreement.

IX.—That on the first day of March, 1908, there became due and payable upon all the said $10,391,000 face value of said bonds so issued and outstanding under said mortgage or deed of trust dated June 15th, 1881, as aforesaid, the semi-annual interest and coupons thereon maturing on that day and amounting, at the rate of five per centum per annum, to the sum of $259,775; that demand was duly made for the payment of some of such interest, but said defendant Railroad Company made default in the payment of all such interest, and the whole amount thereof has ever since the said first day of March, 1908, remained, and still remains, due and unpaid; that the said default was a default upon coupons upon said bonds unmatured at the date of said agreement of January 27th, 1892; that said default has continued for more than a period of ninety days and had so continued prior to the filing of the said supplemental bill of complaint herein, and the said original rate of interest, namely, six per centum per annum, has been restored, and there is now in default upon the said interest and coupons which fell due on March 1st, 1908, in addition to the said sum of $259,775, the sum of $51,955, making a total of $311,730.

That there became due upon all the said $10,391,000 face value of said bonds so issued and outstanding under said mortgage or deed of trust dated June 15th, 1881, as aforesaid, the semi-annual installments and coupons thereon maturing, respectively, on the first day of September, 1908, and the first day of March, 1909; that the semi-annual installments and coupons maturing on said bonds on each of said dates respectively amounted to the sum of $311,730; that in each instance demand was duly made for the payment of some of said interest and compons, but said defendant Railroad Company made default in the payment of all said interest installments and coupons and the whole amount thereof has ever since the same fell due respectively as aforesaid remained, and still remains, due and unpaid.

The payment of the interest which fell due on some of said bonds on March 1st, 1908, having been duly demanded at the agency of the said defendant Railroad Company in the City of New York, and the default in the payment of such interest having continued for six months after such payment had been so demanded as aforesaid, the complainant, The Farmers Loan & Trust Company, Trustee, after the lapse of said six months, and during the continuance of such default, and prior to the first day of September, 1909, to-wit, on the 14th day of May, 1909, duly gave written notice to the said defendant Railroad Company of its option that the principal of all the said $10,391,000 face value of said bonds should be and become immediately due and payable, and declared and duly elected that the said principal sum was and had become immediately due and payable, and thereupon the whole of said principal sum did become, and the same is now, due and payable and in default.

That in addition to the foregoing defaults upon the said bonds so issued and outstanding under the said mortgage dated June 15th, 1881, as aforesaid, the said defendant Railroad Company has defaulted in the payment of the semi-annual interest which fell due upon some of said bonds upon the following dates, the amounts of such defaults respectively being set forth opposite the said respective dates:

On March 1st, 1904	$ 75.00
On September 1st, 1904	75.00
On March 1st, 1905	75.00
On September 1st, 1905	125.00
On March 1st, 1906	75.00
On September 1st, 1906	75.00
On March 1st, 1907	75.00
On September 1st, 1907	637.50

That each of said defaults has continued from the date upon which the same was made as aforesaid to the date of this decree, and still continues, and that all of said defaulted interest is due and unpaid; so that the following

sums are now due and payable at the date of this decree for principal and coupons and interest upon the said bonds so issued and outstanding under the said mortgage dated June 15th, 1881, as aforesaid, viz:

1. The amount of $75.00 for coupons due March 1st, 1904, with interest on the amount of said coupons at the rate of six per centum per annum;
2. The amount of $75.00 for coupons due September 1st, 1904, with interest on the amount of said coupons at the rate of six per centum per annum;
3. The amount of $75.00 for coupons due March 1st, 1905, with interest on the amount of said coupons at the rate of six per centum per annum;
4. The amount of $125.00 for coupons due September 1st, 1905, with interest on the amount of said coupons at the rate of six per centum per annum;
5. The amount of $75.00 for coupons due March 1st, 1906, with interest on the amount of said coupons at the rate of six per centum per annum;
6. The amount of $75.00 for coupons due September 1st, 1906, with interest on the amount of said coupons at the rate of six per centum per annum;
7. The amount of $75.00 for coupons due March 1st, 1907, with interest on the amount of said coupons at the rate of six per centum per annum;
8. The amount of $637.50 for coupons due September 1st, 1907, with interest on the amount of said coupons at the rate of six per centum per annum;
9. The amount of $311,730 for coupons due March 1st, 1908, with interest on the amount of said coupons at the rate of six per centum per annum;
10. The amount of $311,730 for coupons due September 1st, 1908, with interest on the amount of said coupons at the rate of six per centum per annum;
11. The amount of $311,730 for coupons due March 1st, 1909, with interest on the amount of said coupons at the rate of six per centum per annum;
12. The amount of $10,391,000 for the principal of

said bonds, with interest at the rate of six per centum per annum from the first day of March, 1909;

So that the entire sum due for principal and interest, and interest on the unpaid coupons, up to the day of this decree, is twelve million, one hundred and sixty-five thousand, five hundred and forty-five 60-100 dollars ($12,165,545.60).

X.—That the property and premises above described are so situated that they cannot be sold except as an entirety, due regard being had to the best interests of those interested in the same; and further that the said defendant Railroad Company is unable to pay the said sum so found to be due.

XI.—IT WAS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant International and Great Northern Railroad Company pay, or cause to be paid, within ten days after the entry of this decree to the complainant, The Farmers' Loan & Trust Company, as Trustee, for the use and benefit of the holders of the said bonds secured by the said mortgage dated June 15th, 1881, and the respective coupons for interest appertaining thereto, the sum hereinbefore found due upon said bonds and coupons, together with interest thereon at the rate of six per centum per annum from the date of this decree. In case the said amount shall be paid as herein decreed, then any party hereto may apply to this Court for such further relief and for such further directions as may be just and equitable.

XII.—IT WAS FURTHER ORDERED, ADJUDGED AND DECREED that in default of payment of the said sum as aforesaid by the defendant Railroad Company, or by any one claiming under it or for its account, or by the other parties defendants in the said Equity Cause No. 2514, or some of them, the said mortgage dated June 15th, 1881, shall be foreclosed and the said mortgaged premises, property and franchises, as well as all the property purchased or held by the Receiver herein, including any

balance of cash, credits and income which may remain in his hands after application thereof, as herein provided, or has been or may hereafter be directed by the Court herein, to the payment of receivership obligations and charges and to the payment of claims which may be allowed by the Court herein against the same with priority over said Second Mortgage dated June 15th, 1881, shall be sold as hereinafter directed, and all the right, title, estate and equity of redemption of the defendant Railroad Company and of each and all of the parties to the said Equity Cause No. 2514, and of all persons claiming or to claim under them or either of them, of, in or to the said premises, property and franchises and every part and parcel thereof shall be forever barred and foreclosed, and that said sale shall be made upon the terms and in the manner following, to-wit:

The said premises and property, real, personal and mixed, rights, privileges, immunities and franchises, wherever situated, shall be sold as an entirety and without valuation, appraisement, redemption or extension, at public auction to the highest bidder therefor, at twelve o'clock noon, at the passenger depot of the said defendant, International and Great Northern Railroad Company, in the City of Palestine, in the County of Anderson, in the State of Texas, on a day to be named by the Master Commissioner herein appointed in his notice of sale; that before making said sale the said Master Commissioner shall publish a notice thereof once a week for at least four weeks prior to such sale in the following newspapers, namely: in one newspaper in the City of New York, in the County of New York, in the State of New York; in one newspaper in the City of Palestine, in the County of Anderson, in the State of Texas; in one newspaper in the City of Houston, in the County of Harris, in the State of Texas; in one newspaper in the City of Austin, in the County of Travis, in the State of Texas; and in one newspaper in the City of Dallas, in the County of Dallas, in the State of Texas; the particular newspaper

to be selected by the Master Commissioner herein appointed, and to be newspapers printed, regularly issued and having a general circulation in said places respectively; and further, that the Master Commissioner, personally, or by some person to be designated by him to act in his name and by his authority, may adjourn the sale from time to time without further advertisement, but only on request of the said complainant The Farmers' Loan and Trust Company, Trustee, or its solicitors, or by order of the Court, or a Judge thereof.

The Master Commissioner shall receive no bid from any person until such person shall have deposited with him the sum of $100,000. Such deposit shall be returned in case the depositor's bid be not accepted; but if his bid be accepted, then such deposit shall be held by such Master Commissioner on account of the purchase price.

The purchaser, when the property is struck down to him, shall at once pay the Master Commissioner, on account of his purchase, a sufficient sum to make up with his deposit ten per centum of his accepted bid. The deposit required before bidding shall be paid in United States currency or in such certified draft, certificate or checque as may be satisfactory to the Master Commissioner, or in a certificate of The Farmers' Loan and Trust Company duly made payable to the order of said Master Commissioner. Said further payment shall be made either as aforesaid, or in the bonds and coupons secured by the said mortgage dated June 15th, 1881, taken at a valuation equal to the amount said bonds and coupons would be entitled to receive in cash out of the amount bid for said property. The certificate of the said The Farmers Loan and Trust Company that it holds bonds and coupons as therein described subject to the order of the party named therein, such certificate being by him transferred to the order of said Master Commissioner, shall be accepted in lieu of such bonds and coupons. Should such further payment be not made, the property shall be forthwith resold, without further advertisement, the Court re-

serving the right to consider such resale made on account of said successful bidder or as an original sale; and in case of such resale, the deposit received from the successful bidder shall be applied on account of the purchase price. Such further portions of the purchase price shall be paid in money as the Court may from time to time direct, the Court reserving the right to resell the premises and property herein directed to be sold upon the failure of the purchaser or purchasers, his, its or their successors or assigns, to comply with any order of the Court in that regard, and in case of any such resale or the failure of the purchaser or purchasers, his, its or their assigns, to comply with the terms of the bid or the orders of the Court relative to such additional payments, the said money, bonds and coupons so paid in as aforesaid shall be forfeited as liquidated damages and shall be applied towards the expenses of any resale ordered, or towards making good any deficiency or loss in case the property at such resale shall bring less than at the prior sale. The balance of the purchase price may be paid either in money or in bonds or overdue coupons secured by the said mortgage dated June 15th, 1881, each said bond and coupon being received for such sum as the holder thereof would be entitled to receive under the distribution herein ordered and according to the priority herein adjudged. The certificate of the said The Farmers' Loan and Trust Company that it holds bonds and coupons as therein described subject to the order of the party named therein, said certificate being by him transferred to the order of said Master Commissioner, shall be accepted in lieu of such bonds and coupons.

Any party to this cause and any holder or holders of any of the bonds and coupons so outstanding under said mortgage dated June 15th, 1881, as aforesaid, may bid and purchase at such sale.

The said premises and property are subject to, and the Master Commissioner shall offer the same for sale subject to, the said mortgage dated November 1st, 1879, made

655

by said defendant Railroad Company to John S. Kennedy and Samuel Sloan, as Trustees, and known as said Railroad Company's First Mortgage; and subject also to any unpaid indebtedness or liability contracted or incurred by said defendant Railroad Company in the operation of its railroad which the Court may hereafter order or decree herein to be prior or superior to the lien of the said mortgage dated June 15th, 1881, except such as shall be paid or satisfied out of the income of the property in the hands of the receiver herein under orders of the Court entered or to be entered herein; and subject also to such debts, claims, liens and demands of whatsoever nature heretofore incurred or created or which may hereafter be incurred or created by the Receiver herein under orders of the Court heretofore or hereafter entered herein, and which have not been or shall not hereafter be paid by said Receiver under orders of the Court heretofore or hereafter entered herein, or other parties in interest herein; or out of the proceeds of such sale as hereinafter directed. Certain specific portions of said property and premises, namely: The San Antonio Passenger Station, the Colorado Bridge, and certain equipment, are respectively subject to, and shall be by the said Master Commissioner sold subject to, the existing recorded mechanic's lien, the First Mortgage Colorado Bridge Bonds and the unsatisfied recorded equipment liens, specifically and respectively affecting the same.

The Master Commissioner, when ordered by this Court, shall publish at least once a week for the period of four weeks, in one or more newspapers published in each of the cities in which the notice of sale is hereinabove directed to be published, a notice requiring holders of any claims for such unpaid debts or liabilities to present the same for allowance, and any such claims which shall not be so presented or filed within the period of three months after the first publication of such notice shall not be enforceable against said Receiver or against the property sold, or against the purchaser or his successors or assigns.

657

Any such purchaser or purchasers and his, its or their successors and assigns shall have the right to enter his or their appearance in this cause and he or they, or any of the parties to the said Equity Cause No. 2514, shall have the right to contest any claim, demand or allowance existing at the time of the sale and not then finally determined, and any claim or demand which may thereafter arise or be presented, which would be payable by such purchaser or his successors or assigns or which would be chargeable against the income in the hands of the Receiver or against the property purchased, and he or they may appeal from any decision relating to any such claim, demand or allowance.

IT WAS FURTHER ORDERED THAT William H. Flippen, Esq., of Dallas, Texas, be, and he hereby is, designated and appointed a Master Commissioner to make the sale hereby ordered and decreed and to execute and deliver a deed of conveyance and bill of sale of the property so to be sold to the purchaser or purchasers thereof upon the confirmation of such sale and completion of the payment of the entire bid as herein provided; the Court, however, reserving the right in term time or at Chambers to appoint another person such Master Commissioner with like powers, in case of the death or disability to act of the Master Commissioner hereby designated, or in case of his resignation or failure to act, or removal by the Court.

IT WAS FURTHER ORDERED AND DECREED that within thirty days from the confirmation of said sale, or such further time as the Court may allow, on application of the purchaser for good cause shown, the purchaser or purchasers, his, its or their successors and assigns, shall complete payment of the entire amount bid to the said Master Commissioner; and that on such payment the said purchaser or purchasers, his, its or their successors and assigns, shall be entitled to receive a deed of conveyance and bill of sale of the property purchased from the Master Commissioner, and from the other par-

ties to this cause as herein provided, and to receive possession of the property so purchased from the parties holding possession of the same, and the Receiver shall deliver all of the property so purchased which may be in his possession to the said purchaser or purchasers, his, its or their successors and assigns, subject, however, to the said Mortgage dated November 1st, 1879, made by said defendant Railroad Company to John S. Kennedy and Samuel Sloan, as Trustees, and known as said Railroad Company's First Mortgage, and subject also to any unpaid indebtedness or liability contracted or incurred by said defendant Railroad Company in the operation of its railroad which the Court may hereafter order or decree herein to be prior or superior to the lien of said mortgage dated June 15th, 1881, except such as shall be paid or satisfied out of the income of the property in the hands of the Receiver herein, under orders of the Court entered or to be entered herein, and subject also to such debts, claims, liens and demands of whatsoever nature heretofore incurred or created or which may hereafter be incurred or created by the Receiver herein under orders of the Court heretofore or hereafter entered herein, and which have not been or shall not hereafter be paid by said Receiver under orders of the Court heretofore or hereafter entered herein, or other parties in interest herein or out of the proceeds of sale as hereinafter directed, and subject also, as to certain specific portions of said property and premises, namely, the San Antonio Passenger Station, the Colorado Bridge, and certain equipment, to the existing recorded mechanic's lien, the First Mortgage Colorado Bridge Bonds and the unsatisfied recorded equipment-liens, specifically and respectively affecting the same. And the Court reserves jurisdiction over said property, notwithstanding such deed or deeds or delivery of possession, for the purpose of enforcing such payment.

IT WAS FURTHER ORDERED AND DECREED that the fund arising from such sale shall be deposited by

said Master Commissioner in a United States depositary to be named by the Court and shall be paid out and applied only upon orders of the Court herein as follows:

1. To and for the payment of all proper expenses attendant upon said sale, including the expenses, outlays and compensation of the Master Commissioner to make said sale, as such expenses, outlays and compensation may be hereafter fixed and allowed;
2. To and for the payment of any Receiver's certificates which may be outstanding under the orders of the Court entered in the said Equity Cause No. 2514 or in said Consolidated Cause No. 2501, to the extent that the same shall not be paid out of income in the hands of the Receiver;
3. To and for the payment of the costs in said Equity Cause No. 2514 and the share of the costs in said Consolidated Cause No. 2501 of the said complainant, The Farmers' Loan and Trust Company, Trustee, and the other parties to its said bill as defendants thereunder, and to and for the charges, compensation, allowances and disbursements of the complainant, The Farmers' Loan and Trust Company, as Trustee, under the said mortgage dated June 15th, 1881, and its solicitors and counsel, and of the Receiver and his solicitors and counsel, and also to and for such other proper allowances, compensations and disbursements to the parties in said Equity Cause No. 2514 or their counsel and to the Special Master herein as the Court shall order. All of the payments to be made under this sub-division shall be hereafter fixed and allowed and taxed by this Court herein.
4. To and for the payment of the bonds and coupons of the defendant Railroad Company secured by the said mortgage dated June 15th, 1881, with interest thereon, to the amount hereinbefore specified, together with interest thereon at the rate of six

per centum per annum to the date of payment, or, if such fund be not sufficient to pay the same in full, then to the payment of the same pro rata; that each of the said bonds presented to the Master Commissioner shall, if the holder thereof shall so request, be stamped or endorsed in some way by said Master Commissioner, so as to show the amount that has been paid on account of the same, and on account of the coupon interest due thereon, and be returned so stamped and endorsed to the holder thereof; that in case of payment in full said bonds, with interest thereon, the same shall be delivered with payment in full stamped thereon, by the Master Commissioner, to the purchaser or purchasers at the sale, to be held as a muniment of title; and

5. If, after making all of the above payments, there shall be any surplus, the same shall be paid according to the further order of Court in that regard.

AND FURTHER, that in case there shall be any deficiency in the amount required to be paid in full of the several amounts directed and allowed to be paid, then the said Master Commissioner shall report to the Court the amount of the deficiency, and the complainant as Trustee, shall have judgment against the said defendant Railroad Company for the amount due, and shall have execution therefor, pursuant to the rules and practice of this court; and

IT WAS FURTHER ORDERED AND DECREED that the defendants International and Great Northern Railroad Company and Thomas J. Freeman, as Receiver of the International & Great Northern Railroad Company, and the complainant The Farmers Loan & Trust Company, be, and they hereby are, directed to execute and deliver but under the direction of the Master Commissioner, conveyances executed by them respectively by way of confirmation and further assurance of title to the said purchaser or purchasers, his, its or their assigns, of all and singular the mortgaged property and premises,

and every part and parcel thereof, of every kind and description, wherever situated, hereby directed to be sold by the Master Commissioner; and that the form of said conveyance and mode of execution thereof shall be settled and approved by the Master Commissioner or by the Court or a Judge thereof, if any question shall arise with reference thereto; and that in default of such conveyance or conveyances this decree shall operate as such; and that the purchaser or purchasers at any such sale, and his, its or their successors and assigns, shall have the right within six months after the completion of the sale and delivery of the deed of the Master Commissioner as herein provided to elect whether or not to assume or adopt any lease or contract made by the defendant Railroad Company, and such purchaser or purchasers, his, its or their successors and assigns shall not be held to have assumed any of such leases or contracts which he or they shall so elect not to assume; such election shall be shown by filing with the Clerk of this Court from time to time within said period a description of such leases or contracts which he or they shall so elect not to assume; and

IT WAS FURTHER ORDERED, ADJUDGED AND DECREED that all questions not hereby disposed of, including the discharge of the receiver and the settlement of his accounts, and including the disposition of all claims heretofore filed herein, or hereafter to be so filed in accordance with the provisions of this decree, are hereby reserved for future adjudication; and the Court reserves jurisdiction of this cause and of the property affected by this decree for the purpose of final disposition of all such questions and matters; and any party to this proceeding and any claimant whose claims have been or shall be so filed herein may apply to the Court for further orders and directions at the foot of this decree. And the Court reserves jurisdiction, upon due hearing, and subject to full right on the part of the purchaser to contest, to charge the property in the hands of the purchaser with any liabilities which have been, or which hereafter may at any time

tisement and announced the terms and conditions of sale in a loud and audible voice; when, at said offering, and on said conditions, Frank C. Nicodemus, Jr., of New York City, New York, having been the last and highest bidder, the said property, premises and franchises, muniments of title and evidences of ownership were struck off and adjudicated to the said Frank C. Nicodemus, Jr., for the sum and price of twelve million, six hundred and forty-five thousand dollars ($12,645,000).

"That prior to the said bid, the said purchaser had deposited with me as such Master Commissioner, the sum of One Hundred Thousand dollars ($100,000) in conformity with the terms and provisions of the said decrees; that immediately after the said sale the said purchaser signed and delivered to me a memorandum of his purchase, which is hereto annexed marked Exhibit 'A,' and paid to me on account of the said purchase a sufficient sum to make up with his said deposit at least ten per cent. of his said accepted bid, which said last mentioned sum was paid, in conformity with the said decrees, by the said purchaser handing to me certificates of the Farmers' Loan and Trust Company representing nine hundred and ninety thousand dollars ($990,000) face value of second mortgage bonds of the International and Great Northern Railroad Company with coupons annexed maturing March 1, 1908, and subsequently; that I issued to said purchaser a receipt, a copy of which is hereto annexed, marked Exhibit 'B.'

"Dated June 13, 1911.

"Respectfully submitted,

"WILLIAM H. FLIPPEN,

"Master Commissioner."

"Now comes, by its solicitors, The Farmers Loan and Trust Company, the complainant in the cause last above entitled, and upon the report of the sale of the property, premises and franchises of the International and Great

665

Northern Railroad Company, filed herein June 14th, 1911, and the exhibits attached thereto, moves the Court to confirm said report of sale and the sale therein reported, made June 13th, 1911, to Frank C. Nicodemus, Jr., for Twelve Million Six Hundred Forty-five Thousand Dollars ($12,645,000).

"The Farmers Loan and Trust Company,
"By Geller, Ralston & Stone,
"Baker, Botts, Parker & Garwood,
"Its Solicitors."

"IN THE CIRCUIT COURT OF THE UNITED STATES,

FOR THE NORTHERN DISTRICT OF TEXAS.

AT DALLAS.

THE MERCANTILE TRUST COMPANY, Trustee, THE FARMERS LOAN AND TRUST COMPANY, Trustee, GEORGE J. GOULD, ET AL., MARSHALL CAR WHEEL AND FOUNDRY CO., ET AL., Complainants, vs. INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY, *Defendant.*	Consolidated Cause, No. 2501.
THE FARMERS LOAN AND TRUST COMPANY, Trustee, Complainant, vs. INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY, THE MERCANTILE TRUST COMPANY, and THOMAS J. FREEMAN, as RECEIVER of the International and Great Northern Railroad Company, Defendants.	Equity Cause, No. 2514.

"Now at this date, this cause coming on to be heard, upon the motion of The Farmers Loan and Trust Company, the complainant in the cause last above entitled for confirmation of the Master Commissioner's report of sale, filed herein on June 14th, 1911, and the sale therein reported; and

"It appearing to the Court, that the Master Commissioner's report of sale was filed herein on June 14th, 1911; and

"The Mercantile Trust Company, Trustee, appearing by its solicitors; the defendant International and Great Northern Railroad Company by its solicitor; the purchaser Frank C. Nicodemus, Jr., by his solicitor; George J. Gould, et al, the complainants in the general creditors bill, by their solicitors; the Marshall Car Wheel and Foundry Company, et al., the complainants in the bill filed herein May 7th, 1910, by their solicitors; and the Receiver, Thomas J. Freeman, in person, and consenting to the hearing of said motion without further notice, and making no objection to the making of an order thereon; and

"The Court being fully advised in the premises, it is, on motion of the solicitors for The Farmers Loan and Trust Company,

"Hereby Ordered: That the Master Commissioner's report of sale, filed herein on the 14th day of June, 1911, be, and it is hereby, in all things ratified, approved and confirmed, and that the sale to Frank C. Nicodemus, Jr., therein reported, be, and it is hereby, confirmed and made absolute, and the said Frank C. Nicodemus, Jr., is adjudicated the purchaser of said property, premises and franchises, subject, however, to all the terms and conditions of the decree of foreclosure entered herein on May 10, 1910, and subject also to the due performance by said purchaser, his successors or assigns, of all the obligations therein described.

"Dallas, June 14th, 1911.

"A. P. McCormick,
"Circuit Judge, Fifth Circuit."

(10) Plaintiffs offered in evidence a formal written notice offered with statement by plaintiffs that it was notice of the causes of action herein sued on, read at the sale of the railroad and franchises of the I. & G. N. R. R. Co. by the Master Commissioner, at the time when such railroad and franchises were bid in by Frank C. Nicodemus, Jr.; whereupon the defendant objected to the admission of same upon the ground, first, that it was offered

out of due order, and, second, because it is immaterial and irrelevant to any issue in this case, and because no rights in this case can be determined by it being given or not given under the issues here," and plaintiffs thereupon stated, in view of the last objections urged by defendant, they would not insist upon the admission of the notice, and the same was not read in evidence.

11. The plaintiffs proved that the United States Circuit Court for the Northern District of Texas postponed the time for compliance by Nicodemus, under his bid, to September 15, 1911, by an order regularly entered.

12. Next there was introduced in evidence the final report of the Master Commissioner making the above sale, which is as follows:

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF TEXAS.

THE MERCANTILE TRUST COMPANY, TRUSTEE,
THE FARMERS' LOAN AND TRUST COMPANY, TRUSTEE,
GEORGE J. GOULD, ET ALS.,
MARSHALL CAR WHEEL & FOUNDRY CO. ET AL.,
Complainants

—VERSUS— CONSOLIDATED CAUSE No. 2501.

INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY,
Defendant.

THE FARMERS' LOAN AND TRUST COMPANY,
Complainant

—VERSUS— EQUITY CAUSE No. 2514.

INTERNATIONAL & GREAT NORTHERN RAILROAD COMPANY, THE MERCANTILE TRUST COMPANY, AND THOMAS J. FREEMAN AS RECEIVER OF THE INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY,
Defendants.

FINAL REPORT OF WILLIAM H. FLIPPEN, MASTER COMMISSIONER, SHOWING PAYMENT OF PURCHASE PRICE AND CONVEYANCE AND TRANSFER OF PROPERTY TO INTERNATIONAL AND GREAT NORTHERN RAILWAY COMPANY.

Now comes William H. Flippen, Master Commissioner, appointed by decree of this Court and entered herein on May 10, 1910, and reports as follows:

1. By reference to Report of Sale filed by the undersigned Master Commissioner on June 14, 1911, and duly confirmed by this Honorable Court, it will appear that the Purchaser at that time delivered to the Master Commissioner, pursuant to the terms of the decree of sale, a certified check for the sum of $100,000 to qualify him as Bidder, and after the acceptance of his bid delivered in payment of ten per cent. of the purchase price as required by the decree a certificate of the Farmers Loan & Trust Company, Trustee, to the effect that it held to the credit of the Master Commissioner $990,000 par value of the bonds and appurtenant unpaid coupons of the International & Great Northern Railroad Company, secured by the mortgage of said Company to the Farmers Loan & Trust Company, Trustee, dated June 15, 1881.

2. From time to time thereafter the time for the completion of the payment of the purchase price for the property and franchises sold on June 13, 1911, was extended by order of this Court, the last extension expiring on September 15, 1911. On September 13, 1911, Frank C. Nicodemus, Jr., the Purchaser of said properties and franchises, desiring to complete the payment of the purchase price by delivering to the Master Commissioner in part payment thereof the bonds of the International & Great Northern Railroad Company, secured by its mortgage of June 15, 1881, to the Farmers Loan & Trust Company, as Trustee, aforesaid, it became necessary to ascertain the distributive value of said bonds and appurtenant unpaid coupons in the proceeds of sale at which the same with

coupons thereto annexed could be accepted in payment of the purchase price under the terms of the decree of sale. To this end it became necessary for the Master Commissioner to ascertain the amount of expenses, disbursements and other allowances to be deducted under the terms of the decree of sale from the proceeds of sale before any distribution could be made on account of the bonds and coupons secured by said mortgage. Your Master Commissioner also undertook to ascertain approximately the cost in the several equity causes, consolidated under Cause No. 2501, and the several items of cost, expenses and disbursements provided by the decree were arranged as follows:

(a) With respect to the expenses attendant upon the sale including compensation and expenses and allowances to the Master Commissioner, the International & Great Northern Railway Company, Assignee of the Purchaser, as hereinafter more fully set forth, entered into a stipulation which was satisfactory to the Master Commissioner, whereby said Railway Company agreed to pay or cause to be paid as a part of the said purchase price of property and franchises such further sum in cash as might thereafter be fixed and determined by this Honorable Court as and for the compensation, allowances, disbursements and expenses of the Special Master theretofore appointed in this cause and of the Master Commissioner appointed in aforesaid decree, which said stipulation and agreement is on file with the Master Commissioner.

(b) It was ascertained by your Master Commissioner that there were no outstanding Receiver's certificates issued under the orders of this Honorable Court for the payment of which provision was made in said decree of sale; although there were outstanding certain Receiver's Equipment obligations of an aggregate principal amount of $276,000 subject to which the property was sold and which were assumed by the Purchaser as a part of the purchase price in accordance with the provisions of the

order of this Honorable Court authorizing the Receiver to create and issue said obligations.

(c) Your Master Commissioner ascertained as accurately as possible the amount of costs which had accrued in the several causes consolidated into Equity Cause No. 2501, and the amount of said costs as thus ascertained was deducted from the amount distributable by the Master Commissioner to the holders of said second mortgage bonds and coupons and International & Great Northern Railway Company, assignee of the Purchaser as hereinafter stated, stipulated and agreed that in the event the amount of costs required by the foreclosure decree to be paid out of the fund arising from said sale should exceed the sum so ascertained it would upon the determination of said excess, pay the amount thereof upon the direction of the Court all of which will more fully appear from the original of said stipulation on file with the Master Commissioner.

(d) The purchaser at said sale delivered to the Master Commissioner a stipulation and agreement in writing duly executed by all of the parties of record to said causes and the Receiver by their respective solicitors, stipulating and fixing the amount of compensation and allowances to be made to the Farmers Loan & Trust Co. as Trustee, under the mortgage of June 15, 1881, and to other parties as contemplated by the provisions in this behalf contained in decree of May 10, 1910, and authorizing the Master Commissioner to pay the amounts so agreed upon to the respective parties entitled thereto from the proceeds of sale, which said stipulation and agreement is now filed with the Master Commissioner. The aggregate of the amounts so agreed upon for compensation, allowances and disbursements to the respective parties entitled thereto as aforesaid were deducted by the Master Commissioner from the proceeds of sale in arriving at the distributive value of the bonds and coupons aforesaid and the several amounts so stipulated and agreed upon have been paid to the respective parties en-

titled thereto under the terms of said agreement by the Master Commissioner as authorized under the terms of said stipulation.

(e) The decree of May 10th, 1910, found that there were outstanding and unpaid Coupons appertaining to bonds secured by the aforesaid mortgage of June 15th, 1881, which matured prior to March 1st, 1908, but which had not been presented for payment, of an aggregate principal amount of $1,212.50, on which there was accrued interest at the rate of six per cent. per annum to the date of said decree. In order to avoid delay in making the settlement of the purchase price and difficulty in ascertaining the distributive value of the several bonds with coupons maturing March 1st, 1908, and subsequent thereto, the purchaser requested that said coupons maturing prior to March 1st, 1908, be eliminated from consideration in calculating the distributive value of said bonds with coupons maturing March 1st, 1908, and undertook and agreed to pay to the Master Commissioner the ascertained value of all of said $1,212.50 of coupons maturing prior to March 1st, 1908, on the basis of said decree of May 10th, 1910, which amount aggregating the sum of $1,568.00 has been paid to the Master Commissioner by the International & Great Northern Railway Company, assignee of the purchaser and is now held by the Master Commissioner subject to the orders of the Court.

(f) After deducting the sums hereinbefore mentioned and making due provision for expenses and allowances provided by said decree of sale as aforesaid and eliminating from consideration the value of said coupons maturing prior to March 1st, 1908, provided for by separate fund deposited with the Master Commissioner as aforesaid, it was ascertained that the balance of said purchase price available for distribution to the bonds of the International & Great Northern Railroad Company secured by its mortgage of June 15, 1881, and coupons thereunto belonging maturing on March 1st, 1908, and subsequent thereto, mentioned in said decree of sale, was $12,466,-

130.45, and that the distributive value of each of said bonds with coupons maturing March 1st, 1908, and subsequent coupons attached, was $1,199.704,595.

3. On September 13th, 1911, Frank C. Nicodemus, Jr., the Purchaser of said property and franchises at said sale presented to the Special Master in partial payment of the purchase price of said property and franchises, bonds of the International & Great Northern Railroad Company secured by its mortgage of June 15th, 1881, to the Farmers Loan and Trust Company, Trustee, in aggregate par value of $9,346,500 of principal with coupons maturing March 1st, 1908, and subsequent coupons thereto attached, which together with the bonds of an aggregate par value of $990,000 of principal with coupons maturing March 1st, 1908, and subsequent coupons attached, for which certificate to the order of the Master Commissioner was presented to him at the time of acceptance of said bid, made the total amount of said bonds presented to the Master Commissioner in payment of said bid $10,336,500 in aggregate par value of principal, leaving outstanding bonds for which provision must be made in cash of aggregate par value of $54,500 of which the distributive value on the above basis amounted to an aggregate sum of $65,383.89; and at the same time the Purchaser delivered the Master Commissioner in payment of the balance of the purchase price of said property and franchises, a certified check for the sum of $144,253.45, being the entire amount of the balance due.

The entire purchase price of $12,645,000 was thus paid by the purchaser as follows:

Amount paid by purchaser in cash on June 13th, 1911		$100,000.00
Amount paid in bonds of International and Great Northern Railroad Company, as follows:		
Delivered on June 13th, 1911	$990,000	
Delivered on September 13th, 1911	9,346,500	
Total bonds delivered	$10,336,500	

at distributive value of $1,199.704,595 per bond	12,400,746.55
Balance paid in cash on September 13th, 1911	144,253.45
	$12,646,000.00

4. The entire purchase price having thus been paid by the Purchaser, Frank C. Nicodemus, Jr., delivered to your Master Commissioner an assignment wherein and whereby he assigned, transferred and set over to the International & Great Northern Railway Company, a corporation organized under the laws of the State of Texas, its successors and assigns, all his right, title and interest under said decree or by virtue of his said bid and purchase and payment of the entire purchase price bid, in and to all the railroads, property, rights, franchises, functions, immunities and appurtenances thereunto belonging, rolling stock, property and premises of every kind and description, sold at said sale, including his rights to receive conveyance and possession thereof; and wherein and whereby he did direct that the deed or deeds directed by the said decrees to be made to the purchaser or purchasers at said sale, or his, its or their successors or assigns, conveying and releasing said property, as in said decree provided, he made and delivered to said International & Great Northern Railway Company, its successors and assigns, all of which will more fully appear from the original of said assignment executed by said Frank C. Nicodemus, Jr., attached hereto as Exhibit "A" and made a part of this report.

5. The Master Commissioner thereupon executed and acknowledged in forty counterparts a deed for said property, franchises, rights, privileges and immunities sold under and described in said decree of May 10, 1910, and said deed having also been executed and acknowledged by The Farmers Loan and Trust Company, Trustee; The International and Great Northern Railroad Company; Thomas J. Freeman, as Receiver of The International &

Great Northern Railroad Company; Frank C. Nicodemus, Jr., the purchaser, and International and Great Northern Railway Company, was delivered to the International and Great Northern Railway Company assignee of the purchaser pursuant to the provisions of said decree of May 10, 1910, and of the assignment of the purchaser aforesaid. Copy of said deed is executed and attached hereto as Exhibit "B" and made a part of this report.

6. The balance of funds in the hands of the Master Commissioner has been deposited to his order in the City National Bank of Dallas, Texas, to await the further orders of the Court, the same being applicable to the outstanding bonds and coupons secured by the aforesaid Mortgage of June 15th, 1881, not presented to the Master Commissioner as hereinbefore stated.

7. The several stipulations and agreements herein mentioned are exhibited herewith and are held by the Master Commissioner for such final disposition as the Court may direct. Respectfully submitted.

WILLIAM H. FLIPPEN,
Master Commissioner.

Dallas, Texas, September 22, 1911.

EXHIBIT "A"
WITH REPORT OF MASTER COMMISSIONER,
WILLIAM H. FLIPPEN,
Dated September 22, 1911.
FRANK C. NICODEMUS, JR.,
To
INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.
ASSIGNMENT OF BID.
Dated August 28th, 1911.

KNOW ALL MEN BY THESE PRESENTS, That:

WHEREAS in a certain cause pending in the Circuit Court of the United States for the Northern District of Texas, wherein the Farmers Loan and Trust Company, trustee, is complainant and International and Great Northern Railroad Company and others are defendants,

a decree of foreclosure and sale was entered by the said court on or about the 10th day of May, 1910; and

WHEREAS, by said decree of said Circuit Court of the United States for the Northern District of Texas in said cause therein pending, it was, among other things, adjudged and decreed that International and Great Northern Railroad Company pay or cause to be paid, within ten days after the entry of said decree, certain amounts therein found to be due under the Second Mortgage of International and Great Northern Railroad Company dated June 15, 1881, made to said The Farmers' Loan and Trust Company, as Trustee, and that, in default of such payment by said Railroad Company or by some one claiming under it or for its account, within the time fixed as aforesaid, the mortgaged premises and franchises should be sold, as provided in said foreclosure decree, by William H. Flippen, the Master Commissioner appointed by said decree, at public auction, to the highest bidder or bidders, at the passenger station of International and Great Northern Railroad Company in the City of Palestine, Anderson County, State of Texas, on a day or days to be fixed by the said Master Commissioner, after giving notice of said sale as in said decree provided; and

WHEREAS neither said International and Great Northern Railroad Company nor anyone claiming under it nor anyone for its account, did, within the time fixed or at any other time make payment of the sums so decreed to be payable, or any part thereof; and

WHEREAS in causes ancillary to said cause, between the same parties and pending respectively in the Circuit Courts of the United States for the Southern District of Texas, the Eastern District of Texas and the Western District of Texas, a decree was entered by each of said courts on the following dates respectively, to-wit, in the Circuit Court of the United States for the Southern District of Texas, on or about June 25, 1910; in the Circuit Court of the United States for the Eastern District of Texas; on or about June 27, 1910; and in the Circuit

Court of the United States for the Western District of Texas, on or about June 29, 1910; by each of which said decrees it was, among other things, adjudged and decreed that the decree rendered and pronounced by the Circuit Court of the United States for the Northern District of Texas be rendered and pronounced as the decree of said courts respectively in said ancillary causes; and;

WHEREAS the said Master Commissioner, in pursuance of said decrees, due notice having been given as therein prescribed and according to law, did duly sell, at public auction, at the passenger station of International and Great Northern Railroad Company in the City of Palestine, Anderson County, State of Texas, on the 13th day of June, 1911, all and singular the railroads, property, rights, franchises, functions, immunities and appurtenances to the same belonging, rolling stock, property and premises of every kind and description covered by and embraced in said Second Mortgage of International and Great Northern Railroad Company and in said decrees described, and thereby directed to be sold, to Frank C. Nicodemus, Jr., at and for the sum of twelve million six hundred and forty-five thousand dollars, he being the highest bidder for said property at said sale and having duly and seasonably qualified as a bidder thereat, as required by said decrees in that behalf; and

WHEREAS the said Master Commissioner did thereafter duly make and file his report of said sale, which report and the sale therein reported, have been, upon due notice and by orders of court entered in every of said causes, duly confirmed; and

WHEREAS the said Frank C. Nicodemus, Jr., has, in all respects to the date of these presents, complied with the provisions of said decrees of foreclosure and sale, and has made payment of the entire amount bid for the property sold; and

WHEREAS in said decree it is, among other things, provided that, on payment by the purchaser or purchasers, his, its or their successors or assigns, of the entire amount

bid at the sale of said property, said purchaser or purchasers, his, its or their successors or assigns, shall be entitled to receive a deed of conveyance and bill of sale of the property purchased from the Master Commissioner and from other parties to said cause, as in said decrees provided, and to receive possession of the property so purchased; and

WHEREAS International and Great Northern Railway Company, a corporation organized and existing under the laws of the State of Texas, is desirous of acquiring and is authorized to acquire all the right, title and interest of the purchaser at said foreclosure sale in and to the property sold thereat, including the right of the said purchaser to receive a deed or deeds, pursuant to said decrees, of the property purchased by him at said foreclosure sale;

NOW, THEREFORE, THESE PRESENTS WITNESS:

That the undersigned, Frank C. Nicodemus, Jr., in consideration of the premises and of the sum of One Dollar to him duly paid by International and Great Northern Railway Company, at or before the ensealing of these presents, the receipt whereof is hereby acknowledged, and of other good and valuable considerations, has sold, assigned, transferred and set over, and hereby does sell, assign, transfer, and set over, unto International and Great Northern Railway Company, its successors and assigns, all his right, title and interest under said decrees or by virtue of his said bid and purchase and payment of the entire purchase price bid, in and to all the railroads, property, rights, franchises, functions, immunities and appurtenances to the same belonging, rolling stock, property and premises of every kind and description, sold at said sale, including his right to receive conveyance and possession thereof.

TO HAVE AND TO HOLD the same unto the said International and Great Northern Railway Company, its successors and assigns, for its and their own use forever.

SUBJECT, however, to all the terms and reservations in said decrees set forth.

And said Frank C. Nicodemus, Jr., does hereby direct and request that the deed or deeds directed by the said decrees to be made to the purchaser or purchasers at said sale, or his, its or their successors or assigns, conveying and releasing said property as in said decrees provided, be made and delivered to said International and Great Northern Railway Company, its successors and assigns.

And These Presents Further Witness, that International and Great Northern Railway Company hereby accepts the foregoing assignment, and covenants and agrees to pay, satisfy and discharge, and to indemnify and forever hold harmless said Frank C. Nicodemus, Jr., his executors or administrators, from and against any and all loss, damages, expenses and liabilities which may have been incurred or which hereafter may be incurred by said Frank C. Nicodemus, Jr., or his executors or administrators, by reason of his said bid and the acceptance thereof (other than the payment of the purchase price bid), or by reason of any act or thing required, by said decrees or said orders confirming said sale, to be performed by the purchaser thereat (other than as aforesaid).

In witness whereof, the undersigned, Frank C. Nicodemus, Jr., has hereunto set his hand and affixed his seal, and International and Great Northern Railway Company has caused these presents to be executed by its President or a Vice-President, and its corporate seal to be hereunto affixed, attested by its Secretary or an Assistant Secretary, this 28th day of August, 1911.

Frank C. Nicodemus, Jr.,
As Purchaser.
International and Great Northern
Railway Company,
By Thomas J. Freeman,
President.

Attached to the Master's Final Report was a copy of the deed hereinafter copied, under paragraph 15 next.

13. Plaintiffs introduced the final report of Thomas J. Freeman, Receiver of the International & Great North-

ern Railroad Company, omitting figures and accounts attached, which report, less said omissions, is as follows:

FINAL REPORT OF THOMAS J. FREEMAN, RECEIVER.

Now comes Thomas J. Freeman, Receiver of the International & Great Northern Railroad Company, appointed by decree entered in the above entitled cause, and submits his final report and account as follows:

1. That on the 15th day of September, 1911, the International & Great Northern Railroad Company presented to the Receiver the original of a deed bearing date 13th day of September, 1911, duly executed and acknowledged by William H. Flippen, Master Commissioner, appointed by decree of May 10, 1910, and other parties provided by said decree, granting and conveying unto the International & Great Northern Railway Company, a corporation organized under the laws of the State of Texas, all the railroads, properties, rights, privileges and franchises of the International & Great Northern Railroad Company mentioned and described in the aforesaid decree entered in this cause on May 10, 1910, and which were sold by the said Master Commissioner pursuant to the terms of said decree on the 13th day of June, 1911, and requested that the Receiver should deliver possession of said railroads, property and franchises to said International & Great Northern Railway Company. Thereupon the Receiver, acting under and pursuant to the authority of said decree of May 10, 1910, did, on the morning of September 16th, 1911, deliver into the possession of the International & Great Northern Railway Company, grantee in said deed, all of the railroads, properties and franchises formerly owned by the International & Great Northern Railroad Company or by said Receiver, and then in his possession and control, and surrendered to said International & Great Northern Railway Company custody and control of same.

2. That as Receiver of this Court he has filed at the

end of each quarter since his appointment, statements and accounts showing the receipts and disbursements of his office, the last of such quarterly reports being filed for the quarter ending 30th day of June, 1911, and no exception has yet been filed to any of said accounts or reports; he returns and files herewith his final account from the period of July 1st, 1911, to the night of September 15, 1911, at which time his possession and control of said properties and franchises were terminated as aforesaid, and attaches hereto as a part of said final account copies of the quarterly accounts or reports heretofore filed as aforesaid.

3. The undersigned prays that his action in delivering possession of the railroads, properties and franchises as aforesaid may be confirmed; that his final account and report may be accepted, approved and confirmed by this court; that he be finally discharged as Receiver of this Court, and that his bond heretofore given as such Receiver may be duly vacated and released.

THOMAS J. FREEMAN, *Receiver.*

Sworn to and subscribed to before me, this the 22nd day of September, 1911.

(Seal.) C. R. GOIAY,
Notary Public, County of Harris, State of Texas.

14. The decree of the United States Circuit Court confirming final report of the Master Commissioner, and the final report of the Receiver, was read in evidence, as follows:

682

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF TEXAS.

THE MERCANTILE TRUST COMPANY, TRUSTEE,
THE FARMERS' LOAN AND TRUST COMPANY, TRUSTEE,
GEORGE J. GOULD, ET ALS.,
MARSHALL CAR WHEEL & FOUNDRY CO. ET AL.,
Complainants,

VERSUS

CONSOLIDATED CAUSE
No. 2501.

INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY,
Defendant.

THE FARMERS' LOAN AND TRUST COMPANY,
Complainant,

VERSUS

EQUITY CAUSE
No. 2514.

INTERNATIONAL & GREAT NORTHERN RAILROAD COMPANY, THE MERCANTILE TRUST COMPANY, AND THOMAS J. FREEMAN, AS RECEIVER OF THE INTERNATIONAL & GREAT NORTHERN RAILROAD COMPANY,
Defendants.

DECREE CONFIRMING FINAL REPORT OF WILLIAM H. FLIPPEN, MASTER COMMISSIONER, AND ACCOUNT AND REPORT OF THOMAS J. FREEMAN, RECEIVER.

On this day came William H. Flippen, Master Commissioner, appointed by decree entered in this cause on May 10th, 1910, and filed his final report and exhibits "A" and "B" therewith showing the payment of the entire purchase price of the properties and franchises of the International & Great Northern Railroad Company sold under said decree and the delivery of the deed therefor to the International & Great Northern Railway Company, assignee of the purchaser at said sale.

And then came also Thomas J. Freeman, Receiver of the International & Great Northern Railroad Company heretofore appointed by order of this Court entered in

this cause and filed his final account and report as such Receiver.

And then came also International & Great Northern Railway Company, grantee of said railroads, properties and franchises and entered its appearance as party to this cause by Wilson & Dabney, its solicitors, and filed its motion in writing for a confirmation of the aforesaid report of said Master Commissioner and the aforesaid account and report of said Receiver and also filed a stipulation, agreement and consent in writing of the Farmers Loan & Trust Company, Trustee, by its solicitors, The International & Great Northern Railroad Company by its solicitors, The Mercantile Trust Company, Trustee, by its solicitors, Thomas J. Freeman as Receiver by his solicitor, Frank C. Nicodemus, Jr., by his solicitor and International & Great Northern Railway Company by its solicitors and George J. Gould et al. by their solicitor, accepting and approving said report of said Master Commissioner and accepting and approving said account and report of said Receiver, and consenting that the same be forthwith confirmed without being required to lie or remain in the Clerk's office for exceptions, and waiving the provisions of any rules of Court or decree in that behalf.

And it appearing to the Court from the final report of the Master Commissioner aforesaid that the entire purchase price bid for the railroads, properties, and franchises of the International & Great Northern Railroad Company sold on June 13th, 1911, as heretofore reported to the Court and confirmed, has been duly paid in full by the purchaser at said sale on September 13th, 1911, and that all the rights of the purchaser were duly assigned by instrument in writing filed with the Master Commissioner to the International & Great Northern Railway Company, a corporation organized under the laws of the State of Texas, and that a deed for said railroads, properties and franchises has been duly executed and acknowledged by said MasterCommissioner and by all other

parties required to execute and acknowledge same by the terms of said decree of May 10th, 1910, as in said decree provided, and that said deed so executed and acknowledged has been duly delivered to the International & Great Northern Railway Company, assignee of the purchaser aforesaid;

And it further appearing to the Court from the report of Thomas J. Freeman, Receiver, this day filed as aforesaid that on request of the International & Great Northern Railway Company grantee of said deed the said Thomas J. Freeman, Receiver, did on September 16th, 1911, deliver to the International & Great Northern Railway Company, grantee as aforesaid, full possession of all of the railroads, properties and franchises, including money on hand and current assets formerly owned by the International & Great Northern Railroad Company or said Receiver, and then in the possession, custody or control of said Receiver;

And it further appearing to the Court that the final accounts of the said Thomas J. Freeman, Receiver, are in proper form it is therefore, on motion of the International & Great Northern Railway Company and by consent of the various parties of record to this cause as evidenced by the stipulation, agreement and consent in writing this day filed herein as aforesaid, adjudged, ordered and decreed as follows:

1. That the final report of William H. Flippen, Master Commissioner showing the payment in full of the purchase price for the railroads, properties and franchises of the International & Great Northern Railroad Company sold on June 13th, 1911, and the conveyance and transfer of same to the International & Great Northern Railway Company, assignee of the purchaser, which report has been this day filed as aforesaid, be and the same is in all respects approved and confirmed, and the action of the said Master Commissioner in accepting the settlement for the railroads, properties and franchises aforesaid, and executing, acknowledging and delivering

685

to International & Great Northern Railway Company, assignee of the purchaser, a deed of conveyance of said railroads, properties and franchises as in said report fully and detailed set forth is hereby in all respects approved and confirmed.

2. That the report of Thomas J. Freeman, Receiver, this day filed showing the delivery of possession of the railroads, properties and franchises in his possession or under his control, is in all respects confirmed, and the action of the said Thomas J. Freeman, Receiver, in delivering possession of the said railroads, properties and franchises formerly owned by the International & Great Northern Railroad Company or said Receiver, and then in his possession, custody or control, to the International & Great Northern Railway Company on September 16th, 1911, as set out in detail in said report, is in all respects approved and confirmed, and it is hereby ordered and adjudged that the said International & Great Northern Railway Company, grantee as aforesaid, shall take and hold said properties, released and discharged from the possession and custody of said Receiver and of this Court from and after the 16th day of September, 1911.

3. That the final accounts of Thomas J. Freeman, Receiver of this Court as aforesaid, this day filed, be and the same are hereby accepted, approved and confirmed.

4. And it now appearing to the Court that the duties of said Thomas J. Freeman, as a Receiver of this Court in this cause, have been fully performed and that proper and final accounts have been rendered by him of all property or monies coming into his control as such Receiver, and that said accounts have been duly confirmed, it is now adjudged, ordered and decreed that said Thomas J. Freeman, Receiver as aforesaid, be and he is hereby discharged as Receiver of this Court in this cause, and the said Thomas J. Freeman and any surety on any bond given by him as such Receiver are hereby discharged from further liability on or account of any such bond; and all of the railroads, properties and franchises of the

International & Great Northern Railroad Company or said Receiver formerly in the possession, custody or control of said Receiver, are hereby finally discharged from the possession, custody and control of said Receiver and of this Court.

A. P. McCormick,
United States Circuit Judge.

Dated at Dallas, Texas, September 25th, 1911.

15. Next was introduced the deed of the Master Commissioner and others to the International and Great Northern Railway Company, as follows:

WILLIAM H. FLIPPEN, Master Commissioner, and others, to
INTERNATIONAL AND GREAT NORTHERN
DEED

Under Decrees Foreclosing Second Mortgage of International and Great Northern Railroad Company.

Dated August 31, 1911.

INDENTURE made this 31st day of August, A. D. 1911, between

William H. Flippen, of Dallas, Texas, as Master Commissioner appointed by the decree entered in the causes hereinafter mentioned, by the Circuit Courts of the United States for the Northern District of Texas, the Southern District of Texas, the Eastern District of Texas, and the Western District of Texas, party of the first part;

International and Great Northern Railroad Company, a corporation organized and existing under the laws of the State of Texas, party of the second part;

Thomas J. Freeman, as Receiver of International and Great Northern Railroad Company, appointed by the aforesaid Circuit Courts of the United States in the causes hereinafter mentioned, party of the third part;

The Farmers' Loan and Trust Company, a corporation organized and existing under the laws of the State of New York, as trustee under a mortgage or deed of trust,

hereinafter mentioned, executed by International and Great Northern Railroad Company, bearing date June 15, 1881, party of the fourth part;

FRANK C. NICODEMUS, JR. (unmarried), of New York City, New York, party of the fifth part; and

INTERNATIONAL AND GREAT NORTHERN RAILWAY COMPANY, a corporation organized and existing under the laws of the State of Texas, party of the sixth part:

WHEREAS International and Great Northern Railroad Company, party hereto of the second part, was duly organized and existing under the laws of the State of Texas, and was duly authorized under the laws of said State to own, hold and operate the railroads and to own and hold the other properties (real and personal) hereinafter particularly described; and

WHEREAS said International and Great Northern Railroad Company, party hereto of the second part, on or about the 15th day of June, 1881, executed and delivered a mortgage or deed of trust (hereinafter called the Second Mortgage) bearing date June 15, 1881, whereby it conveyed and transferred to The Farmers' Loan and Trust Company, party hereto of the fourth part, as trustee, its railroads, property and franchises, in said mortgage described, to secure certain bonds of said Railroad Company (hereinafter called the Second Mortgage Bonds), of which there were issued and outstanding on May 10, 1910, bonds in the aggregate principal amount of $10,391,000; and

WHEREAS, on or about April 20th, 1908, said the Farmers' Loan and Trust Company, as trustee as aforesaid, filed its bill in equity in the Circuit Court of the United States for the Northern District of Texas, against said International and Great Northern Railroad Company and others, and prayed, among other things, for the foreclosure of the Second Mortgage, and such proceedings were thereafter had in said cause that on the 10th day of May, 1910, a decree of foreclosure and sale was entered by said Circuit Court of the United States for the North-

ern District of Texas wherein and whereby it was adjudged and decreed, among other things, that said International and Great Northern Railroad Company, party hereto of the second part, pay or cause to be paid, within ten days after the entry of said decree, the amounts therein found to be due upon the Second Mortgage, and that, in default of such payment by said International and Great Northern Railroad Company or by someone claiming under it or for its account, within the time fixed as aforesaid the said mortgaged premises and franchises should be sold, as provided in said foreclosure decree; and

WHEREAS similar and ancillary causes had been brought and were pending between the same parties, in the Circuit Courts of the United States for the Southern District of Texas, the Eastern District of Texas and the Western District of Texas, in each of which Districts portions of the mortgaged premises, property and franchises were situated, and said decree entered by the Circuit Court of the United States for the Northern District of Texas on or about May 10, 1910, was subsequently adopted, rendered and pronounced as the decree of said other courts in said similar and ancillary causes therein pending, by decrees rendered by said Courts respectively on the following dates, namely, by the Circuit Court of the United States for the Southern District of Texas, on or about June 25, 1910; by the Circuit Court of the United States for the Eastern District of Texas, on or about June 27, 1910; and by the Circuit Court of the United States for the Western District of Texas, on or about June 29, 1910; to which said several suits and to the proceedings and record thereof in each of said Courts, including said Circuit Court of the United States for the Northern District of Texas, reference is hereby made; and

WHEREAS, by orders of said Circuit Courts of the United States for the Northern District of Texas, for the Southern District of Texas, for the Eastern District

of Texas and for the Western District of Texas, in said causes therein pending, Thomas J. Freeman, party hereto of the third part, was, prior to the entry of said decrees of foreclosure, appointed Receiver of all the railroads, property and franchises covered by and embraced in the Second Mortgage; and

WHEREAS neither said International and Great Northern Railroad Company nor anyone claiming under it nor anyone for its account did, within the time fixed as aforesaid or at any other time, make payment of the sums decreed to be payable, or of any part thereof; and

WHEREAS William H. Flippen, party hereto of the first part, was in and by said decree of the Circuit Court of the United States for the Northern District of Texas, and in and by said ancillary decrees of the United States Circuit Courts for the Southern District of Texas, for the Eastern District of Texas, and for the Western District of Texas, appointed Master Commissioner, to execute said decrees and make the sale therein provided to be made, and to execute and deliver a deed of conveyance and bill of sale of the property decreed to be sold to the purchaser or purchasers thereof, or his or their successors or assigns, upon the confirmation of such sale and completion of the payment of the entire purchase price, as in said decrees provided; and

WHEREAS said William H. Flippen, Master Commissioner as aforesaid, gave due public notice, in pursuance of said decrees and in accordance with law, of the time and place of the sale under said decrees and of the manner and terms under which said sale was to be conducted, and duly complied with all of the provisions of said decrees relating to said sale, and in pursuance of said decrees, at the place specified therein, to-wit, at the passenger depot of International and Great Northern Railroad Company in the City of Palestine in the County of Anderson, in the State of Texas, on the premises to be sold, did on the 13th day of June, 1911, sell at public auction to Frank C. Nicodemus, Jr., party hereto of the

fifth part, being the highest bidder at said sale and having duly qualified as a bidder thereat in the manner provided in said decrees, all and singular the railroads, property, rights, franchises, functions, immunities and appurtenances to the same belonging, rolling stock, property and premises of every kind and description, covered by or embraced in the Second Mortgage, as adjudged by said decrees and thereby directed to be sold, at and for the sum of Twelve Million, Six Hundred and Forty-five Thousand Dollars ($12,645,000); and

WHEREAS, afterwards, said William H. Flippen, as Master Commissioner as aforesaid, did duly make and file his report of said sale, and by decree entered on or about June 14, 1911, by said Circuit Court of the United States for the Northern District of Texas, in said cause therein pending, the said report of sale was in all things ratified, approved and confirmed, and said sale to Frank C. Nicodemus, Jr., was confirmed, and made absolute and the said Frank C. Nicodemus, Jr., was adjudicated the purchaser of all the property, premises and franchises sold at said sale, subject, however, to all the terms of said decree of foreclosure entered by said Court on or about May 10, 1910, and subject also to the due performance by said purchaser, his successors and assigns, of all the obligations in said decree described; and

WHEREAS said Circuit Court of the United States for the Southern District of Texas, by decree entered in said cause therein pending on the 1st day of July, 1911, said Circuit Court of the United States for the Eastern District of Texas, by decree entered in said cause therein pending on the 7th day of July, 1911, and said Circuit Court of the United States for the Western District of Texas, by decree entered in said cause therein pending on the 11th day of August, 1911, respectively, adopted said decree of said Circuit Court of the United States for the Northern District of Texas confirming said sale, and in all things ratified, approved and confirmed said report of sale and confirmed and made absolute said sale to said Frank C. Nicodemus, and

691

WHEREAS the said Frank C. Nicodemus, Jr., party hereto of the fifth part, has in all respects complied with the provisions of said decrees of foreclosure and sale with reference to the payment of the amount of the bid made by him as aforesaid at said sale, and has paid or made settlement of the amount of his said bid as provided in said decrees; and

WHEREAS the said Frank C. Nicodemus, Jr., has duly assigned, transferred and set over unto International and Great Northern Railway Company, party hereto of the sixth part, all of his right, title and interest, as said purchaser, in and to the property sold to him as aforesaid, including his right to receive deeds of conveyance and bills of sale thereof, as prescribed in the aforesaid decrees:

NOW, THEREFORE, THIS INDENTURE WITNESSETH:

That the said William H. Flippen, as Master Commissioner, party hereto of the first part, in order to carry into effect the said sale made by him and in pursuance of the aforesaid decrees and in conformity with law, and in consideration of the premises and of the payment and settlement, as aforesaid, of the amount bid by the purchaser at said sale, to-wit, the sum of twelve million six hundred and forty-five thousand dollars, the receipt whereof is hereby acknowledged, and in further consideration of the obligations, undertakings and agreements hereinafter expressed and required by the terms of said decrees and by this Indenture to be performed, assumed, undertaken and discharged by the purchaser or purchasers at said sale, his or their successors and assigns, and which International and Great Northern Railway Company, party hereto of the sixth part, hereby assumes, has granted, bargained, sold, aliened, remised, released, conveyed, confirmed, assigned, transferred and set over, and by these presents does grant, bargain, sell, alien, remise, release, convey, confirm, assign, transfer and set over, unto International and Great Northern Railway Company, party hereto of the sixth part, and to its suc-

cessors and assigns, in fee simple and absolutely, all and singular the railroads, property, rights, franchises, functions, immunities and appurtenances to the same belonging, rolling stock, property and premises of every kind and description, covered by or embraced in the Second Mortgage of International and Great Northern Railroad Company, dated June 15, 1881, as adjudged by said decree and thereby directed to be sold, and particularly the following-described property, namely:

ALL and singular the lands, tenements and hereditaments of the International and Great Northern Railroad Company, whether owned at the date of the execution of the Second Mortgage of said company—namely, June 15, 1881—or thereafter acquired by it, including its lines of railroad in the State of Texas extending from the Town of Longview in the County of Gregg, in said State, through said county and through the Counties of Rusk, Smith, Cherokee, Anderson, Leon, Robertson, Milam, Williamson, Travis, Hays, Comal, Bexar, Medina, Frio, La Salle, Encinal and Webb, to Laredo in said last-mentioned County; and from the town of Mineola, in Wood County, to Troupe, in Smith County; and from the City of Palestine, in Anderson County, through the Counties of Houston, Trinity, Walker and Montgomery to Houston, in Harris County; and from the town of Spring, in Harris County, through the Counties of Montgomery, Waller, Grimes, Brazos, Robertson, Falls, McLennan, Limestone, Hill, Navarro, Ellis and Johnson to the City of Fort Worth, Tarrant County; with branches and branch lines from the town of Overton to the town of Henderson, in Rusk County, from the town of Round Rock to Georgetown, in Williamson County, from the town of Phelps to the town of Huntsville, in Walker County, from the City of Houston, in Harris County, to the town of Columbia, in Brazoria County, from Navasota, in Grimes County, to Madisonville, in Madison County, from Calvert Junction to Calvert in Robertson County, and from Waco Junction to East Waco, in Mc-

Lennan County; also the railway and railway tracks and property appurtenant thereto, and certain tracts of land in and adjacent to the City of Houston, in Harris County, known as the Houston Belt Terminals; a total distance of about eleven hundred and six (1106) miles of completed railroad; also the trackage rights of said International and Great Northern Railroad Company from Houston, in Harris County, to Galveston, in Galveston County, Texas, over the railroad of the Galveston, Houston and Henderson Railroad Company of 1882, accorded to it by an agreement between said last-named Railroad Company and said International and Great Northern Railroad Company dated November 19, 1895; also all and singular the said International and Great Northern Railroad Company's railroads, tracks, rights-of-way, main lines, branch lines, superstructures, depots, depot grounds, station houses, engine houses, car houses, freight houses, wood houses, sheds, watering places, workshops, machine shops, bridges, viaducts, culverts, fences and fixtures, together with all its leases, leasehold interests, leased or hired lands, leased or hired railroads and all its locomotives, tenders, cars, carriages, coaches, trucks, and other rolling stock, its machinery, tools, weighing scales, turntables, rails, wood, coal, oil, fuel, equipment, furniture and material of every name, nature and description, together with all of its corporate rights, privileges, immunities and franchises, whether held at the time of the execution of said Second Mortgage of said company—namely, on June 15, 1881—or thereafter acquired by it (including the franchise to be a corporation), and all the tolls, fares, freights, rents, income, issues and profits thereof, and all the reversion and reversions, remainder and remainders thereof, as well as all property purchased or held by the Receiver in said causes, including any balance of cash, credits and income which may remain in his hands after application thereof as in said decree of the Circuit Court of the United States for the Northern District of Texas in said

cause therein pending provided, or, as has been or may hereafter be directed by said Court in said cause, to the payment of receivership obligations and charges, and to the payment of claims which may be allowed by said Court in said cause against the same, with priority over said Second Mortgage dated June 15, 1881; excepting, however, all land grants, lands, land certificates, town lots and town sites owned or controlled by said International and Great Northern Railroad Company at the date of the execution of said Second Mortgage, namely, on June 15, 1881, or at any time prior to said date, which were not on the first day of November, 1879, or thereafter up to the said 15th day of June, 1881, actually occupied and in use by the said Railroad Company and necessary to the operation and maintenance of its lines of railroad; and excepting further, any portions of said premises and property which may have been released from the lien and operation of said Second Mortgage dated June 15, 1881, and the releases for which have been duly filed for record in the proper counties.

To have and to hold all and singular the above-mentioned and described railroads, property, rights, franchises, functions, immunities and appurtenances to the same belonging, rolling stock, property and premises of every kind and description, hereinbefore mentioned and conveyed, or intended to be conveyed, unto said International and Great Northern Railway Company, party hereto of the sixth part, being a corporation organized and existing under and pursuant to the laws of the State of Texas, and to its successors and assigns forever.

Subject, however, to the mortgage dated November 1, 1879, made by International and Great Northern Railroad Company to John S. Kennedy and Samuel Sloan, as trustees, and known as said Railroad Company's First Mortgage, and subject, also, to any unpaid indebtedness or liability contracted or incurred by said Railroad Company in the operation of its railroad which said Circuit Court of the United States for the Northern District of

Texas may hereafter order or decree in said cause therein pending to be prior or superior to the lien of said Second Mortgage of said International and Great Northern Railroad Company, dated June 15, 1881, except such as shall be paid or satisfied out of the income of the property in the hands of the Receiver in said cause, under orders of said Court entered or to be entered in said cause, and subject, also, to such debts, claims, liens and demands of whatsoever nature heretofore incurred or created, or which may hereafter be incurred or created, by the Receiver in said cause under orders of said Court heretofore or hereafter entered in said cause and which have not been or shall not hereafter be paid by the Receiver, under orders of said Court heretofore or hereafter entered in said cause, or by other parties in said cause, or out of the proceeds of sale as directed in said decrees, and SUBJECT also, as to certain specific portions of said property and premises—namely, the San Antonio Passenger Station, the Colorado Bridge, and certain equipment—to the existing recorded mechanic's lien, the First Mortgage Colorado Bridge Bonds and the unsatisfied recorded equipment liens, specifically and respectively affecting the same; and SUBJECT, also, to all of the terms and reservations of each of the said decrees of foreclosure and sale and of the decrees of Court confirming said sales, above mentioned, whether in this Indenture expressly referred to or not.

AND THIS INDENTURE FURTHER WITNESSETH:

That International and Great Northern Railroad Company, party hereto of the second part, for and in consideration of the sum of one dollar, lawful money of the United States, the receipt of which is hereby acknowledged, and pursuant to the said decrees and by way of confirmation and further assurance of title to the said International and Great Northern Railway Company, party hereto of the sixth part, of all and singular the property and premises, and every part and parcel thereof, of every kind and description, wherever situated, cov-

ered by or embraced in said Second Mortgage of International and Great Northern Railroad Company, party hereto of the second part, dated June 15, 1881, as adjudged by said decrees, and thereby directed to be sold, has granted, bargained, sold, aliened, remised, released, conveyed, confirmed, assigned, transferred and set over, and by these presents does grant, bargain, sell, alien, remise, release, convey, confirm, assign, transfer and set over unto International and Great Northern Railway Company, party hereto of the sixth part and to its successors and assigns forever, all the said railroads, property, rights, franchises, functions, immunities and appurtenances to the same belonging, rolling stock, property and premises of every kind and description, covered by and embraced in said Second Mortgage of International and Great Northern Railroad Company, dated June 15th, 1881, as adjudged in said decrees and thereby directed to be sold.

TO HAVE AND TO HOLD all and singular the said railroads, property, rights, franchises, functions, immunities and appurtenances to the same belonging, rolling stock, property and premises (real and personal) unto International and Great Northern Railway Company, the party of the sixth part hereto, its successors and assigns forever.

AND THIS INDENTURE FURTHER WITNESSETH:

That Thomas J. Freeman, as Receiver as aforesaid, party hereto of the third part, for and in consideration of the premises and of the sum of one dollar, lawful money of the United States to him in hand paid, the receipt whereof is acknowledged, and pursuant to said decrees and by way of confirmation and further assurance of title to said International and Great Northern Railway Company, party hereto of the sixth part, of all and singular the property and premises, and every part and parcel thereof, of every kind and description, wherever situated, covered by or embraced in said Second Mortgage of International and Great Northern Railroad Com-

pany, dated June 15, 1881, as adjudged by said decrees, and thereby directed to be sold, has conveyed, released and confirmed, assigned, and by these presents does convey, release and confirm, unto International and Great Northern Railway Company, party hereto of the sixth part, and to its successors and assigns forever, all the said railroads, property, rights, franchises, functions, immunities and appurtenances to the same belonging, rolling stock, property and premises of every kind and description covered by and embraced in said Second Mortgage, as adjudged in said decrees and thereby directed to be sold, and specifically all right, title and interest of said Receiver in and to all rolling stock and equipment acquired by said Receiver under and in pursuance of an order of the Circuit Court of the United States for the Northern District of Texas, entered on November 4, 1908, in the above-mentioned cause therein pending.

To have and to hold all and singular the said railroads, property, rights, franchises, functions, immunities and appurtenances thereunto belonging, rolling stock, property and premises (real and personal) unto the said party of the sixth part hereto, its successors and assigns forever.

Subject, however, as to said rolling stock and equipment to the outstanding equipment notes of said Receiver issued by him pursuant to the aforesaid order of said Court; and International and Great Northern Railway Company hereby, for itself, its successors and assigns, covenants and agrees to and with said Receiver, party hereto of the second part, to assume payment of all unpaid equipment notes issued by said Receiver pursuant to the terms of the order of said Court above mentioned, dated November 4, 1908, and outstanding at the date of the delivery of this Indenture, and to perform all of the obligations of said Receiver under the agreement referred to in said order of court.

AND THIS INDENTURE FURTHER WITNESSETH:

That The Farmers' Loan and Trust Company, as trustee under said Second Mortgage of International and Great Northern Railroad Company, dated June 15, 1881, described in the said decrees, party hereto of the fourth part, in consideration of the premises and of the payment of the amount of the bid as aforesaid by the said purchaser at the said Master Commissioner's sale and of the assignment to the party of the sixth part of all the right, title and interest of said purchaser in and to the property sold at said sale, and in pursuance of said decrees, and by way of confirmation and further assurance of title to the said party of the sixth part of all and singular the property and premises and every part and parcel thereof, of every kind and description, wherever situated, covered by or embraced in said Second Mortgage of International and Great Northern Railroad Company, dated June 15, 1881, as adjudged by said decrees and thereby directed to be sold, has transferred and released, and does by these presents transfer and release, to the said International and Great Northern Railway Company, party hereto of the sixth part, its successors and assigns forever, all the right, title and interest of said party of the fourth part under said Second Mortgage of International and Great Northern Railroad Company, dated June 15, 1881, and all its other right, title and interest, in and to any and all of the said railroads, property, rights, franchises, functions, immunities and appurtenances to the same belonging, rolling stock, property and premises of every kind and description covered by and embraced in said Second Mortgage as adjudged in said decrees and by said decrees directed to be sold.

TO HAVE AND TO HOLD all and singular the said railroads, property, rights, franchises, functions, immunities and appurtenances thereunto belonging, rolling stock, property and premises unto said party of the sixth part hereto, its successors and assigns forever.

AND THIS INDENTURE FURTHER WITNESSETH:

That said Frank C. Nicodemus, Jr., party hereto of the fifth part, the purchaser at said sale thereof of the property sold under the said decrees of foreclosure and hereinbefore by this Indenture conveyed by the said Master Commissioner to International and Great Northern Railway Company, the party of the sixth part, having for a valuable consideration, the receipt of which is hereby acknowledged, assigned, transferred and set over, as hereinbefore recited, unto the party of the sixth part, all of his right, title and interest in and to the property so sold, including his right to receive the conveyance thereof, and all his other rights under said decrees in respect of said property or by virtue of his said bid therefor and purchase thereof, does, in consideration of the sum of one dollar, lawful money of the United States, the receipt of which is acknowledged, hereby join in the execution of this Indenture for the purpose of releasing and confirming, and he does hereby release and confirm, unto said International and Great Northern Railway Company, party hereto of the sixth part, its successors and assigns forever, all of his right, title and interest in and to the property sold at said sale and purchased by him, as aforesaid, and by this Indenture conveyed, to the party of the sixth part and each and every part thereof.

TO HAVE AND TO HOLD unto the party of the sixth part its successors and assigns forever.

Said International and Great Northern Railway Company hereby, for itself, its successors and assigns, covenants and agrees to and with said Frank C. Nicodemus, Jr., party hereto of the fifth part, to perform, satisfy and discharge each and all of the terms of the decrees of foreclosure and sale in this Indenture recited, on the part of the purchaser at the sale thereunder to be performed, satisfied and discharged (other than the payment of the purchase price bid which has been made by said Nicodemus), and as his assignee, to enter its appearance in said causes, and to indemnify and forever hold harmless said

Frank C. Nicodemus, Jr., party hereto of the fifth part, his executors and administrators, from and against any and all loss, damages, expenses and liabilities whatsoever which may have been incurred or which hereafter may be incurred by said Frank C. Nicodemus, Jr., or his executors or administrators, by reason of the bid of said Frank C. Nicodemus, Jr., at the above-mentioned sale and of the acceptance of said bid, or by reason of any acts or things required by said decrees or orders of court to be assumed or performed by said Frank C. Nicodemus, Jr., as such purchaser or by it, said Railway Company, as his assignee.

No personal covenant or liability shall be implied against the parties of the first, third, fourth or fifth parts to this Indenture, or any of them, by reason of the execution of this deed or of any recital or covenant herein contained.

In order to facilitate the recording of this Indenture, forty originals thereof have been executed, acknowledged and delivered by the respective parties, all or any one or more of which may be recorded, and each of which, when executed, acknowledged and delivered, shall be deemed an original, and all collectively one instrument.

IN WITNESS WHEREOF, each of the said parties hereto of the first, third and fifth parts has hereunto set his hand and seal, and each of the parties of the second, fourth and sixth parts has caused these presents to be signed by its President or a Vice-President, and its corporate seal to be hereunto affixed and attested by its Secretary or an Assistant Secretary, the day and year first above written.

WILLIAM H. FLIPPEN,
(SEAL.) As Master Commissioner.

INTERNATIONAL AND GREAT NORTHERN
RAILROAD COMPANY,
by
FRANK J. GOULD,
(Corporate Seal.) Vice-President.

Attest:
H. B. HENSON,
Assistant Secretary.

THOMAS J. FREEMAN,
As Receiver.
THE FARMERS' LOAN AND TRUST COMPANY,
by
SAM SLOAN,
(Corporate Seal.) Vice-President.
Attest:
A. V. HEELY,
Secretary.

FRANK C. NICODEMUS, JR.,
(SEAL.) As Purchaser.
INTERNATIONAL AND GREAT NORTHERN
RAILWAY COMPANY,
by
(Corporate Seal.) GEORGE H. TAYLOR,
Attest: Vice-President.
H. B. HENSON,
Assistant Secretary.

16. Next was introduced the charter of the International and Great Northern Railway Company as follows:

ARTICLES OF INCORPORATION
OF
INTERNATIONAL AND GREAT NORTHERN RAILWAY COMPANY.

Know All Men by These Presents:

That we, the undersigned, whose names are hereunto subscribed, being the purchaser at the sale hereinafter mentioned, and the associates of such purchaser, do hereby certify that we have, under and in pursuance of Article 4550 of Chapter 11 of Title 94 of the Revised Statutes of Texas, as amended by an act of the Legislature of the State of Texas, approved September 1, 1910, associated ourselves together to form a corporation for the purpose of acquiring, owning, maintaining and operating the rail-

road, property and franchises sold at said sale and hereinafter described; and we do further certify, pursuant to the provisions of Chapter 1 of Title 94 of the Revised Statutes of Texas, as follows:

FIRST. The name of this corporation shall be International and Great Northern Railway Company.

SECOND. This corporation is organized for the purpose of acquiring, owning, maintaining and operating the railroads heretofore forming the International and Great Northern Railroad and purchased by Frank C. Nicodemus, Jr., one of the undersigned, at a sale thereof, held on June 13, 1911, pursuant to a decree of foreclosure and sale entered on or about May 10, 1910, in certain judicial proceedings brought for the foreclosure of a mortgage of the International and Great Northern Railroad Company known as its second mortgage, said decree having been made and entered by the United States Circuit Court for the Northern District of Texas, in a certain cause therein pending, wherein The Farmers' Loan and Trust Company, Trustee, was complainant and International and Great Northern Railroad Company and others were defendants, which said decree was subsequently adopted and entered, in certain ancillary causes between the same parties, by the Circuit Courts of the United States for the Southern District of Texas, the Eastern District of Texas and the Western District of Texas; said railroads being described as follows, to-wit:

> All and singular the lines of railroad in the State of Texas formerly belonging to the International and Great Northern Railroad Company, extending from the town of Longview, in the County of Gregg in said State, through said county and through the Counties of Rusk, Smith, Cherokee, Anderson, Leon, Robertson, Milam, Williamson, Travis, Hays, Comal, Bexar, Medina, Frio, La Salle, Encinal and Webb, to Laredo in said last mentioned county; and from the town of Mineola, in Wood County, to Troupe, in Smith County; and from the City of Palestine, in

Anderson County, through the Counties of Houston, Trinity, Walker and Montgomery to Houston, in Harris County; and from the town of Spring, in Harris County, through the Counties of Montgomery, Waller, Grimes, Brazos, Robertson, Falls, McLennan, Limestone, Hill, Navarro, Ellis and Johnson to the City of Fort Worth, Tarrant County; with branches and branch lines from the town of Overton to the town of Henderson, in Rusk County, from the town of Round Rock to Georgetown, in Williamson County, from the town of Phelps to the town of Huntsville, in Walker County, from the City of Houston, in Harris County, to the town of Columbia, in Brazoria County, from Navasota, in Grimes County, to Madisonville, in Madison County, from Calvert Junction to Calvert, in Robertson County, and from Waco Junction to East Waco, in McLennan County; including also the railway and railway tracks and property appurtenant thereto, and certain tracts of land in and adjacent to the City of Houston, in Harris County, known as the Houston Belt Terminals; a total distance of about eleven hundred and six (1106) miles; and including also the trackage rights formerly belonging to said International and Great Northern Railroad Company from Houston, in Harris County, to Galveston, in Galveston County, Texas, over the railroad of the Galveston, Houston and Henderson Railroad Company of 1882, under an agreement between said railroad companies dated November 19, 1895.

This corporation shall have all of the powers and privileges conferred by the laws of the State of Texas upon chartered railroads, including the power to construct and extend.

THIRD. The place at which shall be established and maintained the principal business office, the public office and general offices of this corporation is the City of Houston, in Harris County, State of Texas.

FOURTH. The time of the commencement of this corporation shall be the date of the filing of these articles in the office of the Secretary of State of the State of Texas, and the period of the continuation of this corporation shall be fifty (50) years from the time of its commencement.

FIFTH. The amount of the capital stock of this corporation shall be Eleven Million Five Hundred Thousand Dollars ($11,500,000).

SIXTH. The names and places of residence of the several persons forming the association for incorporation are as follows:

Name.	Residence.
Frank C. Nicodemus, Jr.	New York City, N. Y.
Horace Booth	Palestine, Texas.
Willis H. Cope	Houston, Texas.
Samuel B. Dabney	Houston, Texas.
Thomas J. Freeman	Houston, Texas.
Alfred R. Howard	Palestine, Texas.
Frank T. Richardson	Houston, Texas.
William L. Maury	Palestine, Texas.
Milton L. Morris	Houston, Texas.
Dougald J. Price	Palestine, Texas.

SEVENTH. The names of the members of the first Board of Directors of this corporation are as follows:

Horace Booth.
Willis H. Cope.
Samuel B. Dabney.
Thomas J. Freeman.
Alfred R. Howard.
Frank T. Richardson.
William L. Maury.
Milton L. Morris.
Dougald J. Price.

The government of this corporation and the management of its affairs shall be vested in a board of directors composed of nine persons: a president, one or more vice-presidents and such other officers and agents as this corporation by its by-laws may prescribe.

EIGHTH. The number and amount of the shares of the capital stock of this corporation shall be one hundred

and fifteen thousand shares, of the par value of $100 each.

Of such capital stock fifty thousand shares shall be issued as preferred stock, and sixty-five thousand shares shall be issued as common stock, but the amount of preferred or common stock, or both, may be increased from time to time in the manner provided by the laws of the State of Texas.

No dividends shall be paid in any fiscal year upon the common stock of this corporation until and unless dividends to the amount of five per cent. for the same fiscal year shall have been set apart for or paid upon the preferred stock of this corporation; but such dividends on the preferred stock shall be non-cumulative. After the payment or the setting apart in any one fiscal year of dividends upon the preferred stock to the amount of five per cent., no further dividends in the same fiscal year shall be set apart for or paid upon the preferred stock until and unless dividends to the amount of five per cent. for the same fiscal year shall be set apart for or paid upon the common stock; but after dividends to the amount of five per cent. in any one fiscal year shall have been set apart for or paid upon both preferred stock and common stock, all stock, without priority or distinction as between the different classes thereof, shall share *pro rata* in any further dividends for that year.

In the event of any liquidation, dissolution or winding up (whether voluntary or involuntary) of this corporation, the holders of the preferred stock shall be entitled to be paid in full, out of the assets of this corporation, the par amount of their shares and all dividends thereon declared and unpaid, before any amount shall be paid out of said assets to the holders of the common stock; but, after payment in full to the holders of the common stock of the par amount of their common stock and all dividends thereon declared and unpaid, holders of both classes of stock, without priority or distinction as between the different classes thereof, shall be entitled to participate, *pro rata,* in the assets of this corporation.

WITNESS our hands this 8th day of August, A. D. 1911.

FRANK C. NICODEMUS, JR.,
HORACE BOOTH,
WILLIS H. COPE,
SAMUEL B. DABNEY,
THOMAS J. FREEMAN,
ALFRED R. HOWARD,
FRANK T. RICHARDSON,
WILLIAM L. MAURY,
MILTON L. MORRIS,
DOUGALD J. PRICE.

STATE OF TEXAS,
COUNTY OF HARRIS.—SS.:

Before me, H. B. Mansfield, a notary public in and for the aforesaid State and County duly qualified, personally appeared Frank C. Nicodemus, Jr., Horace Booth, Willis H. Cope, Samuel B. Dabney, Thomas J. Freeman, Alfred R. Howard, Frank T. Richardson, William L. Maury, Milton L. Morris and Dougald J. Price, known to me to be all of the persons whose names are subscribed to the foregoing instrument, and each acknowledged to me that he executed the same for the purposes and considerations therein contained and expressed.

Given under my hand and seal of office this 8th day of August, A. D. 1911. My commission expires May 31st, 1913.

H. B. MANSFIELD,
(SEAL) *Notary Public.*

STATE OF TEXAS,
COUNTY OF HARRIS.—SS.:

Before the undersigned authority, within and for said County and State, on this day came and personally appeared Thomas J. Freeman, Alfred R. Howard and William L. Maury, three of the directors named in the foregoing and attached Articles of Incorporation of International and Great Northern Railway Company, all of whom are personally known to me, and who being by me severally sworn, as the law provides, on their oaths, sev-

erally depose and say that the amount of One Thousand Dollars ($1,000) per mile for every mile of road of said Company has been in good faith subscribed, that five per cent. (5%) of the amount subscribed has been actually paid to the directors named in said Articles of Incorporation, and that the corporators named in said Articles are all subscribers to said capital stock.

THOMAS J. FREEMAN,
ALFRED R. HOWARD,
WILLIAM L. MAURY.

Subscribed and sworn to before me, at my office in the City of Houston, Harris County, Texas, this 8th day of August, A. D. 1911. My commission expires May 31st, 1913.

H. B. MANSFIELD,
(SEAL) *Notary Public.*

ATTORNEY GENERAL'S OFFICE,
Austin, Texas, August 10th, 1911.

CERTIFICATE.

This is to certify that the original Articles of Incorporation of International and Great Northern Railway Company were submitted to me on the 10th day of August, 1911, and having carefully examined the same I find them in accordance with the provisions of Chapter 1 of Title 94 of the Revised Statutes of Texas and any and all amendments thereto, and not in conflict with the laws of the United States or of the State of Texas.

J. P. LIGHTFOOT,
Attorney General.

Filed in the office of the Secretary of State this 10th day of August, 1911.

C. C. MCDONALD,
Secretary of State.

DEPARTMENT OF STATE.

I, John L. Wortham, Secretary of State of the State of Texas, do hereby certify that the foregoing is a true copy of the charter of International & Great Northern Railway Company, with the endorsements thereon, as now

appears of record in this Department, in Book G, pages 265-6-7 and 8, Record of Railroad Charters.

In testimony whereof I have hereunto signed my name officially and caused to be impressed hereon the Seal of State at my office in the City of Austin, Texas, this the 20th day of January, A. D. 1913.

JOHN L. WORTHAM,
(SEAL) *Secretary of State*

17. A. R. Howard was called by the plaintiffs, and testified that he lives at Houston, Texas, and is Secretary and Treasurer of defendant and official custodian of the minutes and records and stock books of the H. & G. N., of the International, and of the I. & G. N. R. R. Companies, and has them with him.

The plaintiffs then identified by the witness and offered in evidence from the minutes of the H. & G. N. R. R. Co. its by-laws approved December 4th, 1871, and contained on pages 73 to 82, and which are as follows:

ART. ONE.

Section 1. The management and direction of the affairs of the Houston & Great Northern Railroad Company, of the State of Texas, shall be vested in a Board of nine directors, each of whom shall be at the time of his election and during the continuance of his term of office a *bona fide* owner of at least five shares of the capital stock, upon which all assessments have been paid.

Sec. 2. At the first meeting of the Board of Directors after such election they shall elect from their own number a President and Vice President for the ensuing year; they shall also appoint a Treasurer, a Secretary, a financial agent, chief engineer and general agent, a register of transfer of stock and bonds, a General Supt., and such other officers and agents as they might deem necessary for the transaction of the business of the Company.

Sec. 3. In addition to the above, the Board of Directors may from time to time appoint such other officers, agents and assistants as the business of the company

may require, whose duty shall be defined by, and who shall hold their respective appointments during the pleasure of, the Board.

Sec. 4. The salaries of the foregoing officers and all others shall be fixed by the Board of Directors, or the Executive Committee, and all salaries shall be paid monthly.

Sec. 5. All officers and agents of the company, who by virtue of their office, shall receive or disburse money on account of the company, shall give bond in such amount and with such security as shall be required by the executive committee for the faithful performance of their duty.

ART. TWO.

Sec. 1. The Annual Meeting of the stockholders of the company shall be held at the principal office in the City of Houston on the 1st Monday of December of each year, which shall be a day for the transaction of business by the stockholders. At which time the annual election for directors shall take place. Should the stockholders owning a majority of the stock fail to meet or be represented on that day, the directors may appoint another day for said election, and an election held on the day appointed shall be valid. Directors elected under the provisions hereof shall hold office until their successors are qualified and chosen. At each general or annual meeting a statement of the affairs of the company shall be submitted to the stockholders by the President and Board of Directors.

Sec. 2. A special meeting of the stockholders may be called at any time the Board of Directors may deem expedient, also upon a written request stating the object of the call, signed by the holders of one-fourth of the whole number of shares of stock, and addressed to the board of directors; notice of all such special meetings shall be given by the Secretary by advertisement in the newspapers or otherwise, as shall be directed by the board of directors, which notice shall specify the time and place of such meeting, a copy of which shall be delivered or duly

mailed to each stockholder, whose postoffice address is known in time for such meeting.

Sec. 3. At all annual and special meetings of the stockholders, the President of the company shall, when present, officiate as chairman, unless otherwise determined by such meeting, and the Secretary of the company shall in like manner act as clerk thereof.

Sec. 4. Full minutes of the proceedings of the stockholders at their several meetings shall be kept by the Secretary and recorded by him in a suitable book to be provided for that purpose, and all resolutions adopted by the stockholders shall be by him duly communicated to the Board of Directors.

Sec. 5. The Board of Directors shall hold an annual meeting on the first Monday of December in each year; special meetings of the directors may be called at any time by the President and shall be called by him whenever requested by two members; but in case that a meeting is convened to act upon matters of importance due and timely notice shall be given to every director, setting forth clearly the object of the meeting and the business to be considered.

Sec. 6. A majority of the members of the board of directors shall be necessary to constitute a quorum, which majority, whenever and wherever convened, shall have full power to transact business, but a less number of the members may adjourn from time to time until a quorum shall be convened.

Sec. 7. At all meetings of the board, the President, if present, shall officiate as Chairman, and in case of his absence the Vice President shall officiate in his stead, and in the absence or inability of both of these officers one of the directors present shall be chosen to preside as chairman of such meeting.

Sec. 8. The Secretary shall be present at all meetings of the board, but in case of his absence the board may choose a secretary pro-tem for that meeting.

Sec. 9. Full minutes of all the proceedings of the board shall be entered by the secretary in a book to be kept for that purpose, and all orders and resolutions adopted shall be by him forthwith communicated to the parties interested.

Sec. 10. The business of the company, during the intervals of the meetings of board of directors, shall be transacted by the executive officers. But all contracts, not of immediate necessity for the proper management of the business of the company and not otherwise provided for, to be subject to the approval of the board or executive committee.

Sec. 11. The executive committee and all select committees shall be elected by the board of directors from their own number, and the executive commitee shall be organized at the first meeting of the board of directors after each annual meeting of the stockholders. The President shall be ex-officio a member of the executive committee.

Sec. 12. The executive committee shall meet at such time and places as they may appoint. It shall consist of five members, a majority of whom shall constitute a quorum to bo business. It may appoint its own chairman, and it shall be vested with all the powers of the full board of directors, during the intervals of the meetings thereof, subject to the ratification of their action by said board at the next stated meeting, all questions and propositions submitted for their action shall be decided by a majority of the committee, and in case of a tie the chairman shall have a casting vote.

Sec. 13. The meetings of the executive committee shall be attended by the Secretary or assistant secretary when required, who shall keep the minutes of their proceedings, which shall be reported to the board at the first stated or special meeting thereafter, and shall be subject to their approval.

Sec. 14. The duties of the executive committee shall be

as follows: To have supervision of all such business as is not entrusted to special committees, supervision of all receipts and disbursements, and to devise the necessary ways and means to meet all payments as they become due; they shall have the supervision of the books, accounts and vouchers, with power to direct as to the manner in which such books and accounts shall be kept.

Sec. 15. There shall be a register of stocks and bonds kept in the City of New York by such officers, persons or corporation as may be appointed by the board, and such appointee for this purpose shall keep the accounts of the bonds and stock registered and transferred in such form as the executive committee may approve.

Sec. 16. All books, accounts, letters or papers appertaining to the business of the company in possession of any officer, agent or employe of the company, shall at all times be open and subject to the examination of any member of the board of directors, and also the executive officers, and all letters and other papers so appertaining, received by the Secretary or Treasurer, shall be submitted when required to the members of the board and to the President.

Art. Three.

Executive Officers.

Section 1. The President shall be the chief executive officer of the company, and shall have power to call special meetings of the board of directors, at such times and places as may be designated by him, and it shall be his duty to call such meetings on the written request of any two members of the board, and he shall preside at all meetings of the directors when present thereat, sign all certificates of stocks, and deeds and contracts requiring the seal of the company, and shall have the general management and supervision of the affairs of the company. He shall see that the by-laws, rules and regulations of the board are faithfully executed, and guard against all violations of the laws of the State of Texas.

Sec. 2. He shall see that all yearly or other reports required from the company by the Legislature or other proper authorities of the State of Texas, are duly prepared and transmitted by the proper officers.

Sec. 3. He shall see that all orders and resolutions of the board of directors or the executive committee in respect to the business of the company are duly executed and complied with; that the duties imposed by them on the various officers, agents and other employees accountable directly to the President and board are in all respects properly performed.

Sec. 4. He shall, in addition to the Treasurer, sign all checks drawn for the use of the company for three hundred dollars and upwards, to be countersigned by the Secretary, and in case of the absence or inability of the Secretary by the Treasurer.

Sec. 5. He shall have the power to negotiate contracts during the intervals of the meetings of the board subject to the approval of the board at its next meeting, save and except in cases specially provided for, and he shall perform such duties not otherwise provided for as are usually devolved upon the President of incorporated companies.

Sec. 6. In case a vacancy occurs in the office of President the same shall be filled by the board of directors without unnecessary delay, by a vote of the majority of all the members, either *viva voce* or by ballot if the latter be required by any two members present; notices of meeting at which such vacancy is to be filled shall set forth such special business.

The Vice-President.

In the absence of the President, or in case of vacancy by death or resignation, the Vice-President shall discharge the duties of President until the vacancy shall be filled by election of a President.

The Secretary.

Sec. 1. It shall be the duty of the Secretary to attend

at the office of the company *wherever* the business of the company may require him to do so.

Sec. 2. He shall give notice by letter or otherwise, as previously prescribed, to all the directors, of the time and place of any meeting of the board, and when officers are to be elected the same shall be stated in the notice of the meeting.

Sec. 3. He shall attend all meetings of the board of directors, keep a correct record and full minutes of all their proceedings, and enter same in a book to be kept for that purpose. He shall keep the books of the company, register all shares of stock and transfers thereof, countersign all certificates of stock and all deeds and contracts requiring the seal of the company, keep the seal and affix it to all such instruments as may be duly executed acoerding to the laws, or that may be ordered by the board of directors, and perform all other duties that may be prescribed for him by the President or the board. In the absence of the Secretary at any meeting a secretary *pro tem* may be appointed.

Sec. 4. The Secretary shall communicate to the several parties interested, all resolutions and orders adopted by the board.

Sec. 5. He shall have the charge of all contracts, deeds of conveyance, and other similar documents, also, of all reports and communications to the board of directors.

The Treasurer.

The Treasurer shall keep accurate accounts in such forms as shall be approved by the executive committee of all the company's moneys received and paid out by him.

He shall sign all checks.

He shall deposit daily all moneys which he shall receive, to the credit of the company, in such bank or banks as may from time to time be designated by the board. He shall pay out money only upon the approval of the President, countersigned by the Secretary, unless specially

ordered by the board of directors or the executive committee, and his draft upon the financial agent in New York shall be countersigned by the President. He shall render a report to the directors at each stated meeting of the board, and monthly to the executive committee, of all moneys received and disbursed by him, and of the amount of money in his hands, and shall perform such other appropriate duties as may be required of him by the President of the board.

The Financial Agent.

Sec. 1. The Financial Agent, under the direction of the executive committee, shall have control of the company's fund in New York, and shall honor drafts made upon him by the Treasurer, countersigned by the President, for the uses of the company in the State of Texas.

Sec. 2. He shall, as often as once a month, examine and audit the accounts of the Treasurer, and shall report the result of such examination regularly, through the executive committee, to each stated meeting of the board.

Chief Engineer and General Agent.

Sec. 1. The Chief Engineer and General Agent shall be specially charged with the location and work of construction of the road; and, in the absence of the President and Superintendent, he shall have the general supervision of the affairs, officers, agents and employes of the company. He shall have charge, under direction of the President, of laying out town sites, purchasing and selling land and town lots, and of purchasing all supplies for construction.

Sec. 2. He shall approve all vouchers for payments of expense of construction, and all expenses in purchasing and selling land.

The Superintendent.

Sec. 1. Shall have charge of running and operating the road, and of all employes engaged thereon, and shall perform such other duties as may be required of him by

the President or board of directors. He shall report from time to time to the board the expediency of any measures, change, alterations or improvements proposed to be adopted or made in the running or operating of said road, and shall make monthly reports of his transactions to the board.

ART. FOUR.

Sec. 1. All other officers and employes of the company shall perform such duties as may be devolved upon them, and shall have such power as may be specially given them by the President or the board of directors.

Sec. 2. The authority here given to the executive officers shall in no case be delegated by them to another, without special authority to do so given by the board of directors.

Sec. 3. The President may be removed at any time by the board, on a vote of a majority of all the directors.

Sec. 4. All officers and agents not elected by the board or appointed by the executive committee may be removed by the President subject to being reinstated by the board.

ART. FIVE.

Issue and Transfer of Stock.

Sec. 1. All certificates of stock or shares shall be signed by the President and the Secretary, and countersigned by the Registrar, and authenticated with the company seal. No sale or conveyance of any property of the company shall be made unless authorized by the board of directors.

Sec. 2. The certificates for shares of the capital stock shall be numbered in progression, beginning with No. 1, and shall be entered in a book called the register of stockholders, and re-entered therein from time to time as changes may occur in ownership or certificates issued with the name of the stockholders, their places of residence, and the number of shares to which each is entitled.

Sec. 3. Each stockholder shall be entitled to a certificate of stock for the shares owned by him, upon which all payments made by him shall be endorsed.

The form of such certificates shall be as follows:

(Here the form of such certificate is shown in the minutes.)

Sec. 4. The transfer of any share may be made an instrument in writing, signed by the owner or his attorney, which writing may be endorsed on the certificate, or made in a separate paper. The assignee must cause his transfer to be presented and delivered to the Secretary of the company before it will entitle him to be recognized as the owner, and, upon presentation of such transfer with the certificate of stock, the Secretary shall record the same in books to be kept for that purpose, called "A Register of Transfer," and the President shall issue new certificate or certificates to the assignee as he may be entitled, unless they have notice of a fraud or invalidity of such transfer.

Sec. 5. "The Register of Transfers" shall be closed three days before each annual or special meeting, and no assignee of shares shall be entitled to vote by virtue thereof at such meeting unless such assignment has been presented for record before the time specified in this article.

Sec. 6. In all cases of the issue of a duplicate or substitute certificate for a certificate alleged to be lost or destroyed, the duplicate shall be void should the original subsequently be presented.

Sec. 7. Of all issues of certificates, original or duplicate, and of assignments of stock, due entry shall be made in the register of stockholders by the Secretary.

ART. SIX.

None of the foregoing by-laws shall be repealed or altered unless at a regular annual meeting of the stockholders, or at a special meeting called for the purpose,

by due notice given to the stockholders of such called meeting setting forth its object.

The witness testified that the above were the by-laws of the Houston & Great Northern Railroad Co., in force during the months of March and April, 1872, and up to December 2nd, 1872. The above by-laws were introduced subject to the objection as to the portions thereof with reference to the executive Board, which objections were made before the introduction of the by-laws, relating exclusively to the portions set out above relative to the executive board.

The defendant objected that any portions relating to the executive board, and any powers conferred upon the executive board were inadmissible, because the executive board could not be substituted for the board of directors, and that any such attempt would be an infringment upon the power which the law placed in the board of directors, and also, in this connection, to the questions proposed to be asked the witness, and to be shown by the minutes as to what they showed in regard to executive officers, making the same objections as above, that no powers could be lodged in the executive officers in substitution for the powers placed by law in the board of directors, which objections being overruled by the court, the defendant then and there excepted to the ruling of the court, and took this its bill of exception No. 4; whereupon, over such objections, all of the by-laws, including that portion relating to the executive board, as appears above, were introduced and read to the jury, and also relating to the executive officers, and the witness, over the objections, reading from the minutes, stated that it appeared therefrom that the first executive officer named in the by-laws was the President, and that the Chief Engineer and General Agent was named as an executive officer, and in this connection plaintiff's counsel stated to the court that the principal purpose in introducing

these matters was to show the authority of Grow, who was President of the corporation, and that, if the executive committee or Grow did not have authority save on approval of their acts by the directors, yet the matter he was introducing would be admissible, to be considered by the jury, in connection with circumstantial evidence of such approval, to be later offered. The witness was next requested to turn to pages 152 and 156 of the minutes, and said that he found there the by-laws of the H. & G. N. R. R. Company, approved December 2, 1872, which were then offered in evidence by the plaintiffs, only upon the issue of authority for the performance of any acts which occurred subsequently to the date of the by-laws, and upon the issue of ratification of any acts that had occurred before that time. Whereupon, defendant objected to the introduction of the by-laws, (1), because the petition alleges a contract between Judge Reagan and Grow, and with Anderson County, anterior to these by-laws, and to have been made in May, 1872, the by-laws being of December, 1872, subsequent to the election and also to that portion relating to the executive board, for the reasons set forth in bill of exceptions No. 4, above, which objections being considered by the court, were overruled, and the defendant then excepted and took its bill of exceptions No. 5, and over the objections the by-laws were read in evidence, being the same as the by-laws of December 4, 1871, above, except in the following particulars:

BY-LAWS OF THE H. & G. N. R. Co., APPROVED DEC. 2, 1872.

(Art. One, Section 1, identical with Art. One, Sec. 1, of the other by-laws already copied.)

(Sec. 2 being the same down to "A secretary," and reading from there as follows: "an Auditor a Financial Agent, a Chief Engineer, a General Agent," and from this on, the same as the other.)

(Sec. 3 being identical with Sec. 3 already copied.)

(Sec. 4. The salaries of the foregoing officers shall be fixed by the board of directors or the executive committee, and all salaries shall be paid monthly.)

(Sec. 5 being same as Sec. 5 copied.)

Sec. 6. The board of directors shall have power, and are hereby authorized, by a vote of a majority of the directors, to mortgage the road and such property of the company as they shall deem proper, in order to procure money for constructing and equipping the road; provided, such mortgage or mortgages shall not at any time exceed $26,000 per mile of finished road.

ART. TWO.

(Sec. 1 being same as the other down to "Directors elected under the provision hereof shall hold office until," and then comes, "next annual meeting, and until their successors," etc., etc., the same as the other.)

(Sec. 2 the same as the other copied.)

(Sec. 3 being the same.)

Sec. 4. At all stockholders' meetings for the transaction of business, a majority of the stockholders shall be represented either in person or owner or by proxie. Each share of stock shall be entitled to one vote, which may be given by the owner of the share in person, or by his proxie.

(Sec. 5 being same as Sec. 4 copied.)

(Sec. 6 being same as Sec. 5 copied.)

(Sec. 7 being same as Sec. 6 copied.)

(Sec. 8 being same as Sec. 7 copied.)

(Sec. 9 being same as Sec. 8 copied.)

(Sec. 10 being same as Sec. 9 copied.)

(Sec. 11 being same as Sec. 10 copied.)

(No further sections of Art. Two in these by-laws.)

ART. THREE.

Executive Committee.

Sec. 1 being identical with Section 11 of Art. Two copied.

Sec. 2 being identical with Section 12 of Art. Two copied.

Sec. 3 being identical with Section 13 of Art. Two copied.

Sec. 4 being identical with Section 14 of Art. Two copied.

ART. FOUR.

Register of Stocks and Bonds.

Sec. 1 being same as Sec. 15 of Art. 2 copied.

Sec. 2 being same as Sec. 16 of Art. 2 copied.

ART. FIVE.

Executive Officers.

Sec. 1 being same as Sec. 1, Article Three, headed same as above.

Sec. 2 being same as Sec. 2 under above head.

Sec. 3 being same as Sec. 3 under above head.

Sec. 4 being same as Sec. 5 under the above head, there being no paragraph contained therein as Sec. 4 under the above head.

Sec. 5 being same as Sec. 6 under above head.

The Vice-President.

Being same as in the other one already copied.

The Secretary.

Sec. 1 being same with the other.

Sec. 2 the same.

Sec. 3 is the same except "he shall keep the books of the company" should be left out of this one.

Sec. 4 being the same.

Sec. 5. He shall have charge of all contracts, deeds of conveyance, leases, legal instruments and other similar documents, also of all reports and communications to the board of directors, and shall keep a record of the purchase, sale, lease and conveyance of all lands of the company.

The Treasurer.

The first two paragraphs being same, and the third being as follows:

"He shall deposit daily all moneys which he shall receive, to the credit of the company, in such bank or banks as may from time to time be designated by the board. He shall pay out money only upon vouchers after the same are audited and duly approved by the President, unless specially ordered by the board of directors or the executive committee, and his draft upon the Financial Agent at New York shall be countersigned by the President.

Sec. 2. He shall report daily in detail to the Auditor the amounts of receipts and disbursements.

Sec. 3. He shall render a report to the directors at each stated meeting of the board, and monthly to the executive committee of all moneys received and disbursed by him, and of the amount of money in his hands, and shall perform such other appropriate duties as may be required of him by the President or the board.

Financial Agent.

Sec. 1 and Sec. 2 being the same.

Chief Engineer.

Sec. 1 the same as above, except leave out "and General Agent" in the beginning, and at close leave out "purchasing and selling land and town lots," and then finish as the other one.

Sec. 2. He shall certify all vouchers for expenses of construction.

Sec. 3 the same.

General Agent.

The General Agent shall be charged specially with procuring the right-of-way, settling land damages, purchasing of land, and such other general business as shall be assigned him by the President or board of directors.

General Superintendent.

Sec. 1. The General Superintendent shall have charge of running and operating the road, and of all employes engaged thereon, and shall perform such other duties as may be required of him by the President of board of directors.

Sec. 2. He shall, before they are audited, certify to all vouchers for the expenses of operating the road.

Sec. 3. He shall report from time to time to the board the expediency of any measures, change, alterations or improvement proposed to be adopted or made in the running or operating of said road, and shall make monthly reports of his transactions to the board.

Auditor.

Sec. 1. The Auditor shall have charge of the books and accounts of the company, and all papers relating thereto, keeping such records as will enable the condition of the account to be ascertained at all times.

Sec. 2. He shall examine, audit and register all vouchers before they are sent to the Treasurer for payment.

Sec. 3. He shall perform such other duties as may be required of him by the President or the board of directors.

ART. SIX.

Sec. 1 being same as Sec. 1 under Art. Four, above.

Secs. 2 and 3 being same as under Article Four.

Sec. 4 being the same as Section 4 under Article Four.

ART. SEVEN.

Issue and Transfer of Stock.

Unchanged.

ART. EIGHT.

Sec. 1 the same which is under Art. Six of the other.

The witness Howard testified that an inspection of the minutes of the meeting of the board of directors of the H. & G. N. R. R. Co. held on December 4, 1871, showed that Galusha A. Grow was elected President, and Charles

E. Noble, Chief Engineer and General Agent of that Company, and he read from the minutes the following resolution:

"On motion, resolved that the President is hereby authorized to act as General Superintendent, until such time as he may desire one, and is hereby authorized to secure one at any time." Adopted Dec. 4, 1871.

The witness next turned to page 90 of the minutes of a meeting of the directors of the H. & G. N. R. R. Co., and found there a resolution of the date 14th of February, 1872, as follows:

"On motion, it was resolved that the President be instructed to proceed with the work of extending the road, providing counties make satisfactory subscriptions."

The witness also read from page 21, the minutes, stating that on Feby. 13, 1872, the report of the consultation by Grow and Dodge on the question of consolidation with the International Railroad Company was submitted, and it was resolved that the agreement for consolidation be adopted, and when adopted by the International Railroad Company that the officers execute the same.

Turning to page 109, the witness found there a minute of a meeting of the board of directors of the H. & G. N. Railroad Co., held March 27th, 1872, showing the articles of agreement for the consolidation of the International and the Houston & Great Northern Railroad, bearing date 19th of February, 1872. It was agreed that the stockholders jointly, of both roads, ratified this agreement on the 23rd of September, 1873, and the articles of agreement were then introduced in evidence, as follows:

ARTICLES OF AGREEMENT.

Between the International Railroad Co. and the H. & G. N. Railroad Co., made this the 19th day of February, 1872, subject to the adoption or rejection of their stockholders, by vote of three-fourths of the shares of the stock of each company.

Art. 1. The companies aforesaid hereby agree to unite,

merge, and consolidate their several properties and franchises, although authority to consolidate is granted by the charter of the International Railroad Company, it is considered expedient that such authority should be enlarged, and expressed more definitely and in detail, which should properly be done by further legislative enactment.

Art. 2. It is therefore mutually agreed that until such legislation can be obtained, or the impossibility of obtaining such legislation be ascertained, the formal and legal embodiment of this consolidation shall be postponed, but in the meantime the interest of the two companies shall be considered as one interest, and managed in view of such consolidation.

Art. 3. From the date of this instrument, the administration of the two companies shall be run and conducted in the following manner, viz.:

1st. Each board shall retain its own existence and its own officers, and its minutes, to record the proceedings which concern the interest of its own company.

2nd. The direction of the business of the two companies shall be in the hands of a joint board, which shall consist of all the members of each board.

3rd. All resolutions concerning the interests of the two companies shall be submitted to and be passed upon by the joint board.

4th. If a quorum of both boards is present, and the joint meeting has been called in such a manner as to answer the requirements of the by-laws of each company, a Secretary of each company will select from the proceedings of the joint board those resolutions which concern his company, and engross them as the minutes of his own board. In the absence of a quorum of either board at any meeting of the joint board, it will be necessary, and it is agreed that such board shall afterward, as soon as practicable, hold a meeting, and pass the resolutions adopted at the meeting of the joint board.

5th. At the first meeting of the joint board there shall be elected by a ballot a member who shall act as President of the joint board, and there shall be appointed a proper person to act as Secretary. The duty of the President of the joint board shall be simply to preside at and to call the meetings of the joint board. He shall at any time, upon the request of the President of either board, summons the joint board. The duty of the Secretary shall be to keep the minutes of the two boards and generally to perform the services of Secretary of the joint board.

Art. 4. Until such time as the further legislation desired shall be obtained, the affairs of the company shall be managed and controlled in the manner above indicated, unless it shall be deemed advisable and proper to effect permanently the consolidation upon the authority already existing and contained in the charter of the International Railroad Company, in which case formal articles of consolidation upon the basis of this agreement shall be prepared and put on record in the proper places.

Art. 5. The basis of the consolidation is hereby stated and agreed to be on the following terms:

The existing stock of each company now issued is to be called in and cancelled, and stock of the joint or consolidated company is to be issued to the amount of five million dollars ($5,000,000.00), which shall represent the property of every description belonging to the joint companies.

The said five millions of consolidated stock shall be divided between the two companies in the following proportions, to wit:

23,430 shares of $100.00 each to the Int. R. Company; 26,570 shares to the H. & G. N. R. Co., to be divided between their respective stockholders, according to their respective interest.

Art. 6. This agreement is made upon the assumption

that the claim of the H. & G. N. R. Company for a land grant of 16 sections per mile from the State is perfected, and the land secured, and that the subsidy of $10,000.00 per mile in Texas State bonds granted to the Int. R. Co. is also sure and certain, and that said subsidy and land grant are taken as an offset to each other in the establishing the basis of consolidation.

In case, however, that the H. & G. N. R. Co. shall fail to secure its grant of land, then the stockholders of the Int. R. Co. of record on the date of this agreement shall be entitled to receive the subsidy to the extent of the amount due on 100 miles of road.

And in case the H. & G. N. R. Co. shall obtain its lands and the Int. R. Co. shall fail to secure its bonds, then the stockholders of record of the H. & G. N. R. Co. at the date of this agreement shall in like manner be entitled to receive the said lands for 100 miles of road.

Art. 7. From and after this date, the earnings of the two companies shall be considered as belonging to the joint company, and the expenses incurred shall be joint expenses, but the accounts and the management of funds shall, as heretofore, be directed by the officers of the respective companies, until the permanent consolidation is effected.

In witness whereof, the Int. R. Co. and the H. & G. N. R. Co. have caused these presents to be signed by their respective Presidents, and their respective seals affixed, and approved the day and year first above written.

J. Sanford Barnes,
President H. & G. & R. Co.
Galusha A. Grow,
President H. & G. N. R. Co.

Plaintiffs read from page 167 of the directors' minutes that on Dec. 13, 1872, G. A. Grow was elected President, C. E. Noble, Chief Engineer, and H. M. Hoxie, General Superintendent of the H. & G. N. R. R. Co.

The plaintiffs next offered in evidence the minutes of

the H. & G. N. R. R. Co. on pages 169 and 170, directing Wetmore to pay certain drafts in favor of Grow, President, and as is set out below, and this offer being made by the plaintiffs, the defendant objected thereto, (1) that the matter offered was immaterial and irrelevant, it being an irrelevancy what expense Grow had been to in procuring donations of county bonds and lands to International and H. & G. N. Railroads, and could have no bearing upon the issues involved. (2) That it was out of due order to introduce such matter now, but that it was upon the plaintiffs, if such matter was admissible, at any time, which is not admitted, to offer first, the contract with Anderson County in regard to the bond issue, all of which was in writing. (3) Defendant's counsel requested plaintiff's counsel to hand to him the proceedings of the County Court of Anderson County in 1872, with reference to the election and the bond issue, including Shattuck's protest, and the whole matter, which, being handed to defendant's counsel he exhibited the same to the court, it being the documents all hereinafter set out and introduced in evidence by the plaintiffs, and objected to the offered minutes further; (4) that the law required all contracts with reference to issue of bonds by the county, in promotion of the railroad, to be in writing, and that no independent considerations or collateral matters not so in writing are admissible in evidence. (5) That the contract appears to have been formed by the county, as shown by the writings in 1872, that over forty years have elapsed since that time, and it is now being attempted to prove by parol, modification of the conditions or collateral contracts alleged to have been made in consideration of and in connection with this original contract and not in writing, which collateral matters and parol modifications and conditions are inadmissible after this lapse, to add to or detract from the contract, which is in writing. (6) That the matter now offered in evidence is offered with a view of contradicting, and if it

has any relevancy, is in direct conflict to the written documents, giving the history of the election exhibited to the court by the defendant's counsel, and which plaintiffs have possession of, and which they say they will offer in evidence, and which are complete within themselves, and consist of a written record not subject to modification, or conditions or variations by parol. (7) That the record of the election and the proceedings therein, and the bond issue made by the County of Anderson, and now exhibited to the court, is the proper adjudication and determination of the considerations on which the bonds were issued and shows the matter to be *res adjudicata,* and cannot be detracted from or added to, in order to show that there was an inducement or preliminary contract in connection with such matter. (8) That if the plaintiffs had any rights, such as they are attempting to show by parol, they were personal rights, exclusively against the H. & G. N. R. R. Co., consolidated with the I. & G. N. R. R. Company, and now sold out, as appears from the evidence already introduced, and sold out under a mortgage made in 1881, as already appears; and it further appearing that the plaintiffs are claiming under the act of 1889, and that by such subsequent act a burden was fixed upon the properties or property now held by the defendant, the plaintiffs are attempting to violate the obligation of their alleged contracts by adding thereto, and claiming a security under the act of 1889, and to violate the obligation of the mortgage of 1881, and the rights of the defendant as a purchaser under the foreclosure thereof by modifying their alleged contracts of 1872 and 1875, and adding a security thereto, as contended by them, under the act of 1889, all in violation of the obligation of such alleged contracts, and of the Fourteenth Amendment to the Constitution of the United States, and of Sub-section One of Section X of Article I of the Constitution of the United States of America, and also in violation of the Constitution of the State of Texas, where-

by the act of 1889, or the application made of it to the facts of this case, would be unconstitutional and void in such attempt to secure an admittedly purely personal contract in 1889, as against the property, or any of the properties, now held by the defendant. (9) Further, the defendant objects that the proposed minutes offered were of the executive committee, and that if these matters had any relevancy, they were conclusively within the power of the board of directors, and not of the executive committee, and that the executive committee had no power under the law or the charter to pass any such resolutions, and all of these objections were applied to the resolutions on pages 169-170 herein duly set out. And these objections being considered by the court, were all by the court overruled; whereupon, defendant, in open court, excepted, and took this its bill of exceptions No. 6, and over the defendant's objection, there was then read in evidence from the minutes of the executive committee of the H. & G. N. Railroad Co., pages 169-170, the following resolution, adopted February 4th, 1873, to wit:

"On motion, resolved that Jacob S. Wetmore, Financial Agent, is hereby authorized and directed to pay draft of Galusha A. Grow, President Houston & Great Northern and International & Great Northern Railroad Companies, to an amount not to exceed $25,000.00, which amount shall be credited to said Grow for extra services and expenses in procuring private donations of land and county bonds to the International and the Houston & Great Northern Railroad Companies,"

and also from page 170, a resolution adopted Jany. 11, 1873, as follows:

"On motion, resolved that the President, Galusha A. Grow, is hereby authorized to receive from the County of Anderson, or any other county having donated bonds to this company, the bonds donated in aid of the building of the road, and to receipt for the same."

From the minutes of the Houston & Great Northern Railroad Company was read an excerpt from the Treasurer's account, being of a joint meeting of the stockholders held at Houston, Texas, December 22nd, 1873, which showed that the company at that time had on hand $100,000.00 of Anderson County bonds, valued at $75,000. This appeared on page 214 of the minutes.

There was introduced from page 247 a record of the by-laws adopted by the I. & G. N. R. R. Co. by its stockholders at meetings held September 24th and 27th, 1873, which witness testified were the by-laws in force up to June, 1875, and thereafter. These by-laws and those of the H. & G. N. R. R. Co. already in evidence were offered as all the by-laws of the H. & G. N. and I. & G. N. Companies, shown by the minutes in the custody of witness. To the introduction of a portion of said by-laws referring to the executive committee, the defendant objected that no powers therein attempted to be vested with the executive committee were powers so legally vested, but were vested by law and under the charters of the companies in the board of directors, and could not legally be exercised by the executive committee, therefore, that such portions of the by-laws as relate to the executive committee were inadmissible; which objections were overruled by the court, and the defendant then excepted and took its bill of exceptions No. 7, and over the defendant's objection th by-laws were read in evidence to the jury, being the same as the by-laws of the H. & G. N. R. Co. set out above, with the following exceptions:

Of the by-laws adopted by joint companies on Sept. 24 and 27, 1873:

Sec. 6, Art. One. "The board of directors shall have power, and hereby authorized by a vote of the majority of directors, to mortgage the road and such property of the company as they shall deem proper in order to procure money for constructing and equipping the road."

Sec. 2 of Art. One. "At the first meeting of the board

of directors after such election, they shall elect from their own number a President and Vice-President for the ensuing year, and shall appoint a Treasurer, a Secretary and Auditor, a Financial Agent and Chief Engineer, a General Agent, a Register of Transfer of Stocks and Bonds, a General Superintendent, and such other officers and agents as they may deem necessary for the transaction of the business of the company."

Sec. 11, Art. Two. "The business of the company during the intervals of the meetings of the board of directors shall be transacted by the executive officers, but all contracts not of immediate necessity for the proper management of the business of the company, and not otherwise provided for, to be subject to the approval of the board or executive committee."

Sec. 1, Art. Three, page 254. "The President shall be the chief executive officer of the company, and shall have power to call special meetings of the board of directors at such time and places as may be designated by him; and it shall be his duty to call such meetings on the written request of any two members of the board, and he shall preside at all meetings of the directors when present thereat, sign all certificates of stock and all deeds and contracts requiring the seal of the company, unless otherwise ordered by the board, and shall have the general management and supervision of the affairs of the company. He shall see that the by-laws, rules and regulations of the board are faithfully executed, and guard against all violations of the laws of the State of Texas."

Sec. 4, Art. Three. "He shall have the power to negotiate contracts during the intervals of the meetings of the board, subject to the approval of the board at its next meeting, save and except in cases specially provided for; and he shall perform such duties not otherwise provided for, as are usually devolved upon the President of incorporated companies."

Under head "General Superintendent":

Sec. 1, Art. Three. "The General Superintendent shall have charge of running and operating the road, and of all employes engaged thereon, and shall perform such other duties as may be required of him by the President or the board of directors."

Section 3 under head "General Superintendent":

"He shall report from time to time to the board the expediency of any measures, change, alterations or improvement proposed to be adopted or made in the running or operating of said road, and shall make monthly reports of his transactions to the board."

The Auditor is named as one of the executive officers, and his duties are defined:

Sec. 1, Art. Six. "All other officers and employes of the company shall perform such duties as may be devolved upon them, and shall have such powers as may be specially given them by the President or the board of directors."

The witness Howard next testified that he did not know whether the reports of the General Superintendent had been preserved, that there were no such documents in his possession; that the minutes of the board of directors of the I. & G. N. R. R. Company showed that R. S. Hays was Chief Engineer on July 30th, 1872, and had been Chief Engineer from May, 1872, and furthermore, that on November 26, 1872, the minutes showed that Galusha A. Grow was elected a director of the International Railroad Company, and was elected President of the International Railroad Co. on November 26, 1872, all of which is shown by the minutes of the joint board of directors; Barnes resigning his presidency of the International Railroad, to take effect December 1st.

The plaintiffs next offered in evidence a minute of the I. & G. N. R. R. Co. allowing Grow further and additional allowances for his extra services, to which the defendant interposed the same objections as contained in bill No.

6 above, and also that the transaction was shown by the minutes as in 1874, an action of the joint board of the two roads, and was not relevant, and was subsequent to the contract alleged to have been made by Grow, which objection being overruled, the defendant excepted, and took its bill of exceptions No. 8; and over its exceptions there was read in evidence from the minutes of the joint board of directors, of date of July 21, 1874, the following:

"On motion, resolved that the President be granted $5,000.00 in addition to the amounts authorized by resolutions of the 4th of February and 3rd of December, 1873, and 7th of April, 1874, which amount is in full payment for extra services and expenses as provided in the original resolution of the 4th of February, 1873."

The witness next read from the minutes of the Board of directors of the I. & G. N. R. R. Co. of date July 21st, 1874:

"On motion, resolved that the General Manager be authorized to perform the duties of the President in Texas in his absence."

At this meeting on July 21, 1874, R. S. Hays was elected General Manager and Chief Engineer, and H. M. Hoxie was elected General Superintendent of the I. & G. N. R. R. Co.

It was also shown from the minutes that on the 17th of September, 1874, Grow resigned as President, and that on April 5, 1875, Samuel Sloan was elected President, and R. S. Hays, Vice-President of the I. & G. N. R. R. Co.

Also from the minutes of the board of directors of the I. & G. N. R. R. Co., of April 5, 1875, page 102, was read:

"On motion, it was resolved that the general offices of this company be moved to Palestine, in Anderson County, Texas, as soon as practicable, and that it be the duty of the Secretary to give timely notice of such removal in the Houston Daily Telegram and the Galveston Daily News."

This meeting of the board was held at Houston, Texas, as shown by the minutes.

Next there was read to the jury a list of stockholders of the I. & G. N. R. R. Co., appearing on the pages of the minutes 31 to 34, 55 and 56, 81 and 82 and 85, dated April 7, 1879, November 1st, 1879, November 17th, 1879, respectively, from which it appeared that the stockholders in said company were the same on each of the dates mentioned, save for the stock transfers noted in paragraph 28 below.

Witness Howard testified that all of the annual meetings of the stockholders and directors of the I. & G. N. R. R. Co. were held from 1881 to 1888, as shown by the minutes, at Palestine. There was a meeting there of the stockholders on April 2, 1888, but on account of injunction, there were no meetings between April 2, 1888, and April 3, 1893; being an injunction obtained by the State on the M. K. & T. leasing the I. & G. N., preventing both roads from holding meetings. The witness' answer had been given with reference to annual meetings, and all annual meetings (except during the period of the injunction), of the directors and stockholders had been held in Palestine up to 1911, as shown by the minutes of the I. & G. N. R. R. Co., which are now testified to and checked back to and including the year 1881, and in 1889 the minutes show that a meeting of the board of directors was held at the general offices in Palestine, and a notice is shown of such meeting being held "at the general offices of the company at Palestine," and this was shown to be the form of notice appearing on the minutes during the period of 1881 to 1889.

Plaintiffs offered in evidence, from page 103 of the minutes, a resolution adopted by the stockholders of the I. & G. N. R. R. Co. on June 1, 1881, ratifying the action of the Company's board of directors, executive committee, President and Secretary, in leasing the I. & G. N. R. R. to the Missouri, Kansas & Texas R'y Co. for 99 years, and authorizing such officers to make and to carry out such lease.

735

Plaintiffs then tendered in evidence such lease, an abstract of which is as follows:

ABSTRACT OF LEASE, INTERNATIONAL & GREAT NORTHERN RAILROAD COMPANY TO MISSOURI, KANSAS & TEXAS RAILWAY COMPANY.

Dated June 1st, 1881.

This document recites that the two roads connect at Mineola in Wood County, Texas; and that they desire to make a lease and contract with respect to the use, management and working of the railroads of the International & Great Northern Railroad Company.

The I. & G. N. R. R. Co. leases and demises to the Missouri, Kansas & Texas Railway Company (hereinafter designated as the M. K. & T.), its railroads from Longview to Houston, 232 miles, more or less; from Palestine to San Antonio, 262 miles, more or less; from Mineola to Troup, on its line, between Palestine and Longview, 44 miles, more or less; from Overton, on its line between Palestine and Longview, to Henderson, 16 miles, more or less; from Phelps, on its line between Houston and Palestine, to Huntsville, 8 miles, more or less; from Roundrock, on its line between Palestine and San Antonio, to Georgetown, 10 miles, more or less; from Houston to Columbia, 50 miles, more or less; or 622 miles, more or less; together with all sidings and branch lines, "depots, stations, buildings, equipment, machine and other shops, tools and appurtenances and property, real and personal," owned or to be acquired by the I. & G. N. R. R., with the exception only of lands and land grants and all property not needed in connection with or necessary to the use and operation of the properties demised.

The term of the lease is made 99 years from June 1, 1881. A stipulation is made that the M. K. & T. should have full and exclusive power to use, manage and work the railroad, and fix the tolls, not to be higher than authorized by the charter of the I. & G. N. R. R., and also

to collect all the tolls and freight charges, and exercise and enjoy all the rights and powers that could be lawfully exercised by the demised railroad as fully as it could exercise the same, but the lessee was prohibited from making any mortgage which could affect the rental to be paid.

The consideration for this lease was:

(1) The lessee and its assigns agreed to work the railroad, provide rolling stock which it should consider necessary, and collect all tolls.

(2) The lessee to bear the cost of repairs and maintenance and all operating expenses whatsoever, and of new equipment which it might consider necessary to put in, and also taxes, and the expenses of maintaining the organization of the I. & G. N. R. R. Co., including the expense of maintaining general offices of the I. & G. N. in the City of New York, and the expenses of a transfer agency, registrar of its stocks and bonds, and for paying interest on its mortgage debts.

(3) The lessee to pay income to interest upon mortgage bonds of the I. & G. N. R. R., and any surplus as might be directed by the directors of the I. & G. N. R. R.

(4) It was stipulated that if the net or surplus revenue should not be sufficient to cover fixed charges on the I. & G. N. properties, the lessee could, at its option, advance the same, and such advances should be a preferred debt, next to the lessor's first and second mortgages, and to be secured by a lien; but the lessee not obligated to make such advances, and if it did not make them, and the interest remained unpaid for six months, then the I. & G. N. would have the right to cancel the lease.

(5) The extension being made by the I. & G. N. from San Antonio to Laredo, Texas, and all other extensions or acquisitions whenever completed or acquired, included in the lease.

(6) The M. K. & T. to keep all buildings insured and in good order.

(7) The M. K. & T. obligated to keep accurate accounts of all revenues and expenditures, and to submit them to the I. & G. N., and its President and Vice-President, who, with a committee of its board of directors, appointed agents of the I. & G. N., given the right at all times to travel free over the demised railroad for the purpose of inspection.

(8) In case an agreement should be perfected for the management and common operation of both roads or either of them, with other Southwestern roads, under one organization or company, then, at the election of the lessee, this lease to end.

(9) In case of differences, provisions for arbitration.

This lease was terminated in 1888.

Plaintiffs offered in evidence from the minutes the following agreement, of date Nov. 26, 1881, to wit:

Memorandum of Agreement made this twenty-sixth day of November, A. D. 1881, in the City of New York, between Collis P. Huntington, of the City of New York, for and on behalf of himself and associates, and for and on behalf respectively of the Southern Pacific Railroad Company of California, the Southern Pacific Railroad Company of Arizona, and the Southern Pacific Railroad Company of New Mexico, the Galveston, Harrisburg and San Antonio Railway Company, the Texas & New Orleans Railroad Company of Texas, and the Louisiana Western Railroad Company of Louisiana, and extensions thereof owned or controlled, or hereafter to be owned or controlled by the said Huntington, or the said Railroad Companies above named, or any of them, of the first part; and Jay Gould, of the City of New York, for himself and on behalf of his associates, and for and on behalf respectively of the Texas and Pacific Railway Company, the International and Great Northern Railroad Company, and the Galveston, Houston and Henderson Railroad

Company of Texas; and for and on behalf of the Missouri Pacific Railway Company, the Missouri, Kansas and Texas Railway Company and the St. Louis, Iron Mountain and Southern Railway Company.

Witnesseth: *That Whereas,* The said Huntington and his associates own and control a majority interest in the said companies for whose behalf he acts as aforesaid;

And Whereas, the said Gould and his associates own and control a majority interest in the companies for whose behalf he acts as aforesaid;

And Whereas, divers differences have arisen and exist between the three Southern Pacific Railroad Companies above named, and the said Galveston, Harrisburg and San Antonio Railway Company, on the one hand, and the Texas and Pacific Railway Company on the other;

And Whereas, in respect to some of the said differences various suits are pending in the courts of Arizona, New Mexico and Texas, threatening long-continued, troublesome and expensive litigation;

And Whereas, the continuance of such litigation is injurious to all of said companies, and incidentally to the public interest, so far as business of said lines is concerned;

And Whereas, said differences and litigation have been found, upon conference and deliberation, to be susceptible of amicable adjustment, as in this contract provided;

And Whereas, the Missouri Pacific Railway Company, the Missouri Kansas and Texas Railway Company, and the St. Louis, Iron Mountain and Southern Railway Company own and control lines of railroad connecting with the road of the Texas and Pacific Railway Company, and are interested in the subject-matter of this agreement, except as so far as pertains to the direct controversies in the pending suits between the said Southern Pacific Railroad Companies and the Galveston, Harrisburg and San Antonio Railway Company, on the one side,

and the Texas and Pacific Railway Company on the other.

Now, Therefore, the parties hereto, with a view permanently to settle all controversies between said companies of the first part, or any one or more of them, and the companies of the second part, or any one or more of them, and to prevent future controversies, and in consideration of the premises and of the mutual covenants hereinafter contained, the parties hereto do covenant, promise and agree, each with the other, as follows:

(1.) Mutual Agreement to Join Tracks East of El Paso.

It is mutually agreed, by and between the parties hereto that the Texas and Pacific Railway Company shall continue the construction of its road now being built in Texas, westward, until its continuous track shall approach the track of the Galveston, Harrisburg and San Antonio Railway Company, which is now building eastwardly from El Paso, along the valley of the Rio Grande, until the two shall meet and be connected, so as to form one through line to the Pacific Ocean; the point of junction to be agreed upon between the respective Chief Engineers, who shall select a suitable place for such junction, as nearly as practicable intermediate between the ends of the tracks of the said roads as now laid as aforesaid. This point of junction is hereafter referred to in this instrument as the "Junction."

(2.) Relinquishment of Texas and Pacific Claims in Territories.

The Texas and Pacific Railway Company shall release, relinquish and convey, in such form as counsel for both parties may agree and advise, all of its right, title, interest and estate in and to the railway constructed by the said Southern Pacific Railroad Companies of Arizona and New Mexico, and which railways in suits now pending are claimed by the said Texas and Pacific Railway Company to be constructed upon its right-of-way and to be its

property; which claims are denied by the said Southern Pacific Railroad Companies.

(3.) Transfer of Land Grant West of El Paso to Southern Pacific Companies.

The party of the second part further covenants, promises and agrees that the Texas and Pacific Railway Company, being entitled under the 9th Section of the Act of Congress of March 3d, 1881, whereby it was incorporated, to a land grant from the United States, as shown by the said Act (which land grant was made to the said Texas and Pacific Railway Company, its successors and assigns), shall execute a deed whereby it shall in terms assign, transfer and make over the said land grant in such form as counsel for both parties may advise, to the said Southern Pacific Railroad Companies, respectively, and shall allow its corporate name to be used; or, at the request and expense of said assignees, shall take such steps as the said assignees may require, in order to make the said land grant available to the said assignees; and, if the said assignees shall desire to procure any Congressional ratification of such transfer, the Texas and Pacific Railway Company and the said second parties shall not hinder nor embarrass such action, but shall promote the same in any reasonable way in its or their power.

(4.) Texas Pacific to Cede Franchises West of El Paso.

The party of the second part further agrees that the Texas and Pacific Railway Company shall execute an instrument whereby it undertakes to cede and make over all its corporate rights and franchises west of El Paso to the said Southern Pacific Railroad Company, respectively, their successors and assigns, as the case may be. Any Congressional ratification thereof shall contain a provision that they are acquired by the said Southern Pacific Railroad Companies, or said assigns, subject to the right of the Texas and Pacific Railway Company, and

a reciprocal right on the part of the said Southern Pacific Railroad Companies to have the entire roads of each and all of said companies operated and used for all purposes of communication, travel and transportation, so far as the public and Government are concerned, as one continuous line. And the said Texas and Pacific Railway Company shall convey to the Southern Pacific Railroad Company of California, or to such company as may be designated by the party of the first part, all of its right, title, and interest to any and all property, rights and franchises in the State of California, and in and near the City of San Diego.

(5.) Undertakings of Party of the First Part.

In consideration of the foregoing agreements, and especially the agreement of the Texas and Pacific Railway Company relinquishing, releasing and conveying its right, claim, title, interest and estate in and to the road and way and right-of-way on which the railroad is constructed in New Mexico and Arizona, the said Huntington, for himself and for the said railroad companies on whose behalf he acts, covenants, promises and agrees to and with said Gould, and with each of the Companies on whose behalf he acts, as follows:

Roads to be Operated as One Through Line, and Earnings Divided.

1st. That he will, on his part, procure, or cause to be procured, an agreement that the road of the Texas and Pacific Railway Company and the road of the Southern Pacific Railroad Companies, shall be operated as aforesaid as one through continuous line; and that the gross earnings from all through business passing over one of said company's lines to the other shall be divided between them in proportion to the distance hauled by each, with equitable and reasonable allowances to each for terminal expenses, not to exceed the current charges on similar business handled by the Union and Central Pacific line;

and no terminal charges elsewhere by either of the parties shall exceed those at San Francisco.

RATES AND JOINT AGENTS.

2nd. That the said companies of the party of the second part, and each of them, may establish offices and agencies at San Francisco, Los Angeles, San Diego, and all other ports and places on the Pacific Coast, and competing points on the Pacific Slope reached by the Southern Pacific Railroads and their connections, and contract for through business of all kinds, including freight and passengers, via the lines of the said railroads of the party of the first part; and the said companies constituting the parties of the first part shall carry all through business on as favorable terms as they carry for the Galveston, Harrisburg and San Antonio Railway Company, the Atchison, Topeka and Santa Fe Railroad Company, the Union Pacific Railway Company, the Atlantic and Pacific Railroad Company, or any other connecting companies; not to exceed the pro rata per mile of the through rate, with allowance for terminal expenses as aforesaid, and that all through rates via this line between all points on the Pacific Coast and competitive points on the Pacific Slope and East shall be at all times as low as by any other route; and if any dispute arises between the parties as to whether the through rate is as low as by any other route, the agents of the parties of the second part shall have the right to make the through rate on west-bound business until such dispute shall be adjusted by arbitration as herein provided. A reciprocal right in respect of east-bound business is in all respects to be accorded to the parties of the first part. To save expense and to prevent disagreement, it is agreed that at the principal competing points in the East and West the soliciting agents shall be joint agents, and be jointly appointed.

(6.) MUTUAL AGREEMENT TO "POOL" NEW ORLEANS AND GALVESTON TRAFFIC, AND NOT DISCRIMINATE AGAINST MISSISSIPPI TERMINI.

It is further mutually agreed that all unconsigned business, meaning all business whereof the route has not been designated in advance, destined for points West of El Paso, received by the said Texas and Pacific Railway Company, shall be turned over to the Galveston, Harrisburg and San Antonio Railway Company at the Junction, or to the Southern Pacific Railroad Company at El Paso, as the case may be; and all such "unconsigned" business received by the Southern Pacific Companies and destined to places east of the "Junction" reached by the Texas and Pacific Railway and its connections north of Shreveport, La., and west of the Mississippi River, shall be delivered to the Texas and Pacific Railway Company at the "Junction," or at El Paso, as the case may be. The gross earnings on all business passing over either of these roads between El Paso, or the Junction, and New Orleans, shall be divided equally; and the gross earnings on all business passing over either of these roads between El Paso or the Junction and Galveston, shall be divided on the basis of two-thirds thereof to the Galveston, Harrisburg and San Antonio Railway Company and its connections, and one-third thereof to the Texas and Pacific Railway Company and its connections: and the Agents are to divide, as nearly as possible, such business between the two through lines, so that each shall do the proportion of business above allotted.

In the event that either of the said companies of the one party, at either of the termini herein mentioned, shall be unable or shall neglect, or refuse, for any cause, to take the business and to perform the said service in the proportion above named, the company or companies of the other party shall be at liberty, so long as such disability continues, to take such business and perform said service, and shall be entitled to receive the compensation therefor.

The Texas and Pacific Railway Company, the Missouri Pacific Railway Company, the Missouri, Kansas and Texas Railway Company, the St. Louis, Iron Mountain and Southern Railway Company, the international and Great Northern Railroad Company, and the Galveston, Houston and Henderson Railroad Company shall severally take the through business any of them may have to do under this agreement, between El Paso and any point on the Mississippi River, without any discrimination as to rate, or otherwise, in favor of any line, road, or Transportation Company, and with equal dispatch; and this provision applies to business destined to or coming from any railroad east of the Mississippi River.

There shall be no discrimination as to local business by any of the roads of either of the parties as against those of the other party; it being understood that the term "through business," as used in this agreement, applies to traffic carried to and from terminal, common or competitive points; and any point upon the lines of the railways of the parties hereto that may be reached directly by any railroad competitive to either of said roads, is understood to be a competitive point.

(7.) Louisiana Western to Use Texas Pacific Track into New Orleans.

The party of the second part further covenants and agrees that the Texas and Pacific Railway Company shall, at the request of the said Huntington, in the event that it shall become desirable in his judgment, to connect the present eastern terminus of the Louisiana Western Railroad at Vermillionville, by a line of railroad therefrom to the Mississippi River, so as to intersect and effect a junction with the road of the New Orleans Pacific Railway Company now consolidated with and forming part of the Texas and Pacific Railway Company), at or in the vicinity of Bayou Goula, take the business of such road and its connections between such point of intersec-

tion and New Orleans promptly, without undue preference or discrimination, as nearly as may be in the time and manner of its own traffic (details of which shall be settled by the respective superintendents or by arbitration, as herein provided for the settlement of disputes arising hereunder); or, at the option of said Huntington, the said Louisiana Western Railroad Company, or any extension thereof, shall have the right to a perpetual joint use, for the passage of its trains from the point of intersection to the terminus of the Texas and Pacific Railway opposite New Orleans, equally with the Texas and Pacific Railway Company, upon such regulations as shall be prescribed by their respective Superintendents, paying therefor six per cent. per annum, semi-annually, upon $10,000.00 per mile, and one-half of the cost of maintenance, renewals and taxes. In the event of such extension of said line of road to Bayou Goula, or any intersecting point with the Texas and Pacific Railway upon the Mississippi River, then Bayou Goula or such intersecting point shall be treated in reference to the division of business and earnings the same as New Orleans.

(8.) Mutual Agreement not to Duplicate Roads of Each Other.

It is further mutually covenanted and agreed by and between the parties hereto, that while the running and pooling arrangements and agreements herein are kept and observed by the parties of the first part, the parties of the second part shall not build nor promote, except through the Executive Committee, in the manner hereinafter provided, directly or indirectly, the building of any other parallel or through line from the junction, or any point west thereof, to the Pacific Ocean, or the tidal waters thereof, or any line duplicating in whole or in part, or the building of any line to connect with any other line so as to duplicate in whole or in part, the said line of roads of the said parties of the first part. And the parties of the first part shall not

build nor promote, except through the Executive Committee, in the manner hereinafter provided, directly or indirectly, the building of any road west of the Mississippi River, which shall be parallel to, or duplicate in whole or in part, the said lines or roads of the party of the second part, or the building of any line to connect with any other line so as to duplicate in whole or in part the said lines or roads of the said party of the second part.

(9.) Mutual Agreement Not to Purchase or Control Competing Roads Except Through An Executive Committee.

The parties hereto further agree, each with the other, that there shall be an Executive Committee, consisting of C. P. Huntington and Jay Gould and such third person as they may select, and in the event that either of the partties hereto subscribing, or their associates, shall be offered, within the period covered by this agreement, the one-half stock interest in the Atlantic and Pacific Railroad Company, held by the Atchison, Topeka and Santa Fe Railroad Company, or its equivalent in bonds, separately or in conjunction with securities of the said Atchison, Topeka and Santa Fe Railroad Company, or any securities, though less than one-half which may lead to the control of said companies, or either of them, such offer shall be submitted to the said Executive Committee, and no such purchase thereof shall be made, directly or indirectly, except with the sanction of said Committee.

In like manner, should the half-interest in said Atlantic and Pacific Railroad Company, held by the St. Louis and San Francisco Railroad Company, be offered, either separately or in conjunction with securities of said St. Louis and San Francisco Railroad Company or any securities though less than one-half, which shall lead to the control of said companies, or either of them, including the St.

Louis and San Francisco Railroad Company, such offer shall be referred to the said Executive Committee, and no such purchase shall be referred to the said Executive Committee, and no such purchase shall be made, directly or indirectly, except with the sanction of said Committee.

And in the event that either or both of said interests are acquired, or the control of said roads, or either of them, including the St. Louis and San Francisco Railroad, is achieved in any manner, such road shall be transferred to, and held and managed by, said Executive Committee, as may be determined for the interest and benefit of the parties hereto.

(10.) Road Between Junction and El Paso to be Jointly used by Galveston, Harrisburg & San Antonio Railway Company and by Texas and Pacific Company.

And the said Huntington further covenants, promises and agrees that the Galveston, Harrisburg and San Antonio Railway Company shall execute an agreement to conduct for and in consideration of a pro rata share, according to haul, of the charges as aforesaid, all of the business of the Texas and Pacific Railway Company between Junction and El Paso promptly, without undue preference or discrimination, as nearly as may be in the time and manner of its own traffic (the details to be settled by the respective Superintendents, or by arbitration, as herein provided); or, that, at the option of the Texas and Pacific Railway Company, it shall have the right to a perpetual joint use of the road and telegraph between Junction and El Paso, equally with the Galveston, Harrisburg and San Antonio Railway Company, upon such regulations as may be prescribed by their respective Superintendents, paying therefor six per cent. per annum, semi-annually, upon $10,000.00 per mile, and one-half of the cost of maintenance, renewals and taxes; and in the event of such election by the Texas and Pacific

Railway Company the interchange of business above provided for in this contract shall be made at El Paso.

(11.) Galveston, Houston and Henderson Railroad to be Used by Both Parties.

It is further agreed that the Galveston, Houston and Henderson Railroad Company shall conduct all the business of the Galveston, Harrisburg and San Antonio Railway Company and of the Texas and New Orleans Railroad Company between Houston and Galveston, promptly, without undue discrimination, as nearly as may be in the time and manner of its own traffic (the details to be settled by the respective Superintendents, or by arbitration, as herein provided for); or at their option, the Galveston, Harrisburg and San Antonio Railway Company, the Texas and New Orleans Railroad Company, or either of them, shall have the right to perpetual joint use of the said road between Houston and Galveston equally with Galveston, Houston and Henderson Railroad Company, or its successors, as the same may be reorganized, upon such regulations as may be prescribed by their respective Superintendents, paying therefor six per cent. per annum semi-annually upon $10,000.00 per mile, and one-half of the cost of maintenance, renewals and taxes, said payments to be made by one or the other of said companies as they agree.

(12.) Central Pacific to Pro-Rate Between Goshen and San Francisco.

The said Huntington undertakes and guarantees to procure the assent of the Central Pacific Railroad Company to comply with the provisions hereof, so far as its line between Goshen and San Francisco constitutes a link in the operation of the through line in this agreement provided for, until the Southern Pacific Railroad is completed by a continuous line of its own into San Francisco without the intervention of a ferry.

(13.) Same Telegraph Company to do Commercial Business over Entire Routes.

And the party of the first part further agrees that the existing contracts with the Western Union Telegraph Company shall be extended for the further period of ten years, by which all commercial business, so far as the same can legally be done, shall be secured to the said Telegraph Company; but the terms thereof shall not be less favorable to the railroads represented by the party of the first part than the existing contract between the Central Pacific, and other railroad companies, and the Western Union Telegraph Company. This, however, shall not be held to affect or disturb existing contracts east of San Antonio.

(14.) Texas Pacific to Dismiss Suits or Enter Decrees by Consent and Relinquish Claims to Southern Pacific Railroads.

Whereas, there is a suit pending in New Mexico between the Texas and Pacific Railway Company and the Southern Pacific Railroad Company of New Mexico, and also a suit pending in Arizona, between the Southern Pacific Railroad Company of Arizona and the Texas and Pacific Railway Company, in which suits the Texas and Pacific Railway Company claims the way and right-of-way on which the said Southern Pacific Railroad Companies have constructed a railroad through said territories, which claim is disputed and denied by said Southern Pacific Railroad Companies, and nothing in this agreement shall be construed as an admission of such right.

And Whereas, the Texas and Pacific Railway Company claims the title to said road, which claims are disputed and denied by the Southern Pacific Railroad Companies.

And Whereas, the Texas and Pacific Railway Company has, by this agreement, relinquished and released to the said Southern Pacific Railroad Companies all of its right,

title, interest and estate in and to the said way, right-of-way and railroad constructed by the Southern Pacific Railroad Companies in New Mexico and Arizona.

And Whereas, the Texas and Pacific Railway Company is entitled by its charter to make "running arrangements" with any other railroad company or companies.

And Whereas, the consideration to the said Texas and Pacific Railway Company for the said relinquishment and release is the agreement of the said Southern Pacific Railroad Companies, that the said road of the Texas and Pacific Railway Company, and the roads of the three Southern Pacific Railroad Companies and their connections, shall be operated forever as one continuous through line, as aforesaid, and that the gross earnings from all through business passing from one of said Company's lines to the other shall be divided between them in proportion to the distances hauled by each, with allowances for terminal expenses as aforesaid;

Now, therefore, It is agreed that decrees may be entered in said suits in New Mexico and Arizona whereby the right of the Texas and Pacific Railway Company and the three Southern Pacific Railroad Companies to have their respective roads operated and used for all purposes of communication, travel and transportation, so far as the public and Government are concerned, as one continuous line, and the gross earnings from all through business passing from one of said companies' lines to the lines of the others divided between them in proportion to the distance hauled by each, with allowances for terminal expenses as aforesaid, shall be reserved, conceded and established as a perpetual privilege and easement appertaining to the road of each of said Companies in and over the road or roads of the others.

(15.) Right to Maintain Actions—Mutual Covenant as to Arbitration in Case of Disputes.

It is understood that either or any of the said several

railroad companies, parties to this agreement, may maintain any action, either at law or in equity, against either, any or all of the other railroad companies parties to this agreement, to protect any right secured by this agreement, to specifically enforce the same, or to recover damages for the breach of any stipulation in this agreement affecting its interests, and that no objection shall be had or taken to any such action by reason of the non-joinder of parties as plaintiffs; and all clauses in this agreement contained are to be so construed as to secure this right.

It is further mutually agreed between the parties hereto that in case disagreements of any kind shall arise at any time between them or any two or more of the Companies in whose behalf they respectively act, as to any act, or omission to act, under this agreement, or as to the meaning of any clause or provision thereof, that, at the request of either of such parties, an arbitrator shall be appointed by each of the parties so disagreeing, and a third arbitrator shall be chosen by the two so appointed, and the decision of said arbitrators, or a majority of them, given after a hearing, of which both parties shall be duly notified and at which they shall have had an opportunity to be heard, shall be final and binding upon both parties as to the matter or matters in issue between them. And in case of such arbitration, each party to this agreement hereby covenants for himself and itself, its successors and assigns, with each of the other parties to this agreement, and its successors and assigns, that it will forthwith, upon the rendering of any decision as aforesaid, comply with and perform the requirements thereof, and further, will pay any sum or sums of money which it may be required to pay by such award. A failure to appoint arbitrators or to comply with their award or decision shall be a breach of this contract.

DISCONTINUANCE OF SUITS AND RELINQUISHMENT IN TEXAS.

All suits between the said companies parties to this agreement, or any of them, except those in which decrees are to be entered as aforesaid, are to be discontinued as soon as practicable after the execution hereof.

And the Texas and Pacific Railway Company shall execute a conveyance for the consideration sum of one dollar, to the Galveston, Harrisburg and San Antonio Railway Company, granting to it the necessary and conevant way and right-of-way and station grounds wherever the said railroad shall cross or be laid upon the lands of the Texas and Pacific Railway Company, whether granted by the State of Texas or otherwise; and shall renounce, release and relinquish all claim, title or interest in and to the said railroad claimed or included in any suit or suits pending in said State. A release is to be procured from G. M. Dodge of right-of-way over any lands standing in his name in Texas.

The agreements and each of them herein are of perpetual obligation.

EXCHANGE OF RATIFICATION BY COMPANIES.

The foregoing agreement shall be submitted by the respective parties thereto to the several Boards of Directors of the corporations which they respectively represent, and the same shall be accepted, adopted, ratified, confirmed, made and declared by said several Boards of Directors, to be the act and contract of their respective corporations, so far as the same severally affects them respectively; and thereupon each corporation shall deliver, each to each other corporation, certified copies of its proceedings in the premises, signed by the President and counter-signed by the Secretary thereof, and sealed with its corporate seal, within ninety days from the date hereof.

In testimony whereof the said parties have hereunto

153

set their hands, in the City of New York, in duplicate, on the day and year first above written.

C. P. HUNTINGTON,
JAY GOULD.

It is understood that when the said several companies shall have executed an exchange of ratification as aforesaid, the personal undertakings of Mr. Huntington and Mr. Gould shall cease.

C. P. HUNTINGTON,
JAY GOULD.

To the introduction of the above mentioned lease and resolution ratifying it, and of the above mentioned contract executed by Gould and Huntington the defendant objected that they were immaterial and irrelevant to any issue, to which objection plaintiff's counsel responded that he was making the offer of these matters for the purpose of meeting the defendant's plea of limitations, wherein it is set up that the general offices had been moved to St. Louis in 1881, and remained there until in 1888; whereupon the court overruled the objections and the defendant took its Bill of Exceptions No. 9, and over the objections the two documents last above set out were read in evidence.

The witness Howard then testified that W. R. Maxwell performed the duties of Assistant Secretary of the I. & G. N. R. R. Co., at Palestine, and he thought he resided in Palestine during the period of 1881-1888, and that he was the custodian of the Company's stock books at Palestine, and H. B. Kane was General Claim Agent of the I. & G. N. R. R. Co., with headquarters at Palestine during a portion of that period. The witness could not clearly state how long Mr. Kane was such Claim Agent at Palestine, he, the witness, being in St. Louis and working for the Missouri Pacific, Texas & Pacific, the I. & G. N., and other roads in consolidation, at that time, being paymaster for them. That he thought there was a record

in the minutes showing who was Assistant Secretary and General Claim Agent throughout that period, or on the payrolls or in the Treasurer's records. That Maxwell was shown by the minutes to have signed them as Assistant Secretary, in April, 1883, and also as late as 1887, and was then living at Palestine, and he lived and performed the duties of Assistant Secretary there until he died some time between 1887 and 1888, when Kane was elected Assistant Secretary, and as such signed the minutes in 1888, and so continued for several years.

The witness was next asked to show from the minutes who was General Manager of the I. & G. N. R. R. Co. during the Bonner-Eddy receivership, and up to the death of Eddy, and whether or not Eddy, while he was such General Manager, was authorized to and did sign a confession of judgment in favor of Gould for a large sum against the I. & G. N. Railroad, to all of which the defendant objected that it was immaterial and irrelevant, which objection being overruled by the court, and defendant excepted and took its Bill of Exception No. 10, and over the objection, the witness testified from the minutes that a resolution was passed appointing Eddy General Manager of the I. & G. N. R. R. Co., and that this resolution was during the receivership of that company, and, furthermore, that by that resolution he was authorized and directed to execute a power of attorney in the name of the company, and to confess judgment in the suit by Gould upon notes of the company, as provided in the resolutions of the Executive Committee. The receivership was begun in 1888, and the minutes show that on February, 1889, Eddy signed a formal confession of judgment in favor of Gould against the I. & G. N. R. R. Company. It was stated to the court by plaintiff's counsel that the purpose of this evidence was to show that Eddy was performing the duties of General Manager, as well as receiver, at the time in 1889 when Jas. S. Hogg, Attorney General of Texas, protested by telegram, ad-

dressed to Bonner and Eddy, against a threatened removal of general offices from Palestine, which removal did not take place, and which telegram was exhibited to the court, but not to the jury, and later, plaintiff's counsel announced to the court that on the predicate laid they would not offer in evidence the telegram from Attorney General Hogg, and the same was not offered or introduced in evidence.

The witness testified that a majority of the boards of directors of the I. & G. N. R. R. Co. from 1881 up to in 1889 were residents of Texas. In 1889 they were all Texas men, and so in 1888, and resided in Texas.

The witness here corrected his previous testimony, and stated that on account of the injunction, no directors' meetings were held in 1890, 1891 and 1892.

Before the defendant cross-examined the witness Howard it was agreed, on the instance of the defendant, and stated in evidence to the jury, that the minutes of the H. & G. N., of the International Company, and I. & G. N. R. R. Co., were turned over to the counsel for the plaintiffs by the defendant, and that they have investigated those minutes, and that the only matters found by them which they think relevant are those portions thereof which they have introduced in evidence.

The defendant then cross-examined Howard.

The witness said the minutes of the H. & G. N. R. R. show that the annual meetings of directors and stockholders, from the beginning up to 1873, of that company, were held in Houston, Texas, and some of the meetings, other than annual, in New York, and some in Houston, being special meetings; and that the I. & G. N. R. R. Co. and the defendant are shown by the minutes to have held special meetings of the stockholders and directors in New York. And that the first meetings of the stockholders and directors, that is, annual meetings, of the International were held at Hearne, Texas, and afterwards in Houston, Texas. The H. & G. N. and International Com-

panies consolidated, as appears above, in 1873, into the I. & G. N. R. R. Co., the annual meetings of which were held in Houston, Texas, until it moved to Palestine, in 1875.

Witness came to Texas in 1871, in the service of the International Railroad, first in the engineer corps, then in different positions; that the road had its headquarters up to the latter part of 1872 at Hearne, Texas, and then moved them to Houston, Texas, the witness thinks about December, 1872, or January or February, 1873, though he cannot be positive as to the date. When the International moved its domicile and offices to Houston, it domiciled in Houston in the same building with the H. & G. N. R. R., in one building, the two roads occupying separate offices for a few months, but the minutes show they were consolidated actually in September, 1873, when the consolidated corporation became known as the I. & G. N. R. R. Co., and the consolidation became complete, and there was thenceforward only one General Superintendent of the consolidated road, one Auditor, one General Freight Agent, one Chief Engineer. From that time, the annual meetings of the I. & G. N. R. R. Co., the consolidated company, both of stockholders and directors, was held in Houston, Texas, and some of the special meetings in New York, and the road was operated from Houston, Texas, up to June, 1875, and the whole direction was from that point up to that date.

The witness was in the Auditor's and Treasurer's offices during this period, as a clerk, and lived in Houston something over 2 years in these capacities. On April 5th, 1875, a resolution was passed by the directors of the I. & G. N. R. R. Co., which has been read in evidence, moving to Palestine, and the witness moved with the general offices to Palestine, some time in June, 1875. He was then in a very subordinate position, and did not, at that time, hear of any such alleged contract as is now sued on. The witness stated that he was not then in the confidence of the

general officers, and they did not communicate with him nor advise with him as to what caused them to move. At Houston, in 1875, the witness did not think there was over 40 or 50 men in all the general offices. There were then an Auditor, Secretary and Treasurer. The witness is now Secretary and Treasurer of the defendant. There was a General Freight Agent, as head of the traffic department, who was also, to the best of his recollection, General Passenger Agent; and a General Superintendent, who performed the duties of General Agent. This last position was filled by H. M. Hoxie when the headquarters were moved to Palestine. At present, there are more than three times as many employes in the Auditor's office alone than were in 1875 in all of the general offices. Houston then had a population of six to eight thousand. Witness heard nothing, at the time of the moving, of any contract with plaintiffs; but he did hear a statement and discussion as to why the headquarters were moved to Palestine among the clerks, who were then his associates, the talk being that there was dissatisfatcion with the conditions in Houston, and that Hoxie had decided to move to Palestine on that account.

At that time, in 1875, the following persons constituted the general officers of the railroad and of the I. & G. N. R. R., to wit: The General Manager, or person performing his duties, the Auditor, the General Freight Agent or Traffic Manager, the General Passenger Agent, the Chief Engineer, the Treasurer or Treasurer and Secretary, and, perhaps, the head of the Legal Dept. These persons constituted, the witness considered, the general officers of a railroad in 1875, but would now constitute only a part of them. There was no General Fuel Agent in 1875 or 1872, but the witness would consider him a general officer now, but he would not consider the Claim Agent a general officer, nor would he so consider the Master Mechanic, though he is the head of a department, and was then and is now under the General Manager. The Freight Claim

Agent is not a general officer, he is under the Auditor's Department now. The Master of Transportation is now called a Trainmaster, under the General Superintendent's Department, and so are the Division Superintendents under whom the Trainmasters now come. The Trainmaster is not a general officer.

The general offices and headquarters of the road were moved to Palestine in 1875, where the general offices remained until in August, 1881, when they went to St. Louis, Mo., all of them, but the primary records, being the minutes of the board of directors, stockholders and stock books remained at Palestine; the other records were moved to St. Louis. The majority of the directors, during the period from 1881 until in 1889 (during which he was in St. Louis), were citizens of Texas, and not residents of Palestine, but of different placse. Witness became a director first in 1881, and ceased to be a director in 1883, as he was then living in St. Louis, and again became a director in 1893, and remained such of the consolidated I. & G. N. R. R. Co. down to 1911.

The general offices remained in St. Louis from August, 1881, until May, 1888, where also the general offices were, and whither they took all their employes in 1881, who did not resign their positions. From in 1881 to in 1888 these officers and offices remained in St. Louis, Mo., and the business and operations of the I. & G. N. R. R. Co. were conducted from St. Louis, and in 1888 they returned to Palestine. During that St. Louis period the whole operation of the railroad in Texas was conducted from St. Louis, Missouri.

When the general offices were moved from Palestine to St. Louis, there were in them from 100 to 125 employes, the mileage of the road was not then as great as that of the defendant, but the whole general offices, bag and baggage, were removed to St. Louis, and remained there during the time stated, carrying on the business of the road from that point for approximately seven years. The wit-

ness became Secretary of the I. & G. N. R. R. Co. in 1892; he became Paymaster in 1875, and Cashier in 1888, or Assistant Treasurer. During the St. Louis period he resided in St. Louis, and was paymaster. To recapitulate: In 1871 he came to Texas and entered the service of the International Road in the Engineers' Corps; he came to Houston with the headquarters, from Hearne; clerked in the Auditor's Department, then a clerk in the Treasurer's Department; then went with the headquarters to Palestine in 1875, and became Paymaster, and then in 1881 to in 1888 was in St. Louis, Mo., as Paymaster; then he became Cashier, and in 1892 Secretary and Treasurer, and remained such of the I. & G. N. R. R. Co., until it was sold out, and has since been, and is now, Secretary and Treasurer of the defendant. The move to St. Louis, from 1881 to 1888, was made in consolidation of the operation of the I. & G. N. Railroad Company with the Missouri Pacific, the Iron Mountain, the Missouri, Kansas & Texas, and the Texas and Pacific Railway Companies. There was no Auditor or General Manager or Treasurer or Traffic Manager, or General Passenger Agent for the I. & G. N. R. R. Co. during the St. Louis stay, but there was just one head of each department at St. Louis for all the railroad companies as consolidated, save there was a separate Secretary for each company. Mr. Maxwell had charge of the primary records of the I. & G. N. R. R. Co. at Palestine during the St. Louis period, as Assistant Secretary. All of the general officers and their employes were actually in St. Louis from 1881 to 1888.

The defendant here introduced a list of the executive officers of the International, H. & G. N. and I. & G. N. Railroad Companies, during their lives, prepared by Mr. Howard from the minutes, as follows:

H. & G. N.

General Manager	President	V.-President	Secretary
1867 to 1870	Jas. Mitchell C. G. Young		H. D. Taylor L.L.Hohenthall
1871	C. G. Young G. A. Grow		T. L. Blanton J. S. Wetmore
1872	"		Robert Avery
1873	"		"

INTERNATIONAL.

Gen. Manager	President	V.-President	Secretary
1870	H. G. Marquard John S. Barnes	Jas. W. Barnes "	Jno. S. Barnes P. N. Spofford
1	"	"	D. P. Barhydt
2	"	"	"
3	G. A. Grow	"	J. S. Wetmore

I. & G. N. R. R. CO.

Gen. Manager	President	V.-President	Secretary
1874	G. A. Grow	T. W. Pearsall	Ira. H. Evans
R. Somers Hayes			
5	Saml. Sloan	R. S. Hayes	"
6	"	"	"
7	"	"	"
8	"	"	"
9	"	H. M. Hoxie	"
1880	R. S. Hayes	T. W. Pearsall H. M. Hoxie	Dr.D.S.H.Smith
1	"	"	"
2	Jay Gould	R. S. Hayes T. W. Pearsall	"
3	"	"	"
4	"	R. S. Hayes A. L. Hopkins	"
5	"	"	"
6	"	H. M. Hoxie	"
7	"	S. H. H. Clark	"
8	"	"	"
9	(No meeting account injunction Atty. General.)		
1890	"	"	"
1	"	"	"

General Manager	President	V.-President	Secretary
2	Jay Gould	S. H. H. Clark H. B. Kane	A. R. Howard
3	Geo. Gould	"	"
4	"	"	"
5	"	"	"
6	"	"	"
7	"	"	"
8	"	S. H. H. Clark Leroy Trice	"
9	"	Frank J. Gould S. H. H. Clark Leroy Trice	"
1900	"	Frank J. Gould Leroy Trice	"
1	"	"	"
2	"	"	"
3	"	"	"
4	"	"	"
April 5	"	"	"
November			
November 6	"	"	"
7	"	"	"
8	"	Frank J. Gould H. W. Clark	"
9	"	Frank J. Gould T. J. Freeman	"
10	"	"	"

The witness testified that Ira H. Evans was Secretary commencing in 1874 down to in 1879, when he was succeeded by D. S. H. Smith, who continued down into 1889, and that both of these men are alive, Evans at Austin, and Smith in St. Louis. Witness, at the request of defendant's attorneys, tried to get Smith to attend the trial but he refused. Evans was very close to Hoxie and Sloan and the general officers while he was Secretary. He lived in Palestine almost opposite the general office building, and quit the railroad as Secretary in 1879. The witness thinks he was in charge of the land department after that, and that he was also a director.

The witness next inspected a list of directors prepared

by himself, showing the directors of the H. & G. N. and the International Railroad, and after the consolidation the I. & G. N. R. R. The witness looked over this list and testified that of those directors, checking the list as far down as the year 1885, all of the directors of all the roads holding that position before the year 1885 were dead, except Smith and Evans. Evans had been a director of the I. & G. N. R. R. from April 5, 1875, to 1880, Evans again being a director in 1882, and remained director until 1885 and afterwards. Smith became a director of the I. & G. N. R. R. on April 5, 1875, and was a director in 1875-1876, 1879-1880. That of the executive officers of the roads, other than directors, before 1885, they were all dead except Smith and Evans, who were Secretaries, and except Pollock, now living in Missouri, who was the Accountant or Auditor, and who entered the service after the general offices were moved to Palestine in 1875, Hoxie, Noble, Hays, Grow, Van Duersen, and all the others, with the exceptions stated, are dead.

On re-direct, by plaintiffs, Howard testified that Joe Herring was one of the engineers when the railroad was being built, and was Superintendent during a part of the St. Louis period, between 1881-1888, and was living, when this suit was brought, and until about six months ago, when last heard of by witness, in Joplin, Missouri, and witness understands he died in California. He had been connected with the railroad in some capacity since its construction, and was Chief Engineer, or something of that kind, at one time.

In 1875 the witness would estimate the payroll of the general office as not over $10,000 or $12,000.00 per month, and in 1911 about $20,000.00 a month, and after the move to Houston of the defendant, about $40,000.00 per month, making the aggregate payroll of the general offices at this time nearly half a million dollars per annum. He would have to examine the records to determine precisely.

Judge Freeman was Vice-President of the I. & G. N.

R. R. Co. just prior to Sept. 1, 1911, and he did not reside at Palestine. He was also the General Manager in his quality as Receiver. At the same time he was Receiver under appointment of the Federal court, and the general officers, who were operating the property just before the removal to Houston, were officers of the Receiver. Judge Freeman, as Receiver and General Manager, had his office at Houston, but the other general officers engaged in the operation of the railroad resided at Palestine, where the general offices had been for years.

The Traffic Manager under the Receiver was N. M. Leach.

"Question. Now, Mr. Howard, who has actually performed the duties of Traffic Manager of the I. & G. N. R'y Co. since the removal of the general offices from Palestine? Answer. We have no Traffic Manager in the list of officers. Mr. Booth is the General Freight Agent of the I. & G. N. Question. State to the jury just what duties are performed by Mr. Booth, and who was Traffic Manager prior to the removal of these shops? Answer. There is an Assistant to the President in New Orleans, and he handles all business that he can handle of the I. & G. N. under the President, and his title is Assistant to the President. Question. As Traffic Manager, when he was called Traffic Manager, he was to handle the freight business of the I. & G. N. R. R. Co. subject to the direction and supervision of the President? Answer. Yes, sir, I understand so. And that is the position held by the party at New Orleans? Answer. Well, he is Assistant to the President, and handles all freight business of the road that he can under the President. Mr. Leach, as Assistant to the President, has had eight or ten subordinates under him in New Orleans. Since Sept. 1, 1911, all the general officers of the defendant, except Mr. Leach, if he is a general officer, as suggested by the question, have resided in Houston.

"When I undertook to state in my direct examination

who were general officers, I meant by 'general officer' any man who is placed at the head of a department by a railroad company, which department has been set up by the railroad company for its own convenience.

"When I stated that there was a general manager of the I. & G. N. R. R. Co. living in St. Louis from 1881 to 1888, I meant to say that there was a General Manager living there, operating the I. & G. N., and also operating the M. K. & T. and the Mo. Pac., and others. Question. Now, Mr. Howard, state whether or not it is a fact that in so far as the I. & G. N. R. R. Co.'s line was concerned that the officers of that Company consisted of a board of directors, during the period from 1881 to 1888, a majority of whom resided within that time in Texas, and the Assistant Secretary, and, at least during most of the time, a Claim Agent, is that a fact, and that all of these officers resided in Texas? Answer. Yes, sir. There was also a Superintendent who actually directed and controlled the operation of the railroad, and who resided throughout that period at Palestine, and there was a Master Mechanic there who had charge of the shops. The shops were operated at Palestine from 1881 to 1888 just as before."

The general office building at Palestine was constructed about 1878, and is built of brick, and is located on about ten acres of land, and is three stories high, and was large enough to take care of the men and business in 1879, but not at the date of removal to Houston. In 1911 offices were rented in two buildings in Palestine. "I never heard of anybody in Palestine undertaking to charge any exhorbitant rent for outside offices." The different offices in the general office building at Palestine each bore an appropriate sign as, "Treasurer," "General Manager," "General Freight Agent," etc.

On being re-crossed by defendant, Mr. Howard stated:

In 1911 the building in Palestine was crowded and inadequate, and not fire-proof, and poorly adapted to its

purposes, and inconvenient. The records should be kept in a fire-proof structure. There was a vault in that building, but insufficient, and the road had lost papers in Palestine by fire, some of importance. These records belonged to the Auditor. The building that was burned was situated down near the track running towards Houston. On the 10 acres are part of the yards, but not the shop grounds. When the move was made to St. Louis, everything was taken except the primary records, and all of the books, with this exception. The signs were left over the different offices, he thought. Division offices were maintained in Palestine during the St. Louis period.

18. The plaintiffs next introduced the bond record of Anderson County, and, as preliminary thereto, agreed, at defendant's request, that all of the signers of the petition calling for the election, as shown in the record, were good and representative citizens, except, perhaps, two, and that all of the persons after those whose names the letter "D" was placed, are dead. It was also agreed that all of the persons opposite whose names on the petition the letter "L" was written were lawyers, living in Palestine. The complete record, taken from the minutes of the County Court of Anderson County, was then introduced. It was agreed, at defendant's request, that there was no other matter relating thereto upon the minutes, except an order, being below set out, and relating to the bond given by the H. & G. N. to secure the maintenance of the depot, and this record is copied in full, eliminating repetitions. The record is certified to as a complete, true and correct copy of the proceedings of the Commissioners' Court, the certificate being made by the Clerk of the Court Court of Anderson County, January 4, 1914.

In County Court,
Anderson County.

At a Special Term, Monday, May 6th, A. D. 1872.

Be it remembered that at a regular term of the County

Court of said Anderson County, begun and held at the Court House of said County, at the town of Palestine, on Monday, the 25th day of March, A. D. 1872, the following order was made and adopted, to wit:

"At a regular term of the County Court of Anderson County, beginning March 25, 1872, the following order was made:

"County Court
& order and for other purposes.

"In the matter of granting a Donation from Anderson County, to the Houston & Great Northern Railroad.

"Whereas, the following petition signed by more than fifty freeholders of Anderson County, in the State of Texas, has been presented to the County Court of Anderson County, that is to say:

The State of Texas,
County of Anderson.

"To the Honorable, the County Court of Anderson County, Texas:

"The undersigned freeholders of said Anderson County, in accordance with the Act of the Legislature of the State of Texas, approved April 12th, 1871, authorizing counties, cities, and towns, to aid in the construction of railroads, and other works of internal improvements, do respectfully petition your Honorable Court to order an election to take the opinion of the electors of said County on the following proposition, that is to say: Whether said Anderson County will donate to the Houston & Great Northern Railroad Company, the sum of One Hundred and Fifty Thousand Dollars, in the bonds of said County, subject to the provisions of the Act of the Legislature above referred to, said bonds to be payable in twenty years, and to bear interest at the rate of eight per centum per annum, the interest to be due and payable on the first day of January of each year, counting from the first full year which shall elapse after said bonds shall be issued, the principal and interest of said

bonds to be payable in United States Currency, said bonds to be donated to said Railroad Company, to aid them in the construction of their railroad, through said Anderson County from the Northern Line of Houston County in said State, to its intersection with the International Railroad at the town of Palestine, in said Anderson County, and to secure the establishment and maintenance of a Depot of their said Railroad in one-half mile of the Court House, in said town of Palestine, by or before the 1st day of July, A. D. 1873. The bonds for said one hundred and fifty thousand dollars to be delivered to said Houston and Great Northern Railroad Company as soon as their said Railroad shall be completed from the North Boundary of said Houston County to its intersection with the International Railroad at said town of Palestine, and so soon as their depot shall be established within one-half mile of the Court House of said town of Palestine and their cars commence running regularly thereto, provided these things be done by said 1st day of July, 1873.

"We also respectfully petition your Honorable Court to submit to the electors of said Anderson County, at the same time, and as forming a part of the foregoing proposition, the question: Whether they shall donate fifty thousand dollars in County Bonds to the Railroad Company which shall first build a railroad of the class and character of the International and Houston & Great Northern, between said town of Palestine and the North boundary of said Anderson County and connect with the International at said town, and build and maintain a depot within one-half mile of the Court House of said town of Palestine, said bonds to be delivered to the Railroad Company which shall build said Railroad, and run its cars between said North boundary of Anderson County, and said town of Palestine, and comply with the foregoing provisions within three years from the date at which this proposition shall be ascertained, by a count of the vote, to have been adopted by the people of

said Anderson County. But if said Railroad be built in three years from that date then this part of this proposition is to be held for naught, said fifty thousand dollars in county bonds to be payable in twenty years, with interest at the rate of eight per centum per annum, and the principal and interest to be payable in United States Currency.

R. B. Jowers, d	Daniel Hollingsworth, d
J. B. Henderson, d	Michael Ash, d
J. B. Hiner, d	J. J. McBride, d
Jno. F. Weidemeyer, d	H. J. Hunter, d
J. A. Tindel, d	S. S. J. Moore, d
J. L. Helm, d	D. C. Hunter, d
Amerald Licke, d	B. F. Broyles, d
J. T. Henderson, d	W. H. Bowen, d
James M. Mears, d	R. C. Parks, d
B. Hollingsworth, d	H. B. Phillips, d
J. K. Godley, d	J. Crawford, d
G. D. Kelley, d	Fred Mills, d
G. E. Christ, d	W. J. Averyt, d
A. Joost, d	E. Carney, d
J. B. Miller, d	D. A. Calhoun, d
J. L. Sandifer, d	F. Bernhardt, d
W. A. Miller, d	Thos. M. Colley, d
J. C. Simpson, d	W. W. Parks, d
Sam Heidelberg, d	H. H. Link, d
W. M. Shumatto, d	H. H. Norgen, d
John H. Reagan, d-l	R. Jesse Royall, d
Jim Langston, d	Jeff Word, Jr., a-l
J. R. Emerson, d	J. R. C. Jerry, d
A. T. Rainey, d-l	Marsh Glenn, d-l
J. W. Ewing, d	Thomas J. Johnson, d-l
E. J. DeBard, d	T. T. Gamage, d-l
A. S. Pinson, d	J. N. Garner, a-l
J. W. Ozment, a	Virgil Campbell, d
R. McClure, a-l	R. B. Petty, d
J. L. Whitescarver, d	Jno. J. Word, d-l
Phillip Unger, d	Jno. H. Morrison, d

H. C. Swanson, d	R. H. Small, d
T. J. Word, d-l	E. Collins, d
Eli Bailey, d	Jas. L. Hanks, d
O. E. Brittain, a	Edward Smith, d-l
Jno. G. Scott, d-l	J. F. Watts, a
S. Kolstad, -a	J. H. Gee, d
W. O. Spencer, d	Ed Davis, d
J. R. Palmer, d	N. W. Hunter, d-l."

"And whereas said petitioners pray this court to order an election to take the opinion of the electors of said Anderson County as to whether said County of Anderson will donate to the Houston and Great Northern Railroad Company the sum of One Hundred and Fifty Thousand Dollars in the bonds of said Anderson County, said bonds to bear interest at the rate of eight per centum per annum and to be payable in twenty years from the date at which said bonds shall be issued, the interest and principal of said bonds to be paid in United States Currency, and the interest on said bonds and two per centum of the principal to be paid annually, on the first day of January of each year; that is to say, the first payment of said interest and of said two per centum of principal shall be made on the first day of January succeeding the first full year after said bonds shall have been issued. Said donation to be made and said bonds to be issued upon the following conditions, that is to say, that the said Houston and Great Northern Railroad Company shall build their said Railroad, of the same class and style of the portion of said road which is now built, from the North boundary of Houston County to its intersection with the International Railroad in the town of Palestine in said Anderson County, and build and maintain a depot of its said road within one-half mile of the Court House in said town of Palestine, and commence to run their cars regularly thereto, by or before the 1st day of July, 1873."

"Said One Hundred and Fifty Thousand Dollars of

the bonds of said Anderson County are to be issued to said Houston and Great Northern Railroad Company on the completion of the said road from said North boundary of Houston County to its intersection with the International Railroad at said town of Palestine, and on its compliance with the other conditions imposed on it as above set forth."

"And the court in accordance with the request of the aforesaid petitioners, also submit to the electors of said Anderson County, as a part of the foregoing proposition, and to be carried by their vote for or against the same, the question whether they will donate fifty thousand dollars, in the bonds of said Anderson County, to the Railroad Company which shall first build a Railroad of the class and character of the International Railroad and Houston and Great Northern Railroad between said town of Palestine and the North boundary of said Anderson County, and build and maintain a Depot thereof within one-half mile of the Court House of said town of Palestine. Provided that said Railroad from Palestine to the North boundary of said Anderson County shall be built, within three years from the date at which this proposition shall be adopted (if adopted) by the vote of the people of said Anderson County, said bonds to be issued to the Company, which shall build the first Railroad as above provided, between said town of Palestine and said North boundary of Anderson County and upon its compliance with the other conditions above mentioned, on the completion of the same, said bonds to be paid in twenty years, to bear interest at the rate of eight per centum per annum, the interest and two per centum of the principal to be paid annually on the first day of January of each year, the principal and interest of said bonds to be paid in United States Currency."

"Now therefore, under and by virtue of the authority vested in this Court by law, it is hereby ordered that an election be held at the Court House in the town of Palestine, in said County of Anderson, commencing on Wednes-

day, the first day of May, A. D. 1872, and to continue from day to day until Saturday the 4th day of said month of May, inclusive; the polls of said election to be opened at eight o'clock in the forenoon of each day, with a recess from 12 o'clock Noon till one o'clock P. M. of each day."

"And the following named persons are hereby appointed to be managers of said election, to wit: H. J. Hunter, John H. Morrison, and Willie Cowen, said election to be for the purpose of taking the opinion of the electors of said Anderson County, upon the question whether said County will make the donation above mentioned to the Houston and Great Northern Railroad Company, and to such Railroad Company as shall build the said Railroad from Palestine to the North boundary of said Anderson County. The vote to be 'for the proposition' or 'against the proposition,' said Managers to count the vote so taken as the law directs, and to make the return of said vote to Wm. T. Smith, Esq., the Presiding Justice of said County Court, on Monday the 6th day of May, A. D. 1872, and that the Clerk of this Court shall give notice to the Sheriff of this order."

"And it appearing to the court that pursuant to the aforesaid order of said Court, made on the second day of the term of said Court, being the 26th day of said month of March, an election was held by H. J. Hunter, one of the managers aforesaid, and by Fred Mills and J. F. Watts, who were substituted in the place of Willie Cowen, who was absent, and of John H. Morrison, who declined to act as one of the said Managers, on the first, second, third and fourth days of May A. D. 1872, to take the sense of the electors of said Anderson County, on the aforesaid proposition, that said County of Anderson shall donate to the Houston and Great Northern Railroad Company One Hundred and Fifty Thousand dollars, in the bonds of said County, on the terms and conditions mentioned and set forth in the aforesaid order of said County Court, and fifty thousand dollars in the bonds of said County

of Anderson to the Railroad Company which shall build the first Railroad, of the same class and character of the International and Houston and Great Northern Railroad Company from said town of Palestine to the North Boundary of said Anderson County, and build and maintain a depot of said Railroad within one-half mile of the Court House of said town of Palestine, provided that said Railroad shall be built within three years from this date to entitle such Railroad Company to said Fifty Thousand Dollars of the bonds of said County, said bonds to be issued on the conditions and upon the limitations set out in the aforesaid order of the 28th of March, A. D. 1872."

"And it appearing to the satisfaction of this court that a Special Registration of the qualified voters of said County of Anderson, preparatory to said election has been made according to the law in such cases made and provided, at which registration One Thousand and eight qualified voters were registered, and it appearing to the court that at the election aforesaid, held on the first, second, third and fourth days of May, A. D. 1872, that seven hundred and sixteen of said qualified electors voted 'for the proposition,' and that ninety-three of said qualified electors voted 'against the proposition,' and it further appearing to the court that, at said election, more than two-thirds of the qualified electors of said Anderson County have voted for the proposition, it is hereby declared that said proposition has been adopted."

"And it is further ordered by the court that upon the completion of said Houston and Great Northern Railroad, by said Company, to its intersection with the International Railroad at the said town of Palestine of the same style and class and character as of the part of said Railroad now built, and upon the establishment of a Depot of its said Railroad, within a half-mile of the Court House of said town of Palestine and upon the commencement of the said Railroad Company to run their cars regularly to their depot at said town of Palestine,

then the said County of Anderson, will issue to the said Houston and Great Northern Railroad Company the bonds of said County with the coupons attached for said sum of One Hundred and Fifty Thousand Dollars, payable in twenty years, under the provisions of the act of the Legislature of the State of Texas, authorizing counties, cities and towns, to aid in the construction of Railroads, and other works of internal improvements, approved April 12th, 1871, with interest at the rate of eight per centum per annum, the interest payable annually on the first day of January of each year; the first payment of interest and of two per centum of the principal indebtedness to be made on the first day of January succeeding the first full year after the completion of said Railroads, and the principal and interest of said indebtedness to be paid in United States Currency after the County Court of said Anderson County shall have first levied a tax on the taxable property situated in said County sufficient to pay the annual interest, and not less than two per cent annually of the principal of said bonds, besides the expense of assessing and collecting the same, said bonds to be of the denomination of five hundred dollars each, with coupons attached to each for the annual interest thereon, and upon the condition precedent that said Railroad shall be completed and the other aforesaid conditions complied with by the said 1st day of July, 1873."

"And it is further ordered by the court that upon the completion of the building of the Railroad hereinbefore mentioned which shall be first built from its intersection with the International Railroad at the town of Palestine to the North boundary of said Anderson County of the class and character of the International and Houston and Great Northern Railroad to its intersection with the International Railroad at Palestine, and upon the establishment of a Depot at such point of intersection of said Railroad within one-half mile of the Court House in said town of Palestine, and when said Railroad Company

shall commence the running of their cars regularly over their said Railroad from its intersection with the International at said town of Palestine to the North boundary of said Anderson County, then the said County of Anderson will issue to such Railroad Company, Fifty Thousand dollars of the Bonds of said County, in sums of Five Hundred Dollars each, payable in twenty years from the completion of said work and the issuance of said bonds, bearing interest at the rate of eight per centum per annum, with coupons attached, under the provisions of the Act of the Legislature of the State of Texas, authorizing counties, cities and towns, to aid in the construction of Railroads and other works of internal improvements, approved April 12th, 1871, the interest and two per cent of the principal indebtedness payable annually on the first day of January of each year; and the principal and interest of said indebtedness to be paid in United States Currency, after the County Court of said Anderson County shall have first levied a tax, on the taxable property situated in said County sufficient to pay the annual interest and not less than two per centum annually of the principal of said bonds, besides the expense of assessing and collecting the same, Provided that the bonds aforesaid shall not be issued for said purpose unless said Railroad shall be built, and the other above named conditions shall have been complied with within three years from this date."

"It is ordered that the court stand adjourned until tomorrow, Tuesday, morning at 9 o'clock A. M., May 7th, A. D. 1872."

Court adjourned until next regular term.

January 29, 1873.

"County Court,
Order.

"In regard to levying and issuing County Bonds to the Houston & Great Northern Railroad Company.

"Now comes Galusha A. Grow, President of the Houston & Great Northern Railroad Company, and presents

his petition asking that the County Court now proceed to levy an annual tax upon all real and personal property situated in Anderson County, which shall be sufficient to pay the annual interest, to wit: Eight per cent per annum, and not less than two per cent annually of the principal of the One Hundred and Fifty Thousand Dollars County Bonds, heretofore voted as a subsidy to the Houston and Great Northern Railroad, by the citizens of Anderson County, which petition is in words as follows, to wit:

"To the Hon. the County Court of Anderson County, Texas:

"Your petitioner, the Houston and Great Northern Railroad Company, a body politic and corporate by 'An Act of the Legislature of said State entitled an Act to incorporate the Houston and Great Northern Railroad Company,' approved 22nd of October, 1866, respectfully represents that having accepted the proposition of the County of Anderson aforesaid of date the 26th day of March, 1872, and approved by two-thirds of the qualified voters of said County at an election held on the first, second, third and fourth days of May, 1872, to donate to said Houston & Great Northern Railroad Company, One Hundred and Fifty Thousand dollars in the bonds of said County on certain conditions therein specified, said Houston and Great Northern Railroad Company fully performed and complied with all the conditions upon which said proposition was made in the month of December, 1872, and prior to the 31st day of said month. By the terms of said propositions said bonds were to be issued to petitioner on its compliance with the conditions contained in said proposition, and having fully complied therewith your petitioner prays that the truth of these allegations be enquired into and if satisfied they are true, that said bonds be issued in accordance with said proposition, and the laws of the State, and delivered to petitioner, and in duty bound, etc.

"Galusha A. Grow,

"President H. & G. N. R. R. Co."

"And it appearing from the records of our said Court, and the papers thereof on file therein that on the 26th day of March, 1872, a petition was presented to our said court signed by more than fifty freeholders of said Anderson County, praying for an election to take the opinion of the electors of said Anderson County as to whether said County would donate to the Houston and Great Northern Railroad Company, the sum of One Hundred and Fifty Thousand Dollars in the bonds of said Anderson County, said bonds to bear interest at the rate of eight per cent per annum, and to be payable in twenty years from the date of their issuance, payable in United States Currency, principal and interest, the interest on which bonds and two per cent of the principal to be paid annually on the first day of January in each year, and the first payment to be made on the first day of January succeeding the first full year after said bonds shall be issued; on condition that the said Houston and Great Northern Railroad Company, would build their said Houston and Great Northern Railroad of the same class and style of the portion of said road then built, from the North Boundary of Houston County, to its intersection with the International Railroad at the town of Palestine, in this County, and build and maintain a depot of said road within one-half mile of the Court House in said town of Palestine and commence to run their cars regularly thereto, by or before the first day of July, 1873."

"And it further appearing that on the day said petition was presented, our said Court by an order entered on its minutes ordered an election to be held at Palestine, in said Anderson County, on the first, second, third and fourth days of May, 1872, to take the opinion of the electors of said Anderson County on said proposition, and that said order was published three weeks previous to said election in the Trinity Advocate, a newspaper then published at Palestine, in said Anderson County."

"And it further appearing that an election was held in accordance with the order of our said court, and the

notice thereof, as aforesaid; and that afterwards on the 6th day of May, 1872, the same being the first Monday after the return day of said election, at a special term of our said Court, then held to ascertain and record the result of said election, it was found that two-thirds of the qualified electors of said Anderson County, had voted for said proposition at said election, and said result was then entered of record in our said Court, and it also appearing that the said Houston and Great Northern Railroad Company accepted said proposition and completed all the work in aid of which said donation was proposed prior to the 31st day of December, 1872, and had then, to wit: the 31st day of December, 1872, fully performed and complied in all respects with all the conditions on which said donation was offered."

"And it further appearing that by the terms of said proposition said bonds were to be issued to said Railroad Company on the completion of their said Road from said North boundary of Houston County to its intersection with the International Railroad at said town of Palestine, and on its compliance with the other conditions contained in said proposition, and that said road was so completed, and all of said conditions complied with by the said Houston & Great Northern Railroad Company prior to the 31st day of December, 1872, and that said Railroad Company was then entitled to said donation, and to demand and have said bonds then issued to them; and it also appearing by reference to the latest assessment of the real and personal property situate in said County of Anderson, that said donation of One Hundred and Fifty Thousand Dollars, does not amount to ten per cent of the assessed value of said real and personal property, it is therefore adjudged and decreed that the said Houston & Great Northern Railroad Company was entitled to said donation on the 31st day of December, 1872, and to have said bonds then issued to them of that date."

The order then proceeds to levy an annual tax for the payment of the bonds and to direct that three hundred

bonds of the County for $500 each, running for twenty years, should be issued and then proceeded to give the form of the bonds, setting forth the form in the order. The latter part of the form of the bonds was as follows:

"This bond is authorized by a vote of two-thirds of the qualified electors of said county at an election held in pursuance of an order of the County Court of the said county and the general laws of this State on the first, second, third and fourth days of May, 1872, to take the opinion of the electors of said county on a proposition to donate to the Houston and Great Northern Railroad Company on certain conditions therein expressed, one hundred and fifty thousand dollars in the bonds of said county, which proposition was accepted and all of said conditions fully performed and complied with by said Houston and Great Northern Railroad Company, as by the records of said court fully appears and by an order of said court requiring the issue of this series of bonds in accordance with said proposition."

"This bond is one of a series of three hundred of like tenor and effect, and is secured by a decree of the County Court of said Anderson County, and the General Laws of the State, requiring and levying an annual tax upon all the real and personal property, in said County of Anderson, to raise an annual fund, sufficient to pay the annual interest and two per cent annually on one hundred and fifty thousand dollars (being the principal) as hereinbefore stipulated, and further by the Constitution of the State providing that the law levying said tax is irrepealable until the principal and interest shall be lawfully paid."

"In witness whereof, the Presiding Justice of the County Court of said Anderson County, here signs his name, and the Clerk of said Court attests with the seal of said Court hereto affixed at Palestine in said County the 31st day of December, 1872.

Attest: Presiding Justice."

Clk.

"Endorsements of Comptroller to be printed on back of bond: 'The within bond is registered in the office of the Comptroller of the State of Texas, Austin, ... day of ....., 1873."

.....

Comp."

"Print on the back the following endorsement:

"For value received, the Houston and Great Northern Railroad Company hereby assigns the within bond to

.....

.....Prest."

"The Clerk of the District Court, and Ex Officio Clerk of the County Court is hereby required to attest such bonds of date December 31st, 1872, with the seal of the County Court."

"Protest of John S. Shattuck of Precinct No. 2, Anderson County, against the issuance of the Bonds and Coupons attached, ordered to be issued to the Houston & Great Northern Railroad Company, January 29th, 1873."

"Now comes John S. Shattuck, J. P. Precinct No. 2, Anderson County, Texas, and protests against the issuance of the bonds amounting to $150,000 with Coupons thereto attached to the H. & G. N. R. R. Co. and an assessment of One Dollar on the $100, to pay the interest and sinking fund of the same, on the following grounds, to wit:"

"1st. That said Railroad Company has not established, and maintained a depot building within a half mile of the Court House of the town of Palestine, as required by the contract with said Company, and that if said Bonds are issued at all, they should show on their face that a depot shall be established and maintained, which they do not show."

"2nd. That said Railroad Company has not built, nor has it laid any foundation to build, any Machine Shops at their proposed Depot, as promised by the Agents and friends of said road, the same being the inducements held out to the people of said Anderson County; and on ac-

count of such promises and agreements to build a Round House, and Machine Shops, the majority of those voting for the subsidy cast their votes for the same."

"3rd. That the law under which said subsidy was voted on as protestant has been informed and verily believes is unconstitutional and therefore void."

"4th. That the election held by virtue of a former order of the County Court as protestant has lately been informed was unfair and unjust to the County, and a fraud."

"5th. That two-thirds of the qualified electors of said Anderson County did not vote on the proposition."

"6th. That the Special registration for said election was not taken under any law known to the State of Texas."

"It is ordered that the Court stand adjourned until tomorrow, Thursday, January 30th, 1873, at 9 o'clock A. M."

19. The plaintiffs read in evidence the answer of witness D. S. H. Smith to the 4th interrogatory, and to the first and nineteenth cross-interrogatories, this deposition being taken by the defendant.

To the 4th interrogatory witness answered: That he was in the employ of both the I. & G. N. R. R. Co. and the International Railroad Co.; that he entered the employment of the latter in 1871 and afterwards, when the two roads were consolidated, was employed for the former; he first acted as Land Agent for the International, and afterwards as Treasurer and Paymaster for the I. & G. N. R. R., and that in 1871 he lived at Hearne, and in the fall of 1872 moved down to Houston and in 1875 moved to Palestine, but did not think he was ever in the employ of the H. & G. N. until the consolidation of the two roads. To the first cross he answered that Grow was President of the H. & G. N. R. R. Co. in 1871 and to the end of 1873; but the witness stated that he could not give the exact dates, but that the records would show. And, to the 19th cross he answered that H. M. Hoxie was

General Superintendent of the consolidated I. & G. N. R. R. Co. from the day of its beginning for several years, and was during that time in fact the General Manager of the operation and business of that company in Texas.

20. A. R. Howard, being called by the defendant, testified in its behalf that he never heard any executive officer or director of the H. & G. N. or the International or of the I. & G. N. Railroads in any way mention or refer to the alleged contracts sued on in this case.

21. George A. Wright, one of the plaintiffs, was called as a witness, having been, along with his co-plaintiffs, Ozment, Bowers and Hughes, over the exception of the defendant, excused from the rule, as appears above.

Wright having been sworn, the defendant moved the court before he testified to exclude from the court room and put under the rule, while he was testifying, Ozment, Bowers and Hughes, then in the court room, and all of whom the plaintiffs had stated would be put on the stand, and also that all of these four persons should be excluded from the court room when any one of them was testifying; the ground of the motion being that it appeared that Wright and each of these witnesses would be tendered to give parol testimony, in support of an alleged transaction, claimed to have been entered into in parol over 40 years ago; all the citizens of Palestine being plaintiffs in these cases; and because on account of the great lapse of time, one listening to the other testify, their minds might be swayed and impressed as to what testimony they would give. And that, therefore, upon the grounds stated, it would be an abuse of the court's discretion not to enforce the rule; which motion being considered by the court and was by the court overruled, and the defendant then took its Bill of Exceptions No. 11 to the action of the Court, and over the same Wright testified as follows:

That his name is George A. Wright and that he is a resident of Palestine, Anderson County, Texas, and has resided in that County during his life, with the excep-

tion of four years; and in Palestine a number of years, and is now 67 years old; and that in 1872 he was in the livery business at Palestine, and met Galusha A. Grow at Tyler in 1872, he being accompanied by Charles Noble, an officer of the H. & G. N. R. R. Co., Grow representing himself to be its President, and Noble being its Chief Engineer. The witness stated that he went to Tyler, Texas, at the request of Judge Reagan, and that this was early in the spring, about March, and that he met these two men in Tyler, for the first time. He left Tyler with them early in the morning and carried them down by conveyance 56 miles to Palestine, and reached Palestine about dusk, and carried them to the Osceola Hotel there, where they remained, he supposed, about an hour, for supper; and that the witness, having changed teams, drove them to Judge Reagan's home at Ft. Houston, out from Palestine, where they met Judge Reagan and Mrs. Reagan. The witness was then asked to state what took place between Judge Reagan and Mr. Grow, if anything, in the hearing and presence of himself and Noble; to which question and any answer thereto and any statements of any matters in such conversation or of any conversation participated in between Grow and Reagan, or Grow, Reagan and others on this occasion, at Ft. Houston, which was Judge Reagan's residence, about two miles out of Palestine, the defendant objected as follows:

(1) That it now developed, as shown by the contract with the County introduced by the defendant, that there was a complete and perfectly legal written contract between Anderson County, Texas, and the H. & G. N. R. R., required by law to be in writing, and which could only legally be formed in writing, which, as shown by the petition, it was proposed to modify, add to, change, or vary by parol testimony; and that such writing being complete in itself could not be so modified, changed, varied or added to. (2) That the testimony offered as to what Judge Reagan said and what Grow said and others said was hearsay. (3) That the testimony is offered, as ap-

pears by the pleadings and the statement now made by the plaintiffs, in support of a contract alleged to have been made in behalf of the citizens of Palestine acting by Judge Reagan upon an illegal consideration, to wit: Judge Reagan's alleged undertaking to induce and influence the voters of the county to vote a bond issue, the alleged consideration to the railroad being solely the engagement of Judge Reagan to induce and advocate such a bond issue. (4) That the evidence is offered for the purpose of showing an agreement or an alleged contract, in promotion of a County contract, and to attach to the County contract, which is in writing, an alleged promotion contract, which, if made, would be upon an illegal consideration and is prohibited by law and public policy. (5) That after the lapse of over 40 years it is not permissible to prove, in connection with a written contract with the County and the public, what were the inducements or considerations or representations outside of the written contract there were upon which it was made, nor can a written contract adopted by the voters be so modified. (6) That it appears from the pleadings, and tender of the testimony, that it is now proposed to show that Judge Reagan's services were hired to induce and influence the voters of Anderson County to vote a bond issue, on inducements outside of the writings, that the shops and general offices were to be erected in Palestine for the benefit of the people of Palestine, as contradistinguished from the people of the County, and that it would have been illegal to arrange to bestow such benefits upon the people of part of the county as contradistinguished from the people of all of the county. (7) That the proposed agreement, as plead and as proposed to be testified to in parol, if legal and probable under the law, which is denied, would have to be in writing, and comes within the terms of the statute of frauds, which is now invoked; and therefore it is not provable in parol. (8) That after the lapse of over 40 years and after rights had been acquired and acted upon by various parties,

on the basis of the written contract and agreement already introduced, it is not permissible to prove by parol the alleged contract. (8a) That a record of the transaction with the County introduced by plaintiffs, showed the judgment of the County Court settling the whole matter and the considerations for the contract, adjudged to have been performed by the railroad, whereby the matter was *res adjudicata,* and the parties estopped. (9) That there is no evidence that Grow had any authority to make any agreement, such as is proposed to be shown by parol, because the law lodged the authority to make any such agreement, if it could be made at all, wholly with the board of directors, and, furthermore, that there is no evidence whatsoever of the ratification of such an agreement, which ratification could only be by the board of directors. (10) That the testimony would be immaterial and irrelevant. (11) It appears by the decree of foreclosure of the sold out International & Great Northern Railroad Company in May, 1910, and introduced by the plaintiffs, that all of the issues involved in said proposed testimony were settled, and if not settled were reserved exclusively for the United States Court. (12) The plaintiffs rely upon the act of the Legislature of Texas of 1889, carried into articles 6423-4-5 of the present Revised Statutes of Texas, and are now claiming that by such act, long subsequent to the alleged contract which they plead in this case, a lien, burden, or servitude were fixed upon the property or properties, or some of them, of the sold out I. & G. N. R. R., which have been acquired by this defendant; without which lien or burden they can not recover; and in that by this statute and its terms they are extending and attempting to burden and add to the alleged contracts in its extensions and purported obligations, by going beyond the alleged contracts, whereby it appears, when applied to the facts of this case, that such act of 1889, as so construed, is unconstitutional and void and violates sub-section one of section X of article one of the Constitution of the United States, pro-

hibiting any State from passing a law impairing the obligation of contracts. The plaintiffs claiming that their alleged personal contract so became secured first in 1889, and that in 1889 the statute placed other obligations on the alleged contracts, and not included in the contracts. (13) Because said act of the legislature of 1889 violates sub-section one of section X of article one of the Constitution of the United States and impairs the obligation of contracts when, as construed by the plaintiffs and plead by them; without which construction and application they can not recover; in that it appears, from the decree of foreclosure and evidence introduced by them, that the I. & G. N. R. R. was sold out under a mortgage termed the second mortgage, issued in 1881; that the defendant is the assignee and holder as purchaser of all the rights whatsoever accruing to the mortgagees; and further, as to any obligations, claimed by the plaintiffs to have been imposed by the act of 1889 (all of which were additions to and burdens upon the alleged contract asserted by plaintiffs) they are, in violation of said mortgage, attempting to make prior in law rights which were junior in time, if any such rights existed, all of which is in violation of the Constitution of the United States, here and now invoked. (14) It appears that the plaintiffs rely upon said State act of 1889, as construed by them, which act is in violation, when so construed, of section one of article XIV of the Amendments to the Constitution of the United States, commonly called the XIV Amendment; in that such statute imposes great penalties; and in that the insistence that the statute is applicable to the defendant, constitutes an attempt to abridge the privileges and immunities of the defendant and to deprive it of its property without due process of law, and to deny it the equal protection of the law by penalizing or threatening to penalize it at the rate of $5,000 a day, and further penalize it, if it should resort to the courts to resist this action and litigate its rights by refusing to obey such unconstitutional statute. (15) The plaintiffs can not

recover, as admitted by them, without the aid of said State Statute of 1889, which statute, as applied by them, is void and unconstitutional and violates section one of article 14 of the Amendments to the Constitution of the United States; in that it is an undue interference with the business and obligations of the defendant, which it owes to the public in state and interstate commerce; whereby it attempts to interfere with the lawful discretion and power of the defendant to conduct its business within the limits of the law; and whereby it attempts, by subsequent statute, to place burdens and liens and additions on and securing personal contracts as claimed by the plaintiffs, thereby denying to this defendant the equal protection of the law and taking its property without due process of law by such illegal interference. (16) That the said act of 1889 of Texas, as applied, is unconstitutional and void, and yet without it the plaintiffs can not recover; in that such act is applicable only to chartered railroads and not applicable to individuals, receivers or other persons operating as railroad carriers, or to other persons or corporations whatsoever, and so violates section one of article XIV of the Amendments to the Constitution of the United States, being legislation against a species or class, not rightly classified on any legal ground; and in that it places a burden upon the species or class not placed upon other persons and corporations classifiable with it; thereby violating the prohibition of denying to any persons "the equal protection of the laws," and abridging the privileges and immunities of the defendant and depriving it of its property without due process of law. (17) The plaintiffs rely upon the said act of 1889, which is claimed by them to secure their alleged contracts in this case, which as applied, is illegal and void and contrary to the Constitution of the State of Texas: (a) because the same assesses a penalty of an amount prohibited by the Constitution; (b) because the statute as construed and pleaded is retroactive; (c) because the plaintiffs seek to recover in violation of the ob-

ligations and terms of the alleged contracts on which they sue and in violation of the mortgage contract, of the sold out railroad, made in 1881; (d) because such statute is *ex post facto* and pronounces penalties, and therein is contrary to the Constitution of the United States, as well as that of the state; (e) because as construed by plaintiffs the statute denies to the defendant the equal protection of the law and is violative of the due process of law; (f) because such statute as construed by the plaintiffs, and without which construction they can not prevail, is an attempt to place on this defendant, never assuming the same, alleged obligations of the sold out I. & G. N. R. R. or its predecessors, and which were personal to them. (17a) Because the plaintiffs alleged and attempted to prove a contract binding "forever," the law and Constitution not permitting properties and obligations to be bound up or enforced "forever," and the alleged contracts being as claimed forever, or indeterminate, are terminable at option, if contracts at all, which is not admitted. (18) Because the plaintiffs have introduced the conveyance of the properties of the sold out railroad to this defendant, and also its charter and the decree of foreclosure under which the properties were sold, from which it appears that the defendant bought free of all the obligations now asserted by the plaintiffs. (19) Because plaintiffs have introduced the charter of the defendant, from which it appears the general offices are located at Houston, Texas, and the charter being legally issued, the defendant is bound to maintain its general offices at Houston, Texas. (20) Because it also appears that the H. & G. N. R. R.'s charter, introduced by the plaintiffs, required said offices to be at Houston, Texas, and the charter of the International, introduced by plaintiffs, not designating a definite place for the offices, and the two roads consolidated under act of 1889, the offices are obligated to be kept at Houston, Texas.

And these objections being considered by the Court were, by the Court, overruled; and then and there in open

court the defendant excepted to such ruling and took its bill of exception No. 12, and over these objections, Wright testified as follows:

Mr. Grow said to Judge Reagan that he had come to make some definite contract or arrangement with reference to bringing the Great Northern Railroad from its present terminus to Palestine to connect with the International Railroad, and the permanent location of its shops, round houses and general offices. Judge Reagan asked Mr. Grow about what would be expected of the citizens of Palestine to do, and Mr. Grow said he would expect them to give bonds in the sum of $200,000. Judge Reagan said he had been talking with some of the citizens and $100,000 was all they would be able to donate. "Q. Well, just go ahead now, Mr. Wright. From whom did Mr. Grow state or from whom were Mr. Grow and Judge Reagan discussing the bond issue from; that is, from whom was it to be voted? A. Palestine and Anderson County. Q. Who was to issue the bonds? A. The County of Anderson. Q. What amount did Judge Reagan suggest, if any? A. He told Mr. Grow he thought $100,000 would be the largest amount they could get up."

Here an objection was made by the defendant that the witness should not be asked particular questions, but should be told to go ahead and tell all that occurred, and that no suggestions or leading questions should be put to him. Plaintiffs' counsel stated that he would avoid doing so, as much as possible, and then asked the witness to go ahead and state the discussion there between Judge Reagan and Mr. Grow with reference to the amount of the bond issue, and what Mr. Grow said. The witness answered that Mr. Grow said that he did not think $100,000 was sufficient, "that inasmuch as they would locate their machine shops, general offices and round houses there forever, that long after they had paid the bond issue that they would be paying into the Treasury more than the $200,000 paid by the County; Judge Reagan said that the people had just emerged from the war and were not

able to vote a bond issue of $200,000; that they were already burdened with taxes, and it seemed like they were going to disagree there." Q. "State what was the result of that discussion there?" A. "I stated that it seemed that they were not going to agree on the amount, and at that time Mr. Noble, who was present, and the chief engineer, suggested to me that we might get a compromise. He suggested to me—he was talking to me about it while Judge Reagan and Mr. Grow were discussing it—and he suggested to me about a compromise of One Hundred and Fifty Thousand Dollars; if I didn't think so. I suggested the amount to Judge Reagan, and he suggested the amount to Mr. Grow, and Mr. Grow finally agreed with him, but Judge Reagan did not at that time; he said he couldn't make the agreement for one hundred and fifty thousand dollars until he saw some more of the citizens of Palestine, and that he would have to see them before he could make the agreement." Q. "What, if anything, was said in that conversation with reference to any canvass of the county in behalf of the bond issue?" A. "Well, Mr. Grow said in the outset that he would expect Judge Reagan to make a canvass of the county, and gave the reason that it could not be carried unless Judge Reagan would make a personal canvass of the county."

Being asked as to the stage of the negotiations at the close of the conference that night, the witness answered: "Judge Reagan told them he would let them know the next morning early; that he would see the other citizens he desired to see, and let them know at that time. The proposition before Judge Reagan at that time was $1 0,000 and him to make a canvass of the county." Q. "Was there anything else the Houston & Great Northern was to get?" A. "No, sir." Q. "What were the citizens of Palestine and Anderson County to receive, if anything, from the Railroad Company?"

Defendant: We object to that; it is leading.

Q. "I will change it. What, if anything, was offered by Mr. Grow as the matter finally stood?"

Defendant: We object to that as leading; it assumes that something was passed around.

The Court: The objection is overruled.

Defendant: We except.

"Q. Just answer the question, Mr. Wright? A. Well, the first proposition was they were to bring the railroad to connect with the International Railroad and to permanently locate their shops, round houses and general offices. Q. Where? A. Palestine, Texas. Q. Now, I believe you had already stated that Judge Reagan promised to give them an answer the next morning? A. Yes, sir; the answer was to be given at my livery stable. Q. State now, of your own personal knowledge, if they met there the next morning, and just what took place between them? A. Well, I think, about seven o'clock in the morning Judge Reagan told them that he had seen the citizens of Palestine that he wanted to see, and that they would accept this proposition; they would accept the proposition. Q. What proposition? A. The One Hundred and Fifty Thousand Dollars in bonds and Judge Reagan to canvass the county. Q. What, if anything, was said at your stable that morning with reference and in regard to a canvass of the county? A. Judge Reagan agreed to canvass the county at their request, and he said he would go at it immediately; which he did."

The witness stated that he then took Mr. Grow and Mr. Noble in a hack down towards the terminus of the railroad; that is, of the H. & G. N., then building north, only a part of the way, meeting another party, who had come to meet them; and when he met such party he, the witness, came back to Palestine, having turned Messrs. Grow and Noble over to such other party.

The witness was next asked to state whether or not Judge Reagan made a canvass of the county in support of the bond issue. All of this matter was objected to, and included in Bill of Exceptions No. 12, being the last bill mentioned above, but an additional objection was made that such matter was hearsay; to which objection

the plaintiffs replied that they did not propose to show any declarations made by Judge Reagan, but that he made a canvass for the bond issue; whereupon the court overruled the objection, and the defendants excepted and took their Bill of Exceptions No. 13, and over the objection, the witness testified that he was with Judge Reagan at several of his appointments; that Judge Reagan did make a canvass of the county in support of the bond issue; that he heard him make speeches at Elkhart, in the southeastern part of Anderson County, and at Washington Mills, ten or eleven miles from Palestine towards the southeast, and at Ezell-Suggs and Posey's Mills, which is located almost due east from Palestine about twelve miles; at Kickapoo, in the northeastern part of the county, and at Fosterville, and he afterwards heard him speak at Palestine. At Palestine, Judge Reagan introduced Mr. Grow, when the latter spoke, and he made a speech at the Court House before Mr. Grow came. In introducing Mr. Grow at the Court House, Judge Reagan made a little speech of introduction. This, the witness thought, was about two days before the election, which was on the three first days of May, all the voters coming to Palestine and voting there, as shown by the record.

The plaintiffs then said that they now proposed to show by Wright what Grow said in that speech, whereupon the defendant objected to any attempt to prove such speech of Grow's and opposed thereto all of its objections set out in Bill of Exceptions 12, above, which were then referred to, and stated to the court and further objected: (1) that a contract agreement can not be made by campaign speeches; that campaign and electioneering promises and statements were inadmissible in order to show what the contract was, or to add to, modify, or change the same. (2) That the testimony was hearsay. (3) That it is not introducable after this immense lapse of time. (4) That if admitted in evidence, it is a statement which would not bind the defendant, which had purchased the property under foreclosure mortgage of 1881, as shown

by the evidence. (5) That it was not shown that Grow had any authority to make such contract or agreement, if any there was. (6) That the admissions of Grow, if any, as an agent were not now provable.

Plaintiffs' counsel then stated to the court that the testimony was offered for the purpose of showing the statements and declarations then made by Grow, only with reference to the contract alleged to have been made between him and Reagan, and the court then overruled all of the defendant's objections; whereupon the defendant excepted to the ruling of the court, and thereupon, at the request of the plaintiffs' counsel, the court stated to the jury that the testimony with regard to what Grow may have said in a speech in front of the Court House in Palestine, about two days before the election, was only admitted to be considered by the jury in determining whether there was a contract between the citizens of Palestine and the railroad company, as alleged by plaintiffs, and not with Anderson County, and that they should not consider it for any other purpose. Whereupon the defendant renewed each and all of their objections, which the court again overruled, and the defendant excepted and took its Bill No. 14, and over these objections and exceptions the witness testified that Mrs. Reagan, as well as Noble, were present at Judge Reagan's house on the occasion he had testified to. It was then understood that the road was to be built into Palestine within a year, and that Grow made his speech on the occasion inquired about in front of the Court House, and said: "I am Galusha A. Grow, and I am President of the Great Northern Railroad Company, and I understand that there are some persons who doubt the authority that I have given Judge Reagan to state before the voters, upon the proposition of the issuance of the bonds or the voting of the bonds, and I want to tell you myself just what we propose to do and what we agreed with Judge Reagan we would do." "And then he went on to say that they would bring the road there, the shops, general offices, round houses and

general shops there, and went on to state the great benefit to be derived by bringing them there."

"Q. Just name some of the benefits he stated would come to Palestine and Anderson County from the shops and offices? A. I remember very distinctly that he said that within five years it would increase the population five thousand at least; he stated they would bring mechanics there and some skilled men, and it would make a market there for everything we had to sell; for none of his men would be producers, but all would be consumers, and that all produce and things we had to sell would find a ready market there. Q. What, if anything, was said in that speech of Mr. Grow with reference to the time of the location and maintenance of those shops and offices at Palestine? A. He stated they would have them within a year. Q. And how long after being put there did he say they would remain there, if anything? A. He said they would be continued to remain there all of the time."

"He said the railroad company itself would pay most of the taxes, because it would increase the value of property there, and that they would enlarge their shops from year to year, and that their force would be increased from time to time, and that every year they would be paying more taxes, and also that long after the bonds had been paid they would be paying into the treasury more than the amount of the bonds themselves, and that the road was to be completed during that year. It is a matter of fact that during the fall of that year they commenced to run cars into Palestine."

This is the only time witness said he ever heard Mr. Grow make a speech. There was a large audience to which he spoke. Judge Reagan, in his speeches, had large crowds at some places. At Kickapoo and Fosterville he had large crowds, and he had a joint debate at the latter place with a justice of the peace. The witness testified that the next time he saw Mr. Grow he thought it was in July, but he knew it was when he came to see about getting the bonds issued, and that it was at the

time when the County Court ordered the bonds issued. Witness was boarding at the Hunter Hotel, and Mr. Grow stopped there. Witness said that Mr. Grow asked him to go with him over to the County Court, as he was about the only one there whom Mr. Grow knew, and that he thinks it was about ten o'clock when Mr. Grow came to his stable, and he went with him over to the Commissioners' Court, and thinks that he introduced him to members of the Court. His stable was about 100 yards from the Court House. The witness was next asked to state what took place between Grow and the Court, and what Grow told the Court, when he presented the paper to the Court, being Grow's application for the bonds, already in evidence as a part of the record of the bond issue, introduced by the plaintiffs. To all of which the defendant objected, opposing all their objections contained in Bill of Exceptions No. 12, and also the additional objection that the obligations between the County and the railroad company were already fixed, the election having been held and the railroad having built in, and were not subject to modification, and that there would be no considerations either way for any additional contracts for these bonds, and further objected that the record introduced by the plaintiffs showed the judgment of the County Court declaring that the railroad had already performed its obligations, and that such judgment could not now be impeached; which objections, as well as all of the other objections set out in Bill of Exception No. 12, and again stated to the court, were by the court overruled, and the objections were applied to all of the plaintiffs' testimony as to what occurred or was said before the County Court by anyone in this action, and being so stated, understood and agreed to, the court overruled the same, and the defendant then excepted and took this its Bill No. 15, and over the same and over these objections, the witness testified. "The court was composed of one Democrat, and I believe all the rest Republicans; I guess, Republicans; we called them 'Scalliwags.'"

Shattuck, a member of the court, objected to giving Grow just what he wanted, saying that he had not complied with his contract, in reply to which, as well as the witness said he could remember, Mr. Grow had immediately responded by telling Shattuck and the court that he did not want to encumber the bonds, with all of the unnecessary process or whatever it might have been. "I don't remember the exact language he used now." "He said it was a fact that he had promised to do these things, and that he expected to comply with them, and I think he said he had already ordered the shops to be built, and that they would be at work pretty soon, and he very soon convinced the balance of the court, but never did convince Shattuck, but finally they gave him the order he asked." Being asked to repeat what Mr. Grow said to the court, the witness replied that "he said he did not want the bonds encumbered with anything unnecessary; that he had made a contract and did not deny it; that he had agreed to locate the shops, round houses and general offices at Palestine permanently, and that he did not see any sense in putting anything in the bonds which might encumber them, and further, that it might have an adverse effect on his ability to sell the bonds, and that such matters as that might so encumber the bonds that he would have a hard time to dispose of them. That is about the language he used, but, of course, not his exact language. I have stated the general substance of what he said."

Witness stated that Grow and Judge Reagan met at the latter's house between March 15th and 20th, on the occasion to which he had testified, and that, within a few days Judge Reagan commenced to canvass the county for the bond issue, and must have been out for a week or two, at least, in the canvass. The election commenced on the first day of May, and the Reagan speech was made at the Court House a week or ten days before the election. The H. & G. N. entered Palestine from the south, over the right-of-way of the International. The witness thinks it

connected with the International track at the International Depot in Palestine.

The plaintiffs then said that they proposed to prove the descriptions of properties, their sites, acreage, etc., in Palestine, for the purpose of showing that their alleged contracts were performed, and to show ratification; whereupon the defendants objected: (1) That the matters proposed to be shown were subsequent to the transactions attempted to be proved, and therefore could have no tendency to prove them; and were immaterial and irrelevant; (2) they opposed all of the objections heretofore stated by them in their Bill of Exceptions No. 12, now again stated to the court, which objections being overruled by the court, the defendant excepted and took its Bill of Exceptions No. 16, and over the objections the witness testified, as follows: He thought that the general offices, buildings, shops and grounds in the city of Palestine covered about 70 acres; that, as he now remembers, the machine shops and roundhouses were the first improvements made by the H. & G. N., and they were made in 1873; first, the blacksmith shop, then the round houses; but he did not think there were any general offices between 1872 and 1875. The witness was asked to state what additions had been made to the shops from time to time, to which the defendant opposed its objections contained in its last Bill of Exceptions No. 16, and the further objection, that additions to the shops had nothing to do with this contract and did not come within them, and had no tendency to prove the existence of the alleged contracts; which objections were overruled, and the defendant took his Bill of Exceptions No. 17, and over the same the witness testified that the shops had continually grown from year to year all along, until now they covered ten or fifteen acres in Palestine, of which he thought 7 or 8 acres were under roof; that the roundhouse is fixed to accommodate 40 or 50 engines at one time, and is assumed by the witness to now cover one

and a half acres, at least; that the coach shops, where the car department is, he assumes, would cover 2 or 3 acres, and the general blacksmith shops now cover a good deal of ground, and the paint shop now covers a good deal, and there is now a large brick store house covering a good deal of ground, and the master car shop which will cover a good deal of ground, and all those things of that sort. In addition there is now a good large building for boiler shops, then a lot of the work is done out in the open; by "the open," the witness said he meant mostly under shed, under the present law. Most of the buildings are built of brick and mortar, with metal or slate roofing, and all are first-class buildings.

The witness was asked whether or not he knew Mr. H. M. Hoxie, and stated he did know him before the I. & G. N. got to Palestine, at Hearne, and altogether he supposed about 20 years, and was as well acquainted with him as one ever gets to be with a railroad man.

The witness said he had been in the mercantile and real estate businesses; that he built the Court House of Anderson County, previous to the one now under construction, and the High School building, and that he was the principal owner and general manager of the oil mill at Palestine, and had been President of the First National Bank to be established at Palestine.

In 1875 Hoxie was Superintendent, the witness thinks, and acted as General Manager of the I. & G. N. Railroad, "he was or done everything," and in that year, 1875, he had a transaction with Hoxie, together with some other citizens of Palestine, relative to the general offices of the I. & G. N. R. R. Co. The witness was then requested to state what took place in that transaction, to state all of it, and who were present, and what was said and done, and to describe it; whereupon, the defendant objected (1) it stated all of the objections contained in its Bill of Exceptions No. 12, above, and recited each of them carefully to the court; (2) that the plaintiffs now state that Cap-

tain R. S. Hayes, then the General Manager or superior of Mr. Hoxie, of the I. & G. N. R. R., was proposed to be brought into the transaction; that this testimony, obviously, will relate to the "Rent-House" alleged contract set forth in plaintiff's petition, wherein Captain Hayes is not mentioned, and that no transaction can be based upon him, it being plead that the transaction was made with Hoxie, not with Hayes; (3) that the bonds issued by the county had been already delivered, and it was a closed transaction, and that, therefore, there could be no consideration for this alleged "Rent-House" transaction; (4) that the alleged "Rent-House" transaction was a transaction which, if it constituted a contract, which is not admitted, was required by the statute of frauds to be in writing, and cannot, therefore be proved in parol; (5) that, as alleged, no contract is stated; (6) that, as alleged, and within the terms of the allegation, there was shown no consideration to the Railroad for any contract; (7) that, as alleged, the contract was indefinite as to time, if it was a contract, which is not admitted, and therefore was, at the option of either party, to discontinue the performance, and was not further enforceable; (8) that an alleged contract binding "forever" was plead, and that no such agreement, if made, could be a contract, as no such contract could be "forever"; and all of these objections were by the court overruled, and to the ruling of the court the defendant excepted and took its Bill of Exceptions No. 18, and over such exceptions the witness testified as follows:

That J. W. Ozment told witness he had a telegram from Mr. Hoxie; that Mr. Hoxie was coming to Palestine, and to meet him in his private car at Magnolia Street crossing in Palestine, and that this was in the early part of 1875, and it must have been about May, "I guess." Ozment and several other citizens, with witness, he said, met Hoxie and found Captain Hayes with him, who, he thinks, was then still Engineer and Vice-President of the I. & G. N.

R. R. Co. At this point the witness stated that Mr. Hoxie told Mr. Ozment that he had received a letter from Mr. Galusha A. Grow, insisting on his complying with the contract he had made with Judge Reagan, to which the defendants made all of the objections contained in its Bill of Exceptions No. 12, above, reciting each of them to the Court; and also objected that the witness' statement of what Hoxie said or read from a letter would be hearsay, and also that Grow was then outside of the company, and had severed his connection with the Company; and that no ex parte statement from him could bind the company, nor could any admissions made by him at that time (he, at most, merely having been an agent); and that an agent's admissions were not, under these circumstances, receivable in evidence. Also any testimony as to this letter as a part of Wright's testimony was covered by Bill of Exceptions No. 18, already taken in relation to the objections in that bill, stated above; and that the defendant, on the objections now made, separately invoked the ruling of the court. These objections being made, plaintiff's counsel stated that notice had been given to the defendant to produce the original letter here, and defendant's counsel stated that search had been made and that if there was ever such a letter it could not be found. The notice was given about ten days before the trial. The Court then overruled all of the objections, whereupon the defendant excepted and took this its Bill of Exceptions No. 18-A, and over the objections the witness further testified that Mr. Hayes was then present, and that Mr. Hoxie said he had a letter from Mr. Galusha A. Grow, in which Mr. Grow said he had agreed with Judge Reagan to locate the general offices at Palestine, as well as the shops and roundhouses, and that he wanted it to be done, and that Mr. Hoxie said: "We want to come right now," or something like that, but, he said, "we want to know if you have any houses for our men that they could rent, or could you build such houses as are nec-

essary, and how long will it take you to do so if we come right away, as we want to come now." All this was said by Mr. Hoxie. "Q. What response was made to that inquiry as to whether or not houses could be built and completed right away if they would come? A. Well, Mr. J. W. Ozment was Secretary and General Manager of the Palestine Land & Building Company." That company was owned by different stockholders there in Palestine, and there may have been ten or twenty interested in it right there in town, I know there was some considerable number. I think I was a stockholder of it at the time. J. W. Ozment was President. Q. Go ahead, now, and state what response was made. A. Well, we told them that we could build the houses, any amount they wanted. Q. Who made that statement to him? A. Mr. Ozment made that statement to Mr. Hoxie. Q. Go ahead and state what was stated there. A. Well, Mr. Ozment wanted to know how many houses they wanted, and they began to sum up, and first they wanted one for themselves—good house for themselves—one for Mr. Evans and one for Mr. McCoy. Mr. McCoy was General Freight and Passenger Agent. Well, they summed it up, and stated about the houses as I have said, that they wanted all of those to be good houses for the heads of the departments, and the other houses need not be so expensive, and wanted the houses from three to five rooms, and all, of course, comfortable homes. I do not remember whether or not the number of the houses was stated there, but I do not think Mr. Hoxie indicated the number, just wanted whatever they required. I think he said he would have about 35 or 40 men, but the best things he wanted for the general officers and the heads of departments. Q. Well, now, what, if anything, was said further about going ahead and building those houses? A. Mr. Ozment told him he could commence building them right away, and something come up between them about the kind of houses and who would furnish them, and he said he would get the plans

and specifications such as they wanted, and Mr. Hoxie turned and asked Mr. Hayes how long it would take him to furnish them. Q. He had been engineer? A. Yes, sir, and maybe was chief engineer then. He said he could furnish the plans and specifications for those houses right away, and within a few days furnish the balance, but stated the house didn't need any plans or specifications, or that they would not need any for their house, and for them to just go ahead and build the houses for them." All this was in the daytime.

The witness was requested to state what was done by the citizens present in the private car with reference to meeting Mr. Hoxie's requirements. It was objected that there was nobody in the private car except a few men who belonged to the corporation building the houses, to wit, The Palestine Land & Building Company. Plaintiffs stated that they meant those present in the car at the time. The objection was overruled, and the witness answered: "Well, we agreed to build the houses for them." It was then objected that it had never been shown who were present in the car, of the citizens of Palestine, except Ozment and Wright, representing a private corporation, the Palestine Land & Building Company, which Wright's testimony indicated that Hoxie was dealing with, and that nobody represented the citizens of Palestine generally. These objections were overruled and exceptions taken, and the witness was asked the question, "What was done by anybody following that interview, just tell who did it, and what was done? A. The Palestine Land & Building Company, I think, built McCoy's house on Magnolia Street, on property now owned by Dr. Link, or where the Bennett boarding house is now." The witness was then asked to state what kind of house was built for McCoy by the citizens of Palestine, which was objected to by the defendant, and the witness stated that the Palestine Land & Building Company was the only concern, he thought, of that character at that time in Palestine. That the

house was built by the Palestine Land & Building Co. to suit McCoy's views. Here, with the permission of the plaintiffs, the defendant asked the witness to state who prepared the plans and specifications for the McCoy house, and he said that a Mr. Ligon did, that McCoy let Mr. Ligon have the contract. That Ligon was a builder employed by the Palestine Land & Building Company, and that McCoy supervised the building. The plaintiffs then continued. The Palestine Land & Building Company also built the house on a lot formerly owned by Judge Reeves, now covered by the Methodist Parsonage; they did not build it outright, they repaired it, at a cost of about $1500.00, and also that the same company built a good house on the lot where Mrs. Young lives now, of five or six rooms, and built 3 houses on May Street. He thinks, but does not remember, that they built any others. He thinks Mr. Ozment built two houses over in Old Town, and Whitesell and himself built two on May and Dallas Streets, but they built them for the Palestine Land & Building Company, for whom they were buying the lots and improving them; that they improved the lots because the general offices and shops were coming to Palestine to be located, and they would not all or any one of them have built them if they had not had that agreement with Hoxie. That these houses which he and Whitesell built cost $2800 to $3000, he thinks, and that the Palestine Land & Building Company also built a house where Mrs. Young's property now is, costing about $2500, and that the houses which that Company built on May Street cost, he should judge, about $1200 to $1500 apiece; that all the houses that were asked for by the I. & G. N. R. R. Co., or any of its employees, were built; that in the interview with Hoxie, Ozment told him that he would want to get about 10% on the investment in the houses, and that he thinks Hoxie or Hayes, one of them, said that would be about half as much as they were paying in Houston. McCoy occupied the McCoy house for several years. One

of the houses which he and Whitesell built was occupied by Herrick, who, he thinks, was stenographer for McCoy, and some of them were occupied by clerks and their wives in the general offices; that he never heard any objections to the houses that were built, and that the relations between the railroad company and the people of Palestine were absolutely friendly, as far as he knew.

In this connection the plaintiffs introduced a map of the City of Palestine, on which the witness pointed out that the residences which he had testified were built by the Palestine Land & Building Co., were located one on Lot 15 of Larkin & Campbell's Addition to Palestine, one on Lot 14 of Larkin & Campbell's Addition to Palestine, one on the west half of Lot 13 of Larkin & Campbell's Addition to Palestine, three on Lot 4 of Larkin & Campbell's Addition to Palestine, and that the residences built by J. W. Ozment were one on part of Block 80 of said City, and one on Lot 2 in Block 11 of said City, and that the two residences built by Wright & Whitesell were on Lot 5 of Larkin & Campbell's Addition to Palestine.

The witness says that one house was to be built for Hoxie and Hayes, as they were going to occupy the same house. Hayes was single and Hoxie was married. There was to be a separate house for Evans, but after they got through talking on the car, Ozment showed Hayes and Hoxie some land belonging to the Railroad Co., or to the Texas Land Company, allied to the Railroad Company, and they were later advised that Mrs. Hoxie had some money, and so they put up their own house, and Evans put up a house for himself, because he wanted to do it. Before the conversation with Hoxie, the general offices were located in Houston, Texas, and in about four months thereafter, the witness thinks, the general offices moved with their clerks to Palestine. "Q. And when were those houses commenced to be occupied by employes and officers of that Company? A. Just about as fast as we would get them completed they would put men in them."

The first general office building at Palestine was of wood, was about 100 feet long and 20 feet wide, with a shed on one side, on the railroad reservation, and the witness thinks that about 2 or 3 years after that, Captain Hayes built the brick building now standing, in about 1878. It is a 3-story brick, with slate roof, about 125 feet long and 40 feet wide, divided into apartments for the different railroad departments of the general offices, costing, the witness judges, about $25,000 or $30,000. In 1872 the H. & G. N. had shops at Houston, and the International had its shops at Hearne, and also its roundhouses which they abandoned in 1873, but the witness did not know when the shops of the H. & G. N. at Houston were abandoned. From 1875 up to 1911 the annual meetings of the directors and stockholders of the I. & G. N. were, as far as he knows, at Palestine, and from 1873 the I. & G. N. shops and roundhouses have been at Palestine, on the railroad reservation. In 1881 to 1889 Maxwell was Secretary of the Company at Palestine, in the general office building, and Herring, during the same period, was there as Superintendent, and Kane as Claim Agent. The removal of the General Office in 1911 was made to Houston after the sale of the properties of the I. & G. N. R. R. Co. through the Federal Court.

CROSS-EXAMINATION of Wright by the defendant:

Judge Reagan, Mr. Grow and the witness met one time in joint conference at Judge Reagan's house, and also at witness' livery stable the next day, in the morning early, and these were the only interviews he and Mr. Grow and Judge Reagan ever had together, as far as he remembered, though there might have been another. Went out to Judge Reagan's with Mr. Grow and Mr. Noble, at night, at their request, instead of next morning, as he had expected, and stayed there maybe an hour or two, and brought them back to the hotel. Judge Reagan sent him to Tyler, and he brought Messrs. Grow and Noble to Palestine. Mr. Grow paid him, that

is his impression, about $5.00 a day he charged. The night after the trip to Judge Reagan's he slept in his stable with the horses, he remembers that, he might have slept somewhere else as he slept around generally. He remembers that he drove mules to Tyler and a pair of horses out to Judge Reagan's that night; that he is sure of, he remembers the horses balked. He remembers when he got to Judge Reagan's he did not say "hello," but went up to the door and knocked. The witness was next asked to begin at the beginning, and without another question to state the entire interview at Judge Reagan's house between Reagan, Grow and Noble from the beginning to the end. He answered, "On the direct examination questions were asked me, and I answered the questions," but stated that he thought he could give the substance of it, but would not undertake to do it word for word, and proceeded: "Well, when we got in the house we found Judge Reagan and Mrs. Reagan at home, and after a few minutes Mr. Grow told Judge Reagan that he had come to make some definite arrangements or agreement with him to bring their road, in connection with the I. & G. N. or the International, at Palestine, and to permanently locate their offices—general offices—and machine shops and roundhouses at Palestine, and I think at that time Judge Reagan asked him what would be expected of the citizens of Palestine, and Mr. Grow replied, as well as I remember, that he would expect a donation of two hundred thousand dollars in bonds; and Judge Reagan replied that he thought that was too much; didn't think the people of Palestine and Anderson County would be able to vote so large an amount; that the people had just emerged from the war, and were still burdened with large taxes, and suggested that they would be willing to vote one hundred thousand dollars, and some further discussion ensued between the two, and it seemed like they were not going to agree, and Charles Noble suggested to me that he thought they might

agree on a compromise of one hundred and fifty thousand dollars, and I told him that he might suggest it to them, which he did; and Mr. Grow still insisted on the two hundred thousand dollars, and said that he thought that the citizens of Palestine and Anderson County could afford to give that much for the benefits they would get in locating the shops, roundhouses and general offices there permanently; but he finally agreed with Judge Reagan that he would accept the one hundred and fifty thousand dollars, provided Judge Reagan would canvass the county in the interest of the issuance of the bonds; Judge Reagan still insisted that one hundred thousand dollars would be as much as they could give, but he finally agreed that he would give them a final answer the next morning; that they would meet at my stable, and that he wanted to see some other citizens before he could make the proposed agreement for one hundred and fifty thousand dollars; the next morning, somewhere about seven o'clock, Judge Reagan came to town and down to my office, and in a few minutes afterwards Mr. Grow and Mr. Noble came down; and Judge Reagan told them that he had seen the parties that he wanted to see, and he was willing now to accept the proposition to vote one hundred and fifty thousand in bonds, and would canvass the county at their suggestion in support of the bonds, and told them he was ready to go at it at once. Q. Now, is that all of it? A. Well, they may have said some more, of course, but that was the substance of what was said in getting together on the proposition, and Judge Reagan agreeing to convass the county. Q. And that is all there was to it? A. That is the substance of what was said between them, yes, sir; I know Judge Reagan agreed to convass the county and use his influence to carry the election in favor of the bonds. Q. Now, is that all? A. He agreed to establish the roundhouses and general offices and machine shops there if he would canvass the county. Q. And that is all? A. Well, he went on to state the contract as he un-

derstood it, and they were to bring the office, machine shops and roundhouses there and keep them there. Q. Who stated that? A. Judge Reagan did. Q. What did he state? A. He stated that the contract was that they were to bring the road there to connect with the International and to locate the machine shops, general offices and roundhouses there, and that they would be there at all times thereafter. Q. Now, is that all? A. Well, Judge Reagan was willing to canvass the county. Q. Now, have you stated it all? A. I think about all that occurred there, yes, sir, and then Mr. Grow and Mr. Noble left."

These conversations, to which he has testified, occurred about 42 years ago, and he heard Judge Reagan mention the machine shops in that conversation, remembers that he used the expression "roundhouses," and "general offices," that the word "general" was in there; that is his recollection of it; that he knew the difference between "offices" and "general offices," for the road is operated from the general offices; that he understood them to be talking of all the officers who operated the railroad, and that they and their employes, would come to Palestine; they also said they were going to bring the road into Palestine and establish a depot. The witness did not know whether he had mentioned the part about the depot until it came up on cross-examination, did not think that he had, as his attention had not been called to it. He voted at the election; don't remember what was printed on the ballot, but thinks it was printed on it "for" or "against" the bonds; don't remember that he noticed the publication calling the election, and could not say that he did. "Q. Now, did you understand while you voted that ticket the proposition that was being submitted to the people? A. I did. Q. And you understood that you were voting on this proposition settling the question as to the I. & G. N. R. R. coming in there, and establishing all of these things there? A. I did, certainly. Q. Now, on your bal-

lot was there anything said about machine shops? A. I think not." The witness stated that he could not tell just what was on this ballot; that he supposed his ballot was "For" or "Against" the proposition; that was the natural inference. "Q. Going back again into Judge Reagan's residence at the time you were talking about these things there, now, as I understood you, you said that Mr. Grow was willing to build the road into Palestine to connect with the International Railroad there, or intersect it there, and establish the machine shops and general offices there if the County of Anderson would vote and issue to them this bond issue of $150,000? A. No, sir, not exactly that. Q. What did he say? A. He said the City of Palestine and Anderson County."

Witness did not understand that the City of Palestine was to vote the bonds, but the city and Anderson County; that the city was part of Anderson County, and the city was then making the contract, and that Judge Reagan agreed to canvass the county in the interest of the bonds. "Q. On his own account Judge Reagan was doing that? A. I suppose so, yes, sir; he was doing it at the request of Mr. Grow. My understanding was that Judge Reagan had agreed to canvass the county in the interest of the bonds, and that they would be willing to accept the $150,000 if he would make this canvass of the county." The witness thought that Mr. Grow was banking on Judge Reagan's influence as a citizen, and that Mr. Grow said to Judge Reagan about this: "If you will get out and canvass this county we can carry this bond issue," and that Judge Reagan told him he would do that, and that that was the contract up to that point. "There might have been some other connection, but that was the substance of the contract as I understood it." Did not understand that Palestine was to issue the bonds or a bond election was to be ordered for Palestine, it was the County of Anderson, the whole county, which included Palestine, and the whole county was to vote at the elec-

tion which the court had ordered. Witness did not think that he signed the petition for the election, but don't remember, nor whether he saw it published. Before Judge Reagan answered Mr. Grow that night as to the $150,000 proposition, he said that he wanted to see some other friends to find out what they thought about it. Judge Reagan did not claim to be representing any corporation, but witness understood he was representing the citizens of Palestine, or the City of Palestine, and so knows, because "we had had a meeting there."

The witness said that he understood Reagan to be representing the City of Palestine; that the proposition was before all of us, and Judge Reagan was to canvass the county in the interest of it, that is, before all of the citizens of Palestine, and Judge Reagan was to canvass the county representing the citizens of Palestine; he had been so authorized at a meeting prior to that time, and it had authorized Judge Reagan to represent them. He was asked whether that was a mass meeting of the citizens of Anderson county, and he answered: "Citizens of Palestine." He did not know that the Mayor called it; did not know whether it was called by proclamation of the Mayor; he was at the meeting. Judge Reagan did not live in the City of Palestine, but had an office there; never lived in Palestine, but two miles out; did not know whether farmers were at the meeting or not, Judge Reagan was a farmer, and was there; meeting was not kept a secret from the farmers of Anderson County; could not tell whether all of the farmers who attended that meeting lived in Palestine or not; understood the meeting was called for the purpose of getting the citizens of Palestine whoever might be there interested in the matter; did not know that the farmers outside of the city were barred from the meeting, but supposed not. Witness' understanding was the meeting was called by the citizens of Palestine. Judge Reagan did what he had been authorized to do at that meeting. He (witness) did not know

that they would have put a farmer out if he had been there; supposed they would not, and he does not wish the jury to understand that a citizen living outside of Palestine would have been put out if he had come. There were plenty of farmers living in Palestine. "Q. Do I understand you to mean that only the farmers who resided in the corporation of the town would be welcomed at that meeting, and those residing over the line would not? A. I did not understand that there was any distinction between any kind of a citizen. Q. All of the citizens of Anderson County? A. My understanding was that it was called by the City of Palestine. Q. Why do you go in so close on the citizens of Palestine, as distinguished from a mass meeting of the county, when it was a county election about to be called? A. I am just telling what I remember about it. Q. Do you not understand this case now, that the issues to be submitted to the jury, that under the issues to be submitted to them that the County of Anderson has no case as a county; do you not understand in this case that the County of Anderson, as such, is precluded and settled by the vote taken and the issue and delivery of the bonds, and that if some other contract is not put in this case that the plaintiffs have no case; do you not understand this right now? A. I am not passing on the legal part of it, I don't know. Q. Have you not so heard that unless some other contract is wedged into this case, that the plaintiffs have no case, and cannot recover? A. I don't know anything about that. Q. Have you not heard from the lawyers in the case, and from your association with them in the case, that they only have two or three points to rely on, and one is the alleged Reagan contract, and one the rental contract, and the other possibly the representations of Mr. Grow to the Commissioners' Court at the time he come after the bonds? A. I understand those two propositions. Q. And you understand that if they do not recover on one of these that they cannot recover

at all; you so understand it, don't you, Mr. Wright? A. Yes, sir, that is about the way I understand it. Q. Do you not understand furthermore that the Reagan contract falls unless on the consideration that Judge Reagan was representing Palestine as distinguished from the entire county; that they have got to show that under your testimony to make a case on the Reagan contract; do you not so understand it? A. You are asking me to pass on a legal question. Q. No, I am talking about what you understand; you are an intelligent man, and I asked you if you do not understand, under the pleading of this case, that it must be shown that Judge Reagan was representing the City of Palestine as distinguished from Anderson County? A. My opinion is, that if they prove either one they are entitled to a judgment, if you want my opinion. Q. Either one of which? A. The three. Q. Now, eliminating all other issues, and getting down to the Reagan contract alone: suppose it is the only issue, and it gets down to the point of the Reagan contract alone, do you not understand the law to be that if Judge Reagan in his negotiations with Mr. Grow, must be shown to have been representing the City of Palestine, as distinquished from Anderson County, before the plaintiffs can recover? A. I am no lawyer. Q. I understand that, but I know you are an intelligent man, and do you not understand that to be the issue just there, that they must show that Judge Reagan was representing the City of Palestine as distinguished from Anderson County, in order to recover in this case? A. He could not represent Palestine without representing the citizens of the county." Witness said that he understood the petition in this case, had heard it read and understood the facts he was to testify to, and understands the facts concerning the Reagan contract, and understands that Judge Reagan was representing the citizens of Palestine. "Q. Now, let's get that question straight: Did you understand that he was representing the citizens of Palestine as distin-

813

guished from the citizens of the county? A. I could not say at that time that there was any special distinction made; I know he was authorized to represent them at a meeting held there in town. Q. At that time, there was no distinction made; was he the representative, then, as you understood it—now let's distinguish between the two propositions, as to whether he was representing the citizens of Palestine as such, or the entire county? A. My understanding was * * * Q. I wish you would just answer the question. A. He couldn't represent the citizens of Palestine without that far affecting the citizens of the county. Q. I wish you would answer my question, Mr. Wright, as to whether or not you then understood that there was a distinction or a difference in the capacity in which he acted, which was different in the capacity in which Fletcher Saddler acted at Slocum; that is, to make it plainer, did Judge Reagan assume the role of counsel for the City of Palestine, as distinguished from the entire citizenship of the whole county; can you say which, that is, Palestine, or Anderson County? A. I understood he was representing the citizens of Palestine. Q. And you understand that there was a difference in his attitude from the other farmers in the county, do you? A. You will have to get someone to draw your distinction. Q. Did you understand he occupied a different attitude from the attitude of Mr. Saddler? A. I guess he did. Q. What was it? A. Saddler was not called on to represent anybody except himself, and Judge Reagan was called on to represent the citizens of Palestine. Q. Was he representing them specially, do you mean? A. I could not tell you that. Q. Any more than he was the rest? A. I could not tell you; of course, he was representing the citizens of Palestine more than anybody else. Q. Why? A. I told you he was directed to do so by a meeting that was held in Palestine. Q. Was anybody barred from that meeting? A. I suppose not. Q. That was a county mass meeting? A. I think it

was called in town. Q. The meeting was called in the court house? A. Yes, sir. Q. That is a county court house? A. Yes, sir. Q. That is where the usual meetings, you think, in town, were held? A. I don't know about all of them; they might be held out in the street or the court house. Q. Just because a meeting is called at the county site, you understand it to be a town meeting, is that right? A. I understood that was a town meeting." Witness said he was representing the citizens of Palestine in the transactions with Mr. Grow. He was asked whether or not when Reagan was talking to Grow at his residence, he, the witness, understood that the county as a body would forever be bound and limited to the contents of the written record. In answer he said he didn't know that he thought anything about it. "Q. Did you then understand that the citizens of Palestine, or the City of Palestine, was making a contract on the side? A. I don't know whether it was on the side or the end. Q. Did you understand that there was a secret combination in the City of Palestine and by the citizens of Palestine by means of which they intended to work Judge Reagan in front to vote this bond issue on Anderson County, and the farmers of Anderson County, for the special benefit of the town of Palestine; did you so understand it? A. We did not have to work Judge Reagan in front; he was already in front. Q. I understand that, but that was not confined to the town of Palestine? A. No, sir. Q. He was always for the greatest good for the greatest number? A. Yes, sir. Q. Did you understand, however, that there was a secret clique in the town of Palestine, and that there was on record there a secret combination against Anderson County by which they intended to work the people of the county into voting these bonds in the sum of $150,000. A. No, sir, I don't know that; I don't know that anybody ever accused Judge Reagan of belonging to a clique. Q. I am asking you about the town clique; did you understand that the

town of Palestine as such was operating to work the bond issue off on Anderson County? A. No, sir, there was no clique. Q. And you didn't so understand? A. No, sir, everything was open and above board. Q. Did you understand that the proposition was for the benefit of every man in Anderson County equally? A. Yes, sir. Q. And everybody was interested accordingly? A. Anything that was done for the City of Palestine everybody in the county has got an interest in it. Q. After these 42 years, with your various active business engagements, are you willing to say now that Judge Reagan, in the conversation, made the narrow distinction of representing the citizens of Palestine as distinguished from Anderson County? A. As I have stated, he was there by authority of that meeting held before, which meeting vested in him authority to represent the citizens of Palestine. Q. Was that meeting not in common, and would you say that there were no citizens of Anderson County there outside of the City of Palestine? A. I don't know; there might have been. Q. Do you make the narrow distinction before this jury that 42 years afterwards he did not say that the citizens of Anderson County, as well as the citizens of Palestine, had authorized him to go forward? A. He might have said both. Q. He might have said either? A. Yes, sir. Q. As distinguished from the other? A. Yes, sir. Q. You would not say which he said, as a matter of fact? A. He was representing the county and Palestine in making that speech. Q. He was representing everybody then? A. Yes, sir. Q. He could not represent Palestine and represent everybody, could he? A. Everybody that was interested. Q. I understand you now to say you would not say whether he said that he was representing the citizens of Palestine as such, or whether he was representing Anderson County, for the common good of all; you would not say, would you? A. My best recollection is that he was representing the citizens of Palestine. Q. You

would not say which he said to Grow? A. I have told you what I remember. Q. In that conversation with Grow, coming right down to the point, now, you would not say which he said, would you, Mr. Wright? A. My understanding was, he was representing the citizens of Palestine, or the City of Palestine. Q. I am talking about what Mr. Reagan said to Mr. Grow; did he say, "Now, Mr. Grow, I am representing Anderson County, our people," or did he say, "Mr. Grow, you had better be careful, you are about to make a contract on the side, with Palestine, and I want that clearly understood"; did he say I am representing the citizenship of Anderson County, or representing the city or citizens of Palestine, or do you know? A. Might have been representing both, I couldn't tell you that, but I know he was representing the citizens of Palestine. Q. I am trying to get down to it; you don't know which he said to Mr. Grow, do you? A. I know he said Palestine—citizens of Palestine. Q. You don't know whether he happened to say Anderson County on the side or not? A. He might have. Q. I thought you said he might have said both? A. I did. Q. And he might not have said both? A. Yes, sir. Q. And you might be mistaken about which he said? A. I know he said the citizens of Palestine. Q. Did you ever make a mistake in your whole life? A. Yes, sir, every day. Q. Might that not be a mistake on your part, as to whether or not Judge Reagan said that he was representing Palestine or Anderson County; could you not be mistaken? A. I could be, yes, sir. Q. You did not write it out? A. No, sir. Q. You did not put it down? A. No, sir. Q. And you might be mistaken? A. Yes, sir, I might be, but I don't think I am. Q. You had no special reason then to think of a separate contract between the citizens of Palestine and that railroad company; such issue has arisen here now? A. No, sir."

The witness testified that he didn't know of any law or of any reason why the citizens of Palestine should be

differentiated from the county, in 1872, when the conversation took place; that the bonds were those of Anderson County, he knew that, and that the County Court ordered and declared the election and issued the bonds; that he knew there was no city election and no city bonds; but that he understood that the citizens of Palestine were making a contract for the purpose of getting those things at Palestine; that the citizens of Palestine were paying the biggest part of the taxes. "Q. That is all? A. Yes, sir. Q. Not giving anything else? A. No, sir, not specially." That no roll was called to see whether there was any farmer there at that meeting imposing himself on the town, and that it would not have been an imposition for him to have been there. He was welcome. "Q. The meeting was called for his benefit? A. Yes, sir, I guess so, just like the rest. Q. It was an Anderson County proposition? A. The bonds were to be, yes, sir. Q. They held a mass meeting there to talk about the issues for these bonds? A. Yes, sir. Q. And whenever they held a mass meeting it was done looking to the issuance of the bonds? A. Yes, sir. Q. That was all there was to it? A. No, sir. Q. What else? A. Consideration of the location of the machine shops, roundhouses and general offices. Q. All the county was to do was to issue the bonds? A. Yes, sir. Q. Nobody got up in that meeting and said let's do something on the side? A. No, sir." Palestine was then a mere village of 1200 to 1500 people.

The witness was then taken up on his testimony as to what occurred when Grow applied for the bonds from the County Court, after the railroad built in, he having testified on direct examination that he went with Grow and was present, and to certain things he said occurred. On cross, he said that when Mr. Grow met the Court, to present his petition for the bonds, he did not know whether he had a lawyer with him or not from Houston, but thinks he did it himself; that he thought Mr.

Grow did about all of the talking. Mr. Grow read something, and asked the Court to issue the bonds, or something of that sort; he presented the paper and asked that it be approved, the witness thought. One of the Court objected, and gave his reasons why he would not vote for it, but the witness' recollection is that they passed the order, he does not base this opinion upon having been in this court and having heard the application and the protest and the order of the court and the whole matter read to the jury the other day. That the above is about all that occurred. Could not tell what Grow read to the Court, it was some kind of a paper, just knows he presented a paper, and he heard it read, he was not interested much; he thinks that Grow read the paper. "Q. Did he say anything to the court outside of what he read to the court? A. Why, I presume he did, I know he did not want the issuance of the bonds to be accompanied or burdened with anything outside of what was absolutely necessary; he said he had to place them on the market." Witness said that he did not know anything in particular that was in Grow's paper which he read; he was not particularly interested in it, but he heard him read it. "Q. How is it you remember those matters that were verbal and do not remember anything that is written; can you explain any difference in your recollection? A. Yes, sir. Well, this conversation I heard between Judge Reagan and Mr. Grow * * *." Q. I am talking about these matters that occurred at the Commissioners' Court; you told something you heard verbally, but you don't remember a thing that you heard in writing; you know we have a copy of his written report there in this record, don't you? A. I never saw it. Q. You understand now we have it? A. I do now, yes, sir." The witness said that Grow read some kind of a document, that he remembered things said verbally by Grow there, then he was presented with Grow's petition, and he was asked whether he heard it

819

read, and he said he supposed he had, he supposed that was the paper read by Mr. Grow. "Q. When you heard him read that, why did you not call his hand, or something, and say to him: 'You have not done anything of the kind'? A. I had no authority to call anybody's hand. Q. I thought you were appointed in the case? A. I did not understand I was appointed to look after that. Q. Did Shattuck call his hand? A. Yes, sir. Q. What did Shattuck say to him? A. He said he had not complied with it. Q. Tell everything that Shattuck said. A. I don't know that I could. Q. Just the very best you can. A. Said he had not complied with it; said he had not built the roundhouses and shops, and things he had promised there. Q. And what else? A. I couldn't say. Q. Roundhouses and shops and things; now what did he have to say about things? A. Whatever he had promised the people to do. Q. What did he say he had promised? Shattuck did talk to him in that way, in substance? A. Yes, sir, I think he did; I told you what I remembered he said. Q. Anyway, Shattuck called to their attention every proposition that was in the whole transaction, did he not? And call his hand on them, and said you have not done it? A. I don't think he did. Q. What did he leave out? A. I answered Mr. Greenwood that Shattuck made a protest, but I did not pay so much attention to it. Q. You have seen Shattuck's protest; or you know now in substance what it is? A. Yes, sir, in a way. Q. What did Shattuck leave out? A. My understanding is he left out the general offices. Q. But he put all the rest in? A. Yes, sir, I think so. Q. When you saw Shattuck making his protest, and leaving the general offices out, why did you not call his attention to it, and tell him he had left them out? A. I did not have any authority to do that. Q. Did you fail to do it for the want of authority? A. I don't know. Q. Why did you not send at once for Judge Reagan, and tell him right then and there that

they were about to slip one by you, that they were leaving the general offices out? A. That was none of my business. Q. Did you know he had left the general offices out then? A. No, sir. Q. Did you know what he put in there at the time? A. No, sir, I don't remember that I did, not to say remember it. Q. Well, do you remember anything about what did happen there, that is, with any degree of accuracy? A. I have told you about what I remembered, I have said that Grow come to the Court and presented some kind of a document. Q. Grow did that? A. Yes, sir, and I remember there was an objection being made to it. Q. I believe you said Saturday that Mr. Grow, when Shattuck made the howl, said: 'Just be quiet and I will put the general offices, roundhouses and machine shops here'? A. That was my understanding. Q. Then they did talk about the general offices? A. It is my impression that something was said about that, as generally whenever anybody spoke about one they generally spoke about all of them. Q. That impression of yours is mortally dim, is it not? A. It might seem so to you. Q. I am asking you from your standpoint, and not mine? A. Well, most of this I have been talking about is, of course, a little dim. Q. I meant from your viewpoint, I was not in that neighborhood then. A. I have just answered; most of it may be somewhat dim, and other things I remember distinctly. Q. All of it is more or less dim? A. Yes, sir, but some things are not very dim; if you want me, I will tell you the reason why. Q. Now, you heard the Commissioners' Court read its order (here the attorney, in connection with this question, reads the order of the Commissioners' Court attached to the Bond Record of Anderson County); now, you read or heard that order read there that I have just read over to you? A. I don't know that I did. Q. You have just heard me read this order that the court passed? A. Yes, sir. Q. Did you not hear our pleadings also, here in this case, read to the jury or the

court? A. I heard some documents read, but I never caught all of them, of course. Q. And you don't know whether you heard the court—Commissioners' Court—read its order passing these bonds or not? A. I don't remember, but I know it passed the order. Q. They overruled Shattuck in his protest? A. Yes, sir. Q. did the Commissioners' Court, then, think the railroad company had complied with its contract? A. I guess so. Q. Why did you not report to Judge Reagan that the fool Court over there was about to hand out $150,000 and leave you high and dry on the general offices?. A. I never did that. Q. Why did you not do that? A. I don't know why, I had no authority. Q. You saw they were about to do that thing, did you not? A. I don't know that I did. Q. I have understood that you said that he read this matter or document to the court, and finally convinced most of the Court, and got the order passed he was after? A. Yes, sir. Q. And you then knew that Shattuck filed or made a kick or protest? A. Yes, sir. Q. And you knew this Court overruled Shattuck's protest and let Grow have the order he was after? A. Yes, sir; after he had promised that he would do these things, and they were satisfied with it. Q. Then, they gave him the bonds if he would do these things set up in here? A. I reckon so; they seemed to be satisfied. Q. You think so? A. I don't know that that is all; it was part of what he said he would do."

There was then read to the witness the first section, numbered one, in Shattuck's protest, set out in the Transcript above, to the effect that the railroad had not established and maintained a depot as contracted for. Witness answered that he thought he, Shattuck, did read that, that he had read it himself. Then there was read to the witness the second item of Shattuck's protest, to wit, that the company had not built, or laid any foundation to build, machine shops as promised by its agents and friends, same being an inducement held out to the people

of Anderson County, and that, on account of such promise to build roundhouses and machine shops the election had been called. The witness was asked about that, but said he did not remember any particular part of Shattuck's protest, but only the whole thing in a general way. That he had heard the protest generally, but thinks that maybe Shattuck left the general offices out of his protest. Thinks Shattuck said something outside of his protest, he is sure of that. The general offices were left out of the written protest. Witness was asked why he did not go up and "nail Shattuck" right there in the Court, and say that that was not the complete contract, and he answered that he was not in the "nailing business." The third, fourth, fifth and sixth grounds as stated in Shattuck's protest were read to the witness, and he, the witness, said that his recollection was that Shattuck made his protest first verbally, and then that the writing read to him as Shattuck's protest came afterwards, but possibly that he never saw it at all, at the time Grow was before the Court. That he remembered hearing Shattuck making a verbal protest, and never heard him read it and now undertakes to say that Shattuck's protest was made verbally, and not in writing, but did not mean to say that he never saw this writing. That his interest was that of a citizen; that he was paying some attention, but not there for any particular purpose, but that when Shattuck made his protest the Court voted him right down, Shattuck being a member of it. That he remembers that something came up about a bond which the railroad was to give, and he remembers the substance of that. When asked if he understood then that the bond covered Shattuck's protest, he answered he could not remember now how he understood it then. "Q. You heard the order of the Court made requiring the bond? A. Well, I suppose I did; I heard everything that occurred there, but I only remember the substance of it." The witness was then asked to state the substance of the order of

the Court made in 1873, when the order was given for the issue of the County Bonds, requiring the railroad company to give a bond, and answered, "I couldn't tell you." Witness said he did not recollect whether that order was made to cover Shattuck's protest or not, but said he was there during the proceedings. That Grow said that to put matters about machine shops and general offices in the face of the bonds would encumber them in a way he did not think necessary. "Q. Anderson County bonds, he was talking about? A. Yes, sir. Q. You say you suppose it was all put together? A. Yes, sir. Q. Now, you don't say that this protest was all together, but in the meeting at the Court, you say it was all together? A. What they were to do was talked there and it was all together, and I understood the entire matter was discussed. Q. And your understanding was that Mr. Grow gave this bond to do and perform the things which had not been done or performed? A. I don't remember what my understanding was about it. I don't know that I had any understanding. Q. If you did, you do not now remember it? A. No, sir." Then there was read to the witness the entire order of the Commissioners' Court directing the issue of the county bonds and set out above.

There was now read to the witness the order of the County Court of Anderson County, in January, 1873, with reference to the bond to be made by the Houston & Great Northern Railroad Company, which order was as follows, now introduced in evidence:

COUNTY COURT ORDER.

January, 1873.

In regard to issuing County Bonds to the Houston and Great N. R. R. Company.

It is ordered by the Court that before the Bonds heretofore ordered to be issued to the Houston and Great Northern Rail Road Company, with *the* coupons thereto

attached, be signed by the Presiding Justice and the Clerk of this Court, the President of said Houston and Great Northern Rail Road Company be required to enter into his bond with the Seal of said Company attached thereto for the faithful maintenance of the Depot of said Road within one-half mile of the court house of Palestine, which shall be approved by the Presiding Justice, in the sum of three hundred thousand dollars.

The State of Texas,
County of Anderson.

I, C. O. Miller, Clerk County Court in and for said County and State, do hereby certify that the above and foregoing is a true and correct copy of an order passed by the County Court of said County as the same appears of record, Vol. 10, page 311, Minutes County Court Anderson County, Texas.

(SEAL)

C. O. Miller,
Clerk County Court Anderson Co., Texas.
Per Sallye Wolfe, Deputy.

The witness said that he understood that the bond was made. He was asked then why he did not get up there and then representing himself as one of the citizens of Palestine, and have the machine shops and general offices secured in that bond. He answered: "I was not there for that business; I was not an expert, and was not employed as counsel to look after those things."

It was agreed that the execution of the bond was authorized by the R'y Co. The bond was introduced by defendant, and was as follows:

The State of Texas,
County of Anderson.

KNOW ALL MEN BY THESE PRESENTS, that the Houston and Great Northern Railroad Company, a corporation under the laws and by the authority of the State of Texas, is held and firmly bound unto the County

of Anderson in the State of Texas, in the sum of three hundred thousand ($300,000) dollars lawful money of the United States, to be paid to the said County of Anderson, for the payment of which, well and truly to be made, the said Houston and Great Northern Railroad Company bind themselves and their successors firmly by these presents, sealed with their corporate seal, and signed and dated this twentieth day of February, A. D. Eighteen Hundred and seventy-three (1873).

The conditions of the above bond are such that, whereas, pursuant to a contract between the said Houston and Great Northern Railroad Company and the County of Anderson, in the State of Texas, entered into by them, the said County of Anderson and the Houston and Great Northern Railroad Company, and ratified at a regular election of the people of said County on the 1st, 2nd, 3rd and 4th days of May, A. D. 1872, the said County donated to the said Houston and Great Northern Railroad Company the sum of one hundred and fifty thousand ($150,000) dollars, in the bonds of said County—said bonds to bear interest at the rate of eight (8) per cent. per annum, and to be payable in twenty (20) years, in United States currency, the interest on which bonds and two per cent. of the principal to be paid annually on the first day of January in each year, and the first payment to be made on the first day of January, A. D. 1874.

On condition that the said Houston and Great Northern Railroad Company would build their said Houston and Great Northern Railroad of the same style and class of the portion of said road then built, from the north boundary of Houston County, Texas, to its intersection with the International Railroad at the town of Palestine, Anderson County, and build and maintain a depot of said road within one-half mile of the Court House then erected in said town of Palestine, and to commence to run their cars regularly thereto by or before the first day of July, A. D. 1873, and whereas, said Company did build said

Railroad and establish a depot prior to the 31st day of December, A. D. 1872, in accordance with said contract, and whereas, pursuant to the contract of said Anderson County, the Police Court of said County, at the January term thereof, A. D. 1873, imposed an advalorum tax of one per cent. per annum, by an order of said Court, to pay off the principal and interest of said bonds, and ordered the said bonds to be executed, signed and delivered by the Presiding Justice of said County, and attested by the County Clerk thereof, to the said Houston and Great Northern Railroad Company upon the condition that said Railroad Company enter into bond with the said County of Anderson in the sum of Three Hundred Thousand ($300,000) Dollars, for the faithful maintenance by said Railroad Company of said depot within one-half mile of the Court House aforesaid at the town of Palestine in said County of Anderson. Now (in case said County of Anderson shall pay said bonds as therein provided) the said Railroad Company shall forever faithfully and truly maintain a Railroad depot within one-half mile of the said Court House in the town of Palestine in the County of Anderson aforesaid, then the above bond to be null and void. Otherwise to be and remain in full force, virtue and effect.

GALUSHA A. GROW,
President The Houston & Great Northern Railroad Company.

ATTEST:
ROBT. AVERY,
Secretary.

The witness acknowledged that the order of the County Court did not provide for the securing of the machine shops and general offices by the bond, and said that he did not interfere when the County Court made that order, because he had not been delegated for that purpose; that he had gone down to the court with Mr. Grow and did not think it was any of his business to send for Judge

Reagan. The bond secured the depot. He knew that the machine shops were of a great deal more importance than the depot. They never did put up any depot. They occupied the International depot. Witness does not know when the bond was filed and could not tell whether the bond was made the day Shattuck filed his protest. He remembers the suit brought by Williams & Word, to which suit he was opposed, because he thought the County should pay the bonds. Word was a very distinguished lawyer, had been a member of Congress before he came to Texas. The witness does not remember when the suit was filed. He did not know much about that suit, never heard much about it nor paid any special attention to it. This suit was filed by the County of Anderson in 1874 to enjoin the payment of the bond issue to the H. & G. N. Railroad. Witness knew that Williams & Word were representing Anderson County. Here the petition and proceedings in that suit were read to the jury and introduced in evidence and to witness, the gist whereof is as follows:

The petition was filed November 14th, 1874, in the District Court of Anderson County, and styled the County of Anderson vs. H. & G. N. Railroad Company, and addressed to the Honorable M. H. Bonner, Judge. It set out that the railroad had built the road into Anderson County, "and have a principal office and depot in said county," and that "said company proposed that they would build their said road to and through the County of Anderson to the town of Palestine, in said county, by or before the first of July, 1873," provided the county would donate $150 000 in bonds, and that it "would continue their said road from the town of Palestine to the northern line of said County of Anderson within three years; provided the county would donate $50,000 more to the first company that would build a railroad to said northern line through said county." Next was set out the proceedings heard in the County Court for the election and the declaring of the election and issuing the

bonds, all of which are set out above. These proceedings were all attached to the pleading as exhibits or specifications thereof, and included the petition for the election, the order for the election, commencing the first of May, 1872, the decree on the election declaring it had been carried, the application of Galusha A. Grow, President of the Houston & Great Northern Railroad Company, for the bonds, the order of the court to issue the bonds, and Shattuck's protest, all as have been set out above. It was contended in the petition that the election had been fraudulently held, that unqualified voters had been registered and permitted to vote, and that there had been various irregularities, and further:

"Plaintiff further charges and shows that the aforesaid proposition was one and the same voted for as such, and the said company represented and pretended by their agents and friends that if the said proposition was carried, the said company would continue said road and build the same from Palestine aforesaid to the northern line of said Anderson County within three years; and it was upon the faith of that promise, the people believing and confiding in said promise, that the said proposition was voted for by those who did vote for said proposition, believing that the whole proposition would be accepted and acted upon in good faith by said company, and the said road would be extended through said Anderson County to said northern line. But the said company, instead of extending their said road from Palestine to the said northern line of said county, as they were in good faith bound to do, combined with the International Railroad Company and ran their road with and on the International Railroad, from Palestine, going out of said Anderson County in the eastern part of said county and continuing to the town of Troupe, in the County of Smith, forty-six miles east of the town of Palestine, thence running the said Houston and Great Northern Railroad northward to Tyler in Smith County and Mineola in Wood County, thus abandoning all intentions, if any they ever

had, of running and building their road to the northern boundary line of said Anderson County. Wherefore the said plaintiff charges that the said company have not complied with the terms, intention and spirit of said proposition submitted to the voters of said Anderson County, by the means and in the manner aforesaid, and that the said pretensions and promises of the said company were false and fraudulent, the voters of said county believing and confiding in said pretensions and promises, were deceived and defrauded by the failure of said company as aforesaid to run and build said road to the said northern line of said county. The said plaintiff shows that the first payment which purported to be due on said bonds, purported to be due and payable on the first day of January, 1874, and that the collector of taxes for said Anderson County, notwithstanding the utter want of legality in the issuance of said bonds, and the aforesaid fraud, with which the said registration and election was tainted, as above shown, proceeded to collect and did collect the said tax, so unlawfully by the said County Court for the year 1873 assessed, amounting to about fifteen thousand dollars, with the cost of five hundred dollars for the collection of said tax, so unlawfully assessed by the said County Court, and the said collector paid the said tax so collected to the treasurer of said State, and the said treasurer paid the same over to the said company on the first day of January, 1874, which said sum of money so illegally and unlawfully levied and collected, and so paid over to the said company as aforesaid, they, the said company, still hold and have appropriated the same to the use of themselves, and refuse to refund or return the same to the said plaintiff, although the said company well knew the fraud and imposition by which said sum was so illegally and fraudulently collected of the plaintiff, and the said company refused to refund or pay back said sum to the plaintiff, although often requested so to do, pretending that they are legally and justly entitled to the same, and also pretending and claiming that they

are entitled to the said bonds, coupons and to the taxes so illegally and fraudulently levied to meet said bonds and the interest thereon, and the plaintiff charges, that the said company, through their president and agent aforesaid, who was present, and witnessing said election, and the manner in which and the means by which, as above stated, the said election was conducted, well knew the illegality of said election and the fraudulent manner in which the same was conducted, as above stated, and that the said proposition had not been voted for, as required by law, yet the said company are urging and requiring the sheriff of said county to collect the assessment of taxes for the year 1874, for the payment of said bonds, interest thereon and coupons."

The prayer of the petition was that the H. & G. N. be cited, and that the bonds of the county for $150,000 be delivered up and cancelled and for general relief and damages. Also in this connection there was introduced further proceedings in such suit, to-wit: Citation served upon the agent of the Houston & Great Northern Railroad Company. Motion to quash this was made on the ground that the service was not complete, and did not show service on the president or secretary, nor that a copy of the citation had been left at the principal office of the Houston & Great Northern Railroad, which was set out to be in Harris County, Texas, which motion was sworn to by Evans, a citizen of Harris County, Texas. This motion to quash the plaintiff, Anderson County, by Word & Williams, answered, among other things, that the H. & G. N. had an agency or representative in Anderson County. In their answer they did not deny that the principal office and headquarters were in Harris County, at Houston, Texas. The court overruled the motion to quash on the ground that the return of the sheriff showed that citation was served on the agent of the railroad in Anderson County. The defendant, H. & G. N., then filed its sworn plea, sworn to by Evans, its secretary, dated the 25th of November, 1874, as follows: "That defend-

ant's principal office is located in the City of Houston, County of Harris and State of Texas, in the manner prescribed by law, and has been so located since its organization, and is entitled to be there sued, and that there is no principal office of said company located in Anderson County, wherefore defendant says that this court has no jurisdiction, and prays judgment." In answer to this pleading, the plaintiff set up that the railroad had offices at Elkhart, at Nechesville and at Palestine, in Anderson County, and depots and agents there, and that "said office at Palestine is the principal office of said Anderson County." A temporary writ of injunction was issued, restraining tax collection for the bonds and the railroad from selling the bonds. The H. & G. N. demurred, and subject to its demurrers, set up various special contentions. The case went off on demurrers, but defendant traversed the allegations of the plaintiff and represented that the principal inducement of the people was to have respondent road connect with the International Railroad at Palestine; by the general issue, and special plea, and denied that it had "in any particular failed to carry out in good faith any agreement, contract or mutual understanding between it and the people of said Anderson County, and avers that it has kept and fully performed in both letter and spirit every contract, agreement or mutual understanding with them, with reference to the construction of its road." This answer was sworn to by R. S. Hayes. He stated in his affidavit "that the matters and things stated in the above and foregoing answer which are stated as of my own knowledge are true, and those stated on information derived from others, I believe to be true." In a supplemental pleading the county set up that the suit was brought by the order of the County Court, composed of the Justice of the Peace, to-wit: "D. A. Calhoun, Presiding Justice, and I. H. Huen, W. L. Durden, I. M. Hughes and W. R. Anglin," all of whom were present, except Durden, when the order to bring the suit was made to May Term, 1874. Motion was made, by

the defendant, to dissolve the injunction, and by another supplemental pleading the county set up that it was not estopped by the order of May 6th, 1872, declaring the election to have been carried, that the order was not a judicial order, and that the acts of the County Court generally in directing the election and approving the same and issuing the bonds were not judicial in their character. The H. & G. N. Railroad again demurred, and the District Court hearing the demurrers sustained the same, "Because it is considered by the court that the plaintiff's original and amended petitions show no cause of action against the defendant, it is therefore adjudged that the defendant's general demurrer or exceptions to said original petitions be and the same are hereby sustained." The county then took leave to amend again, and in its amendment set up that the frauds alleged had been concealed and that the suit could not have been brought sooner than it was. The defendant railroad then again demurred, among other grounds, because the plaintiff, the county, was attacking its own acts and things done by itself, and demurred generally. Whereupon on the 28th of December, 1875, the railroad's demurrers were again sustained, and the case dismissed and the county appealed. Nowhere in these proceedings was it charged that the railroad had broken its contract by failing to place the general offices, the shops and round houses at Palestine, in Anderson County. These matters being introduced, the cross-examination of the witness Wright proceeded thereon, as follows:

The witness conceded that he knew that when this suit was filed the general offices were in Houston, but stated that he did not know what allegations were made in the petition; that he thought that the shops had been commenced in Palestine in 1873, and that the blacksmith shop and round house of the H. & G. N. were in operation in 1874 in Palestine; that he did not refer to the International, but that such shops as were in Palestine were used by both companies, and said that he did not know

whether the H. & G. N. had anything else to move, but both companies were working together, and it was his understanding that the H. & G. N. had then moved its shops from Houston, and the International had moved its shops from Hearne. He knew about the International, because he saw the shops being moved from Hearne. The witness was then taken on his testimony, as to what occurred in the interview testified to by him with Hoxie and Hayes, in his private car on the Magnolia Street crossing, in the beginning of the year 1875. He said that after they got to the car, Mr. Hoxie came right out and said what his business was; that he had a letter from Mr. Grow, stating that he wanted him to bring the general offices to Palestine; that they were as much a part of the contract as the shops were and he (Grow) had agreed with Judge Reagan and the citizens of Palestine that they would do it, and wanted to fulfill the contract. The witness said that that is the substance of Mr. Hoxie's statement about the Grow letter; that Mr. Hoxie also said that they had no houses for their men and general officers, and they would come right away if "we had any houses for his men," that if they could get houses for his men to live in, they wanted to come. Then Mr. Ozment, who was there with us and representing the Palestine Land and Building Company, asked Mr. Hoxie what kind of houses and about how many he wanted, and Mr. Hoxie enumerated several heads and said he wanted some pretty good houses and some cheaper, for the other employees; and Mr. Ozment said the Land & Building Company would undertake to build them right away. Mr. Hoxie said that three or four of the houses would have to be good houses and the others cheaper, and Mr. Ozment said that they would be ready to begin work on them right away, and asked about the plans and specifications; and Mr. Hoxie asked Capt. Hayes how long before he (Hayes) could furnish the plans and specifications for these houses and for the McCoy and possibly the Evans house, and Capt. Hayes said he could do it right away. The witness

stated that no house was built for Hoxie and Hayes, but that after they returned to Houston they got some money from Mrs. Hoxie and they built their own house. The witness was asked who else was in the car; said he did not remember, but possibly a secretary or stenographer of Hoxie, and that there were one or two others in there, the witness thought, Mr. Ligon and a man named Bush, one of the stockholders, and also Royal, a stockholder in the Palestine Land & Building Company, a corporation.

"Q. Who else, now? A. I don't remember; there were four or five.

"Q. Who did the talking on that car for that private corporation? A. Mr. Ozment did the most of it.

"Q. What was his position with that private corporation then? A. He was secretary and treasurer and manager.

"Q. Of that corporation, the Palestine Land & Building Company? A. Yes, sir.

"Q. That private corporation was organized for profit? A. Yes, sir.

"Q. Did you really incorporate? A. I think so.

"Q. The business of that corporation was building houses, and things of that sort? A. Yes, sir; and dealing generally in real estate.

"Q. It was in the real estate business? A. Yes, sir; properly speaking, it was.

"Q. And while it was incorporated, I wish to ask you how long it continued in business? A. That corporation?

"Q. Yes, sir. A. I couldn't tell you, but sometime afterwards.

"Q. Two or three years? A. Yes, sir; I think so.

"Q. Now, you mentioned Saturday a house built there by this corporation there on the corner of May and Dallas Streets, now known as the Bennett Hotel? A. No, sir, Bennett.

"Q. You say that house was built there and occupied by an employee? A. No, not an employee, but by McCoy.

"Q. He was at the head of some department, was he? A. He was general passenger and freight agent.

"Q. How long did he live at that place? A. He lived there a year or two, I think.

"Q. When did that corporation sell that place? A. I can't tell you.

"Q. It did sell it within two or three years? A. I think they did.

"Q. Do you remember who bought it? A. No, sir.

"Q. Dr. Link bought it? A. No, sir, not that; he bought it after that time sometime.

"Q. Who occupied it after McCoy? A. I couldn't tell you that.

"Q. How long did McCoy occupy it as a tenant for this private corporation? A. I don't know how long exactly.

"Q. The name of that corporation was the Palestine Land & Building Company? A. Yes, sir.

"Q. About how long did McCoy occupy that house as its tenant? A. Mr. Ozment could tell you that, I guess.

"Q. Two or three years? A. I suppose he did.

"Q. And the next residence that you mentioned—just mention it now in the same order? A. I believe next was the Reeves place.

"Q. Is that the same house that is there now? A. No, sir, that is not the one there.

"Q. Who occupied that? A. I don't know; some of the heads of the departments.

"Q. Who was it, do you remember? A. No, sir.

"Q. How long did whoever it was occupy it? A. I couldn't tell you.

"Q. Two or three years? A. I suppose so.

"Q. The corporation sold it then? A. I don't remember.

"Q. They don't own it now? A. No, sir, they finally sold it.

"Q. Do you remember when they sold it? A. No, sir.

"Q. Now, name the other one? A. Where Mrs. Young

is now, at the corner of Combination and Magnolia Streets.

"Q. Who occupied that as a tenant for this private corporation? A. Some of the general officers.

"Q. You don't remember which one? A. No, sir.

"Q. Are you sure any did? A. Yes, sir.

"Q. For two or three years? A. I think so.

"Q. The private corporation then sold it? A. Yes, sir; they finally sold all of their property.

"Q. The same course was taken as to each tenant house as you have described with reference and the same as the three tenant houses about which you have just given details about? A. Yes, sir.

"Q. All of them were occupied for two or three years as tenants for this Palestine Land & Building Company? A. Yes, sir; I think so.

"Q. And after that they were all sold out by this corporation? A. Yes, sir, within a few years.

"Q. And that corporation has disposed of all of its properties and gone out of business many years ago? A. Yes, sir.

"Q. You were a stockholder of that corporation? A. Yes, sir, part of the time.

"Q. You don't remember just when it was dissolved? A. No, sir.

"Q. You mentioned two other houses Saturday that you and Mr. Ozment built? A. Me and Mr. Whitesell.

"Q. And Mr. Ozemnt built some outside, too? A. I think so.

"Q. Both being stockholders of this company? A. Yes, sir.

"Q. And also Mr. Whitesell? A. I don't know whether he was or not.

"Q. Well, you were? A. Yes, sir, and Mr. Ozment.

"Q. You went down on May Street and built two houses there, and before you finished them up you sold them to this private corporation in which you were a stockholder? A. After they were finished.

"Q. Before they were occupied? A. Yes, sir.

"Q. You are sure about that? A. Well, really I couldn't say for sure about that.

"Q. You never rented them to anybody? A. Yes, sir, it seems to me that we did rent them to somebody; I know somebody moved into them.

"Q. Do you know whether or not that was before or after you had sold them to the corporation? A. I don't remember about that now; we had an agreement with them to build them.

"Q. With the private corporation to build the houses and sell them to them? A. Yes, sir, I think we did.

"Q. You really made a profit out of it for yourselves? A. Yes, sir."

Mr. Wright was next cross-examined on the speech that he said Mr. Grow made at the Court House just before the election of 1872. He said that Mr. Grow said that there had been some doubt expressed whether or not he had made the contracts with Reagan, representing the citizens of Palestine, to run the railroad into Palestine and build the shops, round houses and general offices there permanently; that he had authorized Judge Reagan to make that statement, and now made it himself. Mr. Wright said that he would not say that these were the exact words used by the speaker, but that was the substance. Then Mr. Grow went on to enumerate the great benefits which would come from the establishment of the shops and general offices there; that the population would increase to as many as five thousand within five years, it then being only twelve or fifteen hundred; and further, Grow said in that speech that mechanics and their families, whom he would bring to Palestine, would all be consumers; and everything for sale would find a market at Palestine. This speech was made in the presence of a large crowd; he thinks in the presence of 1500 people, on the north side of the Court House, Grow standing on the steps. The witness was asked whether or not after forty-two years he could say that Grow said in that

speech that Judge Reagan represented the people of Palestine, as distinguished from the people of Anderson County. He answered: "My recollection is he said Palestine, and he may have said Anderson County. Q. Now, what is in your mind, Mr. Wright, that causes you to think of Palestine in this matter, as distinguished from Anderson County? A. Well, the whole county and town were interested in carrying the bonds. Q. The whole county and the town? A. Yes, sir." The witness said that he did not remember that he was looking for the distinction to be made between the county and the town, but that his understanding was all the time that Judge Reagan was out in the interest of the citizens of Palestine especially, but he did not know that he was thinking of that when Grow was speaking; that all of the people were thinking about getting the general offices, round houses and machine shops and headquarters there of the railroad; that he thinks the road was then headed to Alto, and it was his understanding that a preliminary line had been run in that direction, and that the county was very much interested, as the county, in getting the road, and he understood Anderson County and Palestine had a common interest, but Palestine had a special interest, too; that he could not tell how many feet from the center of the town the special interest reached. The witness said that he had been a pretty busy man. Testing his recollection of events, he was asked whether or not he had any important business transactions with anybody in the year 1871. He said he did not know; that all of his transactions were important to him, and so in 1872, but that he could not specially name any particularly important business transaction that he had in 1872, nor in 1873, nor for about twenty years; nor could he remember the date when Governor Coke was Governor, nor when Ireland was elected Governor, but he remembered circumstances about both; that he had testified that he built the Anderson County Court House, but did not remember the year he signed the contract or the exact date, but it was about

twenty-seven or twenty-eight years ago. He remembered the amount of money he was to get in the contract, but could not remember the other elements in the contract; presumed that they were the customary ones. Witness admitted that he remembered subscribing for stock in a railroad company about two years before he testified, a proposed line from Corsicana to Palestine, and a branch to Dallas, and that his recollection was that the examiner (Mr. Morris) and Mr. Gregg prepared a contract in connection with a railroad donation to get that railroad into Palestine, and that the examiner (Mr. Morris) did the work himself; that the provisions were read over by the witness and discussed. It was then demanded of the witness that he state the important terms of that subscription contract executed about two years since. He answered: "My recollection is that we were to construct a road from Corsicana to Palestine, and a branch to Dallas; I don't remember the other exact conditions of it now." That he, witness, put up money, but did not have much faith in the building of it, but that he signed the contract, he thinks; but that he took the examiner's (Morris) and Gregg's word for it; that he had confidence in them. He was asked: "Do you or not remember that there was a special provision in that contract about the general offices and machine shops of that proposed railroad, where they would be located? A. I believe there was some sort of condition to it like that. Q. What was it? A. I don't remember it. Q. Where were these things to be? A. I don't remember that now. Q. You remember these other things about Judge Reagan and the Reagan-Grow contract? A. As I have told you, yes, sir. Q. Was there a provision in this contract of just about two years back that the machine shops, general offices and round houses of that proposed railroad were to be located at Palestine? A. I don't remember the exact conditions." The witness, in answer to the special questions as to this recent proposition, said that he remembered that the road was to start at Palestine and build toward Corsicana,

or start at Corsicana and build toward Palestine; and questioned about any provisions in that contract as to round houses, machine shops and general offices, said he did not remember exactly what it was, but that there was something said about it; and that he believed that it was his recollection now about it that there was a controversy in this regard with the officials of the proposed railroad, and that these things were to be at Palestine forever; but being asked whether or not it was not specified that in this proposed railroad of two years back it was specified that the machine shops, round houses and general offices were to be kept at Palestine only so long as the road was operated as an independent line, he said: "I think that condition was in there; I am not certain about it, though," and that he now makes these statements when his attention is called to them by the examiner. He was asked how it was that he could remember things forty-two years ago and not remember with a certainty a similar transaction two years ago, and he answered that this matter of the I. & G. N. general offices and shops had been a matter of continuous excitement, and started to say something about Judge Reagan. It was objected that he should not unload hearsay into the case, but the witness continued that he and Judge Reagan would talk about it. He was then asked whether or or not he was testifying from his independent recollections or from hearsay from Judge Reagan, and he stated, from what he recollected himself, but that he and Judge Reagan had very frequently had conversations about this matter which had refreshed his memory; that he knew as much about the transactions as Judge Reagan, and they merely talked over what had occurred. Judge Reagan is dead. He was asked to state any business transaction he had had of his own, and said if he stopped to study about it he could, and mentioned one that he remembered, a transaction with the I. &. G. N. R. R. Co. in 1885 or 1887.

On re-direct, Mr. Wright was asked by plaintiffs' coun-

sel to state what took place between the citizens in Hoxie's private car at Magnolia Street crossing in 1875, after he (Hoxie) stated that he desired certain houses to be built. The defendant objected that this matter had been gone over, but the witness answered: "We had a conference there among ourselves. It was right in the car there, and we got together and talked about what we could do, and we agreed that we could build the houses, and Mr. Ozment said he could take care of most of them and we would take care of the balance, and that is what we agreed to do, and we then authorized Mr. Ozment, who had done most of the talking theretofore, to accept the proposition from Mr. Hoxie; that we would build the houses as required by him."

22nd. Mrs. John H. Reagan was the next witnes for plaintiffs, and testified that she married Judge Reagan in 1866, and that he made Anderson County his residence about 1852, where he thenceforward resided, except when in Congress or the United States Senate, or on the Railroad Commission, or in the Confederate Cabinet; and that in March, 1872, he was residing at Fort Houston, about a mile and a half west of Palestine, Mrs. Reagan's present home. Witness stated that, of her own personal knowledge, she knew of the meeting between Judge Reagan and Mr. Galusha A. Grow, president of the H. & G. N. R. R. Co., which followed some correspondence between them, which was in turn led up to by correspondence between Judge Reagan and General Barnes, who was then president of the I. & G. N. R. R. Co., and living at Navasota, witness thinks, in Grimes County. Witness was unable to recollect the date when Mr. Grow came to Judge Reagan's residence, but it was about the middle of March, 1872, and he was accompanied by Mr. Noble and Mr. Wright, who, with the witness, were alone present at the conference. Witness was now requested to state what took place in her presence, after Mr. Wright took Mr. Grow and Mr. Noble to her residence about the middle of March, 1872, that is, with reference to any matters in-

volved in the present litigation. To all of which the defendant objected, and to any testimony on this point, making the objections set out above in Bill of Exceptions No. 12, which objections were each carefully stated to the court; the court having considered the same, overruled them, and to this action of the court the defendant excepted and took its Bill of Exceptions No. 19, and, over these objections, Mrs. Reagan testified as follows: The discussion was and the object was to try to get the road into Palestine, and Mr. Grow insisted upon a bond issue or bonus of $200,000 from Anderson County, and Judge Reagan insisted on holding them down to $100,000; and, for the first bonus, which Mr. Grow asked, in addition to having the road come to Palestine and connect with the International, he offered to establish and maintain forever the general offices and machine shops of the road at Palestine. To this offer, Judge Reagan responded, that he did not believe that the people of Anderson County could afford $200,000, it being so soon after the war; and, the people being so much impoverished, after going through reconstruction days, he did not believe the county could afford it; but Judge Reagan said he would do what he could about it, and he suggested $100,000 as a proper amount; and then they discussed a compromise, and really discussed that subject some little time, and, in that connection, Mr. Grow wanted to show the advantages to Anderson County and Palestine of having the machine shops and general offices located at Palestine. He said the distribution of such amounts of money there among the employes of the shops and general offices would be of great value, and would put up the prices of country produce and such as that; and that the people who had butter and eggs to sell would find a good market there, and that eggs that were selling three dozen for 25 cents would go up to 25 or 30 cents a dozen, and other produce would find a market in like proportion; and his object was to show the advantages in having these shops and general offices there, and he wanted Judge Reagan to

canvass the county, to try to get this bonus. Mr. Grow, as well as other people in favor of it, wanted Judge Reagan to do that, and insisted upon his canvassing the county for that bonus. Witness was asked what was Judge Reagan's final response, and what was the final result of the meeting at his residence at which the witness was present, and she said: "Why, they had not come to any conclusion, but decided to have another meeting the next morning in Palestine, at a certain hour, I can't remember which hour, but I am sure in the forenoon."

"Q. What was the next thing you knew about this affair? A. When Judge Reagan returned from Palestine the next morning and I asked him * * * "

Mr. Morris, for the defendant: "We object to that."

"Q. You need not state what he told you, but what was the next thing you knew, Mrs. Reagan, with reference to Judge Reagan getting ready to begin a canvass of the county? A. A few days after that conference, Judge Reagan began to make preparations to canvass Anderson County, and the witness' recollection was that he was canvassing the county for about ten days or a little more, in the different voting places of the county."

The witness was not cross-examined.

23rd. Jno. F. Watts was called by plaintiffs, and testified that he lives in Palestine and has lived there since 1857, with the exception of about eight months, in 1868, when he was temporarily in Waxahachie; he has been County Surveyor, County Judge, Mayor of Palestine, member of the City Council and Justice of the Peace, and is now a member of the City Commission of Palestine. He remembers the election held for the purpose of voting $150,000 in county bonds to the H. & G. N. R. R. in 1872, and was present at the public meeting at the Court House, at which Galusha A. Grow made a public address, and he heard Judge Reagan introduce Mr. Grow. He was then requested to state what Judge Reagan said and what Mr. Grow said on that occasion, to which the defendant objected, making the objections set out above in Bill of Ex-

ceptions No. 12, and again recited to the court, which objections being considered by the court, were by him overruled, whereupon the defendant took its Bill of Exceptions No. 22 to such action of the court, and, over the objections, the witness, Watts, testified as follows: That Judge Reagan presented Mr. Grow and said he was introducing the president of the H. & G. N. R. R., and that Mr. Grow would verify the several statements he had made to the people in regard to the location of the shops and offices and things of that sort, and that Mr. Grow said that it seemed that some had doubted the statements which Judge Reagan had been making in his speeches, and that the shops and offices would be located there at Palestine. And Mr. Grow told in his speech to the crowd there of the benefits that would come to them, and not only to them but to their children and children's children, for the future generations, or the generations unborn; he said one or the other.

The witness was not cross-examined.

24th. P. H. Hughes was called by plaintiffs, and testified that he resides in Palestine, in Anderson County, and is in the real estate, fire insurance and telephone business; and has lived in Palestine since 1881, and in the county forty-four years, and became of age on the 6th of March, 1871; and that he heard a speech made in Palestine prior to the election for the bonds, by Mr. Grow, speaking from the north stile steps of the Court House. He did not hear Judge Reagan introduce Mr. Grow, as he was late getting there, and Mr. Grow had just started his speech when he, the witness, came up. The witness was then requested to state what Mr. Grow said in his speech, to which the defendant opposed all the objections contained in its Bill of Exceptions No. 12, each being recited to the court, and were by the court overruled, and the defendant took its Bill of Exceptions No. 21, and excepted to the ruling of the court, and over these objections the witness testified as follows:

That Grow had just commenced speaking when he got

there with a friend by the name of Ewing, and that they stood six or seven feet away from Grow, and he went on to state his speech: "there sorter seemed to be some misunderstanding as to Judge Reagan's representations made to the people of the county, and he said he was there to make the statement and advise them that he was fully authorized to carry out any contract or agreement that Judge Reagan had made to the citizens of Anderson County, and that he would not only corroborate all of the statements made by Judge Reagan, but that he wanted also to state to the people of Palestine and Anderson County the benefits to be derived by the people from that railroad company in there, in even saving the hauling of freight from different points on the Houston & Texas Central; that it would be so heavy that they would not know in after years that they had ever paid any additional taxes. He said in that speech that the general offices, machine shops and round houses would be located at Palestine and would remain there for all time to come." Witness said that he voted for the bond issue on that inducement and the promises made by Grow: "that these benefits would come to the citizens of Palestine and Anderson County by the location of these shops, general offices and round houses there." Grow said that they would be located there permanently, all of the time to come. Mr. Grow stated in his speech that he had made an agreement with Judge Reagan that if he, Reagan, would canvass the county "that the general offices, machine shops and round houses would be located there in consideration of his services; and as to Judge Reagan, us young fellows thought anything he told us was true; anything that Judge Reagan told us was true." This bond election was the second election at which the witness had ever voted, and his recollection of Mr. Grow's speech was very distinct.

Mr. Hughes was not cross-examined.

25th. Charles Jacobs testified that he has lived at Palestine since 1871, and was living there in the spring

of 1872, then being a merchant, and knew Mr. Grow, who came to Palestine, as President of the H. & G. N. R. R. Co., and witness heard him make his speech in the spring of 1872, in front of the Court House. Judge Reagan introduced him. He was asked to state what Grow said and the substance of Grow's speech, whereupon the defendant opposed the objections contained in its Bill of Exceptions No. 12 above, which being considered by the court, were by the court all overruled, and the defendant then excepted and took its Bill of Exceptions No. 20, and over such objections the witness testified: "Well, he was talking to the people, and there were hundreds there to hear him, as they knew he was coming to make the speech before; and he stated that they had already graded from Trinity City out several miles, but that he had agreed with Judge Reagan to come to Palestine; and he told the people right then and there that he had abandoned the road that he had graded from Trinity City out several miles; that he had abandoned that and was coming to Palestine, if the people of Palestine would give him One Hundred and Fifty Thousand Dollars in bonds; and he told them that he had agreed with Judge Reagan upon that amount, and if the people voted that amount he would come to Palestine for that amount, and promised, at the same time, that he would bring there not only the road, but also the offices they had and the shops, and retain them there forever for that amount of bonds; that is what he stated then and there."

"Q. What was the size of his audience that heard that speech? A. Well, there were several hundred there."

This speech was made in the afternoon.

Cross-examined:

Witness did not know what day it was, or the date, or precisely the month. He was asked to repeat what Grow said in that speech, and he answered that he certainly would. He said Grow commenced telling the people they had graded a portion of the road from Trinity City up several miles, but that he had come to Palestine to tell

the people that he had agreed with Judge Reagan. "He said if the people of Anderson County would give him what he had agreed with Judge Reagan, $150,000 in bonds, that he would bring the road into Palestine, and also at the same time he promised that for that amount he would not only bring the road there, but would bring the offices and shops and maintain them there forever. Q. Forever? A. Yes, sir, amen."

26. Robert McClure was called by plaintiffs, and testified that he resided at Rusk, in Cherokee County, but was born two miles southwest of Palestine, at Fort Houston, and lived there until he came to Rusk in 1884 continuously; except while away in the army, and since 1884 has lived at Rusk, Jacksonville and Alto, in Cherokee County, and that in 1872 he was practicing law in Palestine in partnership with Ed. Bush, with his offices on the west side of the Square. Never spoke to Grow but once, but remembers seeing him two or three times, and heard him deliver his speech in Palestine on the last day before the election, or the day before that, or the day of the election, but he heard him speak from the court house steps on the north side of the Square, witness thinks in the afternoon. The witness was next asked to state what Grow said in that speech, to which the defendant objected, opposing the objections contained in its bill of exceptions No. 12 above recited to the court, and the court overruled these objections, and the defendant excepted and took its bill of exceptions No. 23, and over these objections the witness stated: That he believed Grow started out congratulating himself and feeling glad about the niggers being free, and about there being nobody in the United States who was not free. The witness thought of the loyal legion, and said he did not like that, and turned and walked away, and did not stay there much to hear him; and the next thing he commenced talking about the bonds and the benefits it would be to the town, and things of that sort, which he could give only in a general way,

but that Grow said it would be a benefit to the town and county, and would cause the town to grow and give a better market, that the town would grow, and the railroad would be there all of the time, and it would not be moved away. "I do not know that he used the word 'offices' or 'shops,' but the railroad would be a permanent thing there, and in all he spoke about 30 minutes on that." Witness says he thinks Grow did say something about the shops and offices. "Q. Just state anything that you remember that he said about that. A. I can't tell just exactly what he said, but it was my understanding * * * Mr. Morris, for defendant: We object to that, his understanding. Court: He can state, under the ruling of the court heretofore, what he remembers hearing Grow say. Q. Just go ahead now. A. I don't think anything was said about that at all, that is, about any contract, but the fact of the bonds being voted, and that, if it carried, what a benefit it would be to the town, bringing the railroad there, and things of that sort. He was speaking about what the benefits would be to the town and the county to have the town right there in the center, and how much benefit it would be also to the town; that it would bring a market for everything we had to sell, better market for our cotton, and things generally of that sort."

This witness was not cross-examined.

27. Plaintiff next introduced in evidence deed from John S. Kennedy and Samuel Sloan, as trustees, to the International & Great Northern Railroad Company, dated November 1st, 1879, and executed by said John S. Kennedy and Samuel Sloan, as trustees; this deed recited that Duval, as Special Master, appointed by the Circuit Court of the United States for the Western District of Texas, conveyed by three deeds to Kennedy and Sloan as trustees the property described, and that the I. & G. N. R. R. Co. had agreed to purchase the property from Kennedy and Sloan, and to issue therefor 5374 bonds of

$1,000 each, and 500 bonds of $500 each, secured by purchase money mortgage of even date, and 4474 bonds of $1,000 each, and 500 bonds of $500 each, secured by purchase money mortgage of even date, and inferior to the mortgage first above mentioned, and in consideration of $10,348,000 so secured Kennedy and Sloan, as trustees, conveyed to the I. & G. N. R. R. Co. of Texas, its successors and assigns, in fee simple absolute, all of the properties of the International Railroad Company, including all its corporate rights and privileges and franchises, including all franchises to be a corporation, and also all the properties of the H. & G. N. R. R. Co. except lands other than those necessary for right of way, depot and shop grounds, which were not conveyed; and also certain described rolling stock, and its franchises, charter powers and privileges, and also all the rights, railroads, franchises and properties of the I. & G. N. R. R. Co., and granted to them by their charters or other laws of the State of Texas. These properties and franchises were conveyed to the I. & G. N. R. R. Co. as fully as the International Railroad, the H. & G. N. R. R. Co., and the I. & G. N. R. R. Co., or any of them, were seized thereof.

28. Next the plaintiffs introduced an agreement of counsel to the effect that the stock books of the I. & G. N. R. R. Co. of 1879 show that the shareholders who owned and voted stock therein on April 7th, 1879, and on November 17, 1879, were those shown in a certain list exhibited and introduced in evidence, and that all changes in ownership of stock between said dates, as shown by said stock books, were as follows:

Stock transfers between April 7, 1879, and Nov. 17, 1879:

W. Walter Phelps to Jacob S. Wetmore, 5 shares September 26th.

W. Walter Phelps to W. R. Maxwell, 5 shares October 17th.

849

W. Walter Phelps to W. Walter Phelps, 90 shares October 17th.

Susan Spofford to W. Walter Phelps, 100 shares July 1st.

H. Blum & Co. to H. M. Hoxie, 2 shares November 14th.

P. J. Willis & Bro. to H. M. Hoxie, 48 shares November 7th.

Showing transfers of 250 shares between such dates. For the sake of brevity it is agreed that the list referred to showed 202 persons, owning an aggregate of 53,859 shares of stock, in blocks of various sizes from 1 to 3696 shares, on April 7, 1879, and showed the same identical 202 persons owning the same 53,859 shares of stock, in the same blocks, on November 17, 1879, save for the transfers above noted.

29. The plaintiffs next introduced a deed from the I. & G. N. R. R. Co., by Galusha A. Grow, President, to Hatfield, Jr., for the purpose, as stated, of showing the reservation in the deed of a large piece of ground in the City of Palestine for machine shops, etc., the date of same being September 15, 1874. To the introduction of which the defendant objected that it was immaterial and irrelevant, that it was executed for an alleged contract in 1872, and that an inspection of the instrument did not show that it was for the purpose stated, nor was it restricted to Anderson County, but reserved all places and rights of way and sites in other counties, and is a general conveyance with general reservations, which objections having been overruled by the court, the defendant excepted and took its bill of exceptions No. 29, and stated that in consideration of $1.00 and other considerations acknowledge, the land described therein was conveyed, being 41 different tracts, apparently all of them in Anderson County, and some in Palestine, and running from 640 acres down to 1 acre. It is stated, at the end of the deed, that there was excepted from the conveyance the right-of-way of the railroad company, not exceeding 200 feet in width, and the lands necessary for sidings, stations houses, section

houses, depot grounds, machine and repair shops, turntables, cattle yards, and the ground at and around stations necessary for the yards and operation of the railroad, and the ground marked "Railroad Reservation" in all cases on the maps of the towns and of the railroad company filed in the officers of the Clerks of the several counties, and also excepted town lots and parcels of land conveyed by the International, H. & G. N., or the I. & G. N. R. R. Co., prior to the date of the deed.

30. The plaintiffs next offered a reconveyance from the Texas Land Company, which deed stated that grantor was the assignee of Hatfield, Jr., to the I. & G. N. R. R. Co., dated November 8, 1880, described by field notes the land reserved in the original conveyance to Hatfield, Jr. To this deed the defendant objected that it was immaterial and irrelevant, and is the same general conveyance with reservations; which objections being overruled by the court, the defendant excepted and took its bill of exceptions No. 30, and over the same this intrument was introduced in evidence as follows: It referred to the deed to Hatfield, and stated that Hatfield had conveyed the lands acquired by him to the Texas Land Company, and this deed defines and conveys them to the I. & G. N. R. R. Co. at great length, and among the tracts reserved and defined to the I. & G. N. R. R. Co. is 87.10 acres described by field notes, being the land in the City of Palestine upon which the machine shops, roundhouse, etc., and the general office building, are situated, said 87.10 acres being part of the land marked "Railroad Reservation" on the maps afterwards introduced by plaintiffs.

31. The plaintiffs offered in evidence a map in the deed records of Anderson County, purporting to show the "Railroad Reservation," filed December 12, 1872, marked "Office of Chief Engineer and Supt. of Construction, International Railroad, Hearne, Texas, June, 1872," to the introduction of which the defendant objected as (1) being immaterial and irrelevant, and (2) that it re-

lated to acts of the International R. R. and not the H. & G. N. R. R., (3) that it was dated long after the matters alleged to have occurred in litigation, which objections were overruled and the map was introduced in evidence over the objections of the defendant, who excepted and took its bill of exception No. 31. The map is as follows:

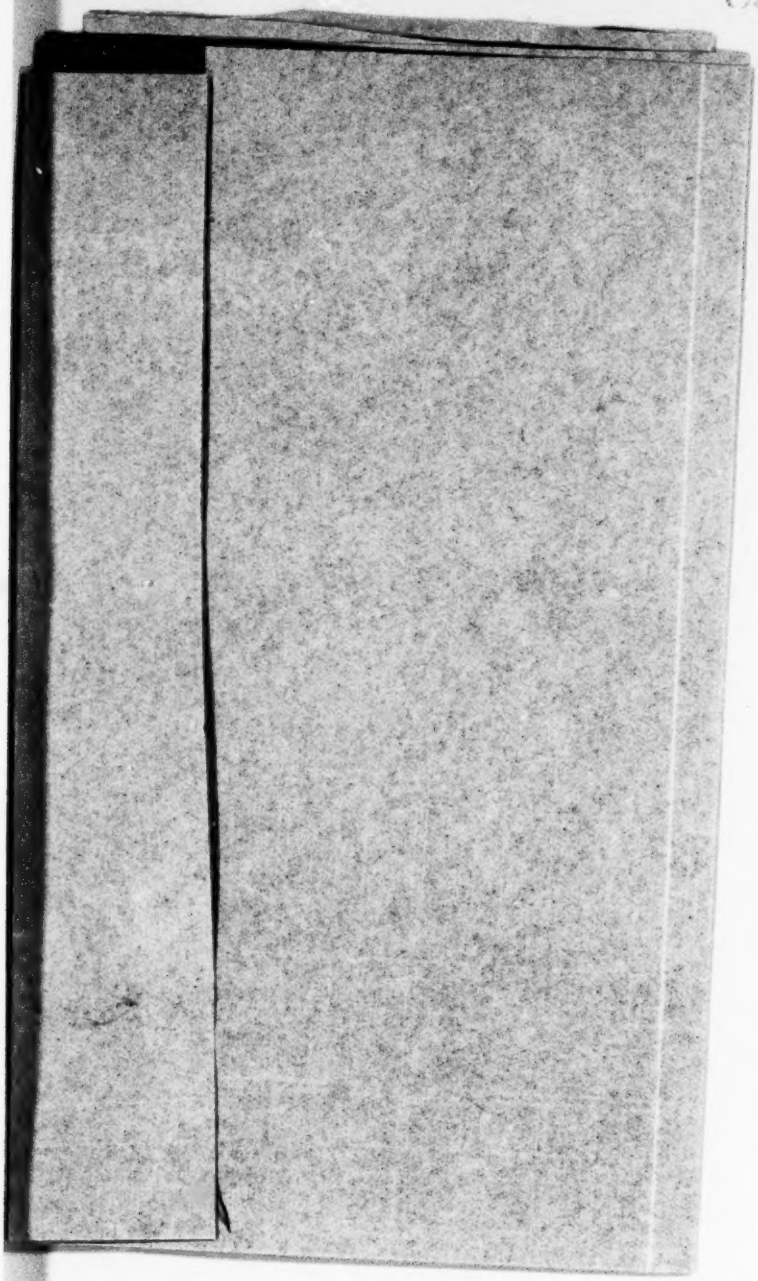
BLUEPRINT

TOO

LARGE

FOR

FILMING



32. The plaintiffs next offered in evidence a map filed in the office of the County Clerk of Anderson County on June 24th, 1875, to the introduction of which the defendant objected as: (1) immaterial and irrelevant, (2) because it was an act of the International and not of the H. & G. N. R. R., (3) that it is in evidence that the H. & G. N. R. R. moved its headquarters from Houston to Palestine at a date prior to this, and therefore that the map is immaterial, which objections were overruled, and the defendant then excepted and took its bill of exception No. 32, and over these objections the map was introduced in evidence, as follows:

33. The plaintiffs offered in evidence 4 deeds from the International R. R. Co., by J. Sandford Barnes, President, to various citizens of Palestine, referring to the map filed December 12, 1872, for description, and of date, one June 1st, 1872, two June 6, 1872, and one June 20, 1872. The defendant objected to the introduction of these instruments, (1) because immaterial and irrelevant, (2) because acts of the International R. R., and not of the H. & G. N. R. R., and that there is no contract asserted here of the International R. R., which objections being overruled by the court, the defendant excepted and took its bill No. 33, and over these objections the deeds were introduced in evidence, and are as follows: Deed from the International R. R. Co. to Swanson of Anderson County, Texas, on consideration of $680.00 gold, cash, conveying lots 7 and 15 in block 164 in Palestine, as shown on the map of the International R. R. Co.; deed from the International R. R. Co. to Fowler, Shumate and Wright, in consideration of $666.00 gold, conveying lots 2, 3 and 4 in block 164, as shown on said map. Deed from the International R. R. Co. to Murchison Coleman Larkin for $427.00 gold, conveying lot 6, block 163, shown on said map. Deed from International R. R. Co. to Julia M. Whittle, for $350.00 gold, conveying lot 9, block 163, as shown on the map.

34. Plaintiffs introduced excerpt from the answer filed by the I. & G. N. R. R. Co. in a suit by the State of Texas against it, the answer being of the 23rd of May, 1888, this excerpt being as follows: "Defendant says it is not true that it has no *bona fide* managing or controlling officer in Texas; nor is it true that it has not a general office in said State. The truth is, that it has a general office at Palestine, on its line, at a junction of the Houston & Great Northern line with the International proper, which it has always maintained, and does yet, and where the annual meetings of its stockholders and directors are now and ever have been held pursuant to notice as required by

law, and where its stockbooks and all other books of said company are constantly kept, which by law it is required to keep at said general office, and where it has also a Secretary in charge of them, who resides at Palestine, and there is always some one there who resides there, and who is authorized to settle and adjust all claims against it.

"It has also, at its said general office, a general claim agent for the adjustment and settlement of all stock and damage claims against said company. It has now, and has ever had, residing at its general office at Palestine, a Superintendent of all its lines in Texas, with full authority to act in all matters upon his own judgment, or under the advice of defendant's counsel, all of whom reside at the principal points on its line in said State, including Palestine."

Plaintiffs' counsel stated that he asked the court to limit this document to the issue raised by defendant with regard to the alleged removal of the general offices from Palestine to St. Louis from 1881 to 1888.

35. A. L. Bowers, called by plaintiffs, testified that he was mayor of Palestine, and was formerly an employe of the H. & G. N. and of the I. G &. N. R. R. Co., commencing August 1st, 1871, and had once been Superintendent of Construction. In 1871 the shops of the H. & G. N. R. R. Co. were in Houston, and of the International at Hearne, and it is a fact, within his own knowledge, that the work of dismantling the shops of the International at Hearne had begun in December, 1873; he was then at Hearne. The earliest date on which he can state, on personal knowledge, that the shops of the H. & G. N. R. R. had been discontinued at Houston was in 1874. He knows this, because he took down the H. & G. N. shops at Houston at that time, but they had been abandoned some time before. The shops of the I. & G. N. R. R. have been gradually built up and increased all the time in Palestine since 1873. The witness then described the shops at Palestine as they now exist. He described the machine shops as a

brick building about 85x240 feet, another building 32x40 or 50 feet; a brick repair shop and coach building shop, one end of it being possibly 200 feet wide, with an "L"; and the other end not more than 75 or 80 feet wide; the whole building 85x240; brick building, with slate roof, concrete floor, about 30x40; blacksmith shop about 120x120 with 40 fires in it; boiler shop between 80 and 100 feet wide and about 200 feet long; a wooden building, a round-house with 14 or 16 stalls, which is a wooden building with a cement roof; two car sheds about 40x150 or 175 each; a number of other smaller buildings; and a 2-story store room about 38x100 feet; and a bridge and building house about 28x40 feet with two additions to it now, and all about 30x80 feet; and a blacksmith shop in addition; and another repair shop about 26x100 feet; and in addition a small wooden building 20x75 feet; and the steel house recently built, besides there is an electric light plant, and artesian wells, and lakes. The general offices were moved from Houston to Palestine in 1875, and first occupied a wooden building, being a wing to the shop, and the present general office building was constructed in 1878; it is a 3-story brick building, 40x130, lower story with a concrete floor, the other stories with wooden floors, and was a first-class building when built, and is still in good condition; that there are about 24 rooms in the building, and it stands on a piece of ground of several acres. The railroad has lots of ground for building, and the general office building would be considered a good, up-to-date building now in any town, not excepting Houston and Dallas.

Mr. Bowers was not cross-examined at this point.

36. J. W. Ozment testified for the plaintiffs as follows: He lives in Palestine, and came to Texas in 1849, locating at Rusk, and in 1865 he moved to Palestine and became a merchant for a while, then built the electric light plant, organized a bank, and afterwards bought the telephone system, and is now Secretary and Manager of

the Telephone Company. Has been in the fire insurance and real estate business at Palestine for over forty years. He knew Mr. Grow when he was President of the H. & G. N. R. R. Co. Mr. Grow made a speech at Palestine in 1872 a few days before the election, in the afternoon, on the north steps of the court house; Judge Reagan introduced him. The witness was next asked to state what Reagan said, and what Grow said in those speeches, to which the defendant opposed the same objections, as set forth in its bill of exceptions No. 12, all of which objections were submitted to the court again and by the court overruled, to which action the defendant excepted, and then and there took its bill of exception No. 24, and, over the objections, Ozment testified as follows: Judge Reagan said that he and Grow had been in Congress together, and Grow had been Speaker of the House of Representatives, and made some preliminary remarks of that sort, and then talked about the building of the H. & G. N. R. R. into Palestine, and said he had made an agreement with Mr. Grow to bring the road into Palestine to connect with the International R. R., and further, that the shops, general offices, roundhouses, etc., would be located there for always, and that he had an agreement with Mr. Grow that Anderson County was to issue $150,000 of the County Bonds, bearing 8 per cent. interest. When Judge Reagan finished, Mr. Grow first replied to Judge Reagan's complimentary remarks, and made some of the same sort about Judge Reagan; and then stated that he had made an agreement "with Judge Reagan and the citizens of Palestine to establish the roundhouses, machine shops and general offices there, on condition that a bond issue of $150,000 was carried by Anderson County." "Q. You had better state the whole thing over; just repeat now what Mr. Grow said. A. Mr. Grow said he had made an agreement with Judge Reagan, for the citizens of Palestine, conditioned that if Anderson County voted the $150,000 bond issue of the Anderson County bonds,

that he would bring the H. & G. N. to Palestine to connect with the International R. R. there, and establish their roundhouses, machine shops and general offices there, and said that they would be there for all time to come; and he went on then to elaborate very greatly on the great advantage and benefit it would be to the citizens of Palestine, as well as to all of the farmers of Anderson County; and that the International road furnished no accommodations to our people anyhow, and that all of our cotton, produce, and everything of that kind, brought or shipped to market, was at the mercy of the Houston & Texas Central at Hearne, Texas." (The witness parenthetically stated, in answer to proper question, that the round houses and machine shops of the H. & G. N. R. R. were commenced at Palestine in 1873, and were constructed on the railroad ground given to the International by the citizens.) He was standing on the steps, when Mr. Grow was speaking, right behind him, and he could have held him by his coat tails. There was a good crowd present, and the space in front of the court house, on the north side, was filled with people. The witness thought that now over half of 70 acres were covered by the shops and other buildings of the I. & G. N. R. R. Co. at Palestine.

Mr. Ozment said he knew Mr. H. M. Hoxie from the time he came to Palestine until he left; that in 1875 he got a telegram from Mr. Hoxie, who was then General Superintendent of the I. & G. N. R. R.; that Hoxie wired the witness to meet him at a certain time in his private car, at the Magnolia Street crossing in Palestine, and to notify Geo. A. Wright and some of the other leading citizens of Palestine to also meet him; and he notified Mr. Wright and other leading citizens, and they met Mr. Hoxie at the Magnolia Street crossing, and went aboard his private car; that he, Mr. E. W. Bush, Mr. Wright, and he thinks 5 or 6 others, met Mr. Hoxie; Capt. Hayes was with him, who was then Vice-President and Chief Engi-

neer, or something like that. Witness was then asked to state what took place and what conversations were held in the car with Mr. Hoxie, to which question the defendant made the objections heretofore made to the testimony of Wright about this same matter, as appears in his bill of exceptions No. 18 above; which objections being considered, were by the court overruled; and the defendant then excepted and took its bill of exceptions No. 25, and over these objections, the witness testified: That Mr. Hoxie said he was very anxious to carry out the agreement and contract made with Judge Reagan, with reference to establishing general offices of the H. & G. N. R. R. in Palestine, but that the road had to have houses, and they would expect the people of Palestine to provide comfortable homes for the officers of the road, as well as all of the employes; that a little conference was held, between witness and the other citizens, and they said to Mr. Hoxie that they would be glad to proceed at once to build all the homes they needed, and Mr. Hoxie said Capt. Hayes, Dr. Smith and himself would live together, and would want a home built for their comfort; that Maj. Evans, the Secretary of the road, would want a home, and so would Mr. McCoy, the General Freight and Passenger Agent; that these would want comfortable homes, and the others would be for employes, and just 4 or 5 room houses would do, and need not cost much. Hoxie said he would furnish the plans and specifications for the homes of Hayes, Evans and McCoy, and he asked Hayes how long it would take, and he replied, not more than ten days. Witness and Mr. Hoxie went out and looked over the grounds that belonged to the people, as well as the railroad company, and afterwards, Messrs. Hoxie, Hayes and Smith concluded to build a home there on the railroad grounds, which they did themselves at their own expense, having advised witness a few days after the visit to Palestine that they and Capt. Evans had gotten up some money, and would build their own houses. The Palestine Land and Building Com-

pany, the witness being Manager thereof, built a house for Mr. McCoy, under the supervision of Mr. McCoy, which cost about $3500, and also remodeled the Reeves house at an expense of, say $1300, and the last mentioned house was occupied by some of the officers of the railroad company, and the Land and Building Company also built another house, costing $2500, occupied, he thinks, by an employe named Wells; the Palestine Land & Building Company built two more houses on May St., costing, say $1550 each, and he thinks that Wright and Whitesell built two houses costing, say about $1300 each. The houses were convenient to the general office grounds. Mr. Hoxie did not ask for any special number of houses, but said he would want comfortable houses, and we built according to that. Witness was asked whether, if there had been no agreement with Hoxie, would those houses have been built, to which question and any answer thereto the defendant objected that this was a conclusion of the witness, and that he does not know what other people would have done, which objection was overruled by the court and the defendant excepted and took its bill of exceptions No. 36, and, over the objections, the witness testified that the houses would certainly not have been built. It was in the spring of 1875 that the meeting was held with Mr. Hoxie. The general offices came to Palestine very late in the spring, about May or June. He knows they were there in August, 1875. The houses were completed and ready before the offices were moved, there was no trouble about that.

Cross-examination of Ozment:

Witness said that the Palestine Land & Building Company was in the building business at Palestine, but that he quit the Palestine Building and Land Company in 1876, and that he knew of no cases where his company ever built a house for rent outside of those railroad houses. That he never built other houses for rent. The Palestine Land & Building Company was wound up about

1880. The witness was with it from its origin to 1876; it had been in operation about a year before 1875, but there was not much going on, and was incorporated a very short time before 1875, not over two years, never did any work until they began on the Reeves house. The Palestine Land and Building Company confined its operations to building for railroad people, and before 1876 it only built for railroad people. A diffierent company was organized at Palestine, in 1880, of which Mr. Bowers was President, which built houses to rent in Palestine. Witness was then asked to state one house that this Land Company built to rent; and he said that they loaned the money to the occupants, but that the Palestine Land & Building Company did build these houses to rent to the railroad employes. The witness said he did not know whether or not the Palestine Land & Building Company ever built any rent houses except those for the Hoxie people, and that he himself never built any houses for other people individually, but had put them in good condition, by means of repairs, and then rented them. "Q. Now, did you individually build any house to rent to anybody on application? A. I told you that I furnished the money and material or hardware, etc. Court Q.: That was as a member of the company? A. Yes, sir." Witness said he was a representative of the Palestine Land & Building Company, and he had a contract with Mr. Hoxie to build these houses and the people who occupied them were to pay rent. Mr. Hoxie said he would carry out the Reagan-Grow contract if the houses were furnished. "Q. Now, Mr. Hoxie did not know that you had this Palestine Land & Building Company? A. I don't know. He did not ask anything about that. He told us that he had a letter from Mr. Grow, and Mr. Grow wanted to carry out his contract." The witness could tell things that happened not only 42 years ago, but 62 years ago. It might be, of course, that Mr. Hoxie said that Mr. Grow told him, instead of having a letter from him, but witness insisted he said he had a

letter from Mr. Grow, and the witness generally remembers things when money or property is at stake. Mr. Hoxie said that he had a letter from Mr. Grow, and that he had come to carry out the contract, provided we would build houses to take care of the officers and employees; that the persons present in that conversation with Mr. Hoxie were Messrs. Wright and Bush, Doctors Shumat and Palmer, and he thinks Mr. N. R. Royall, all are dead except Wright and himself. Shumat had stock in the Palestine Land & Building Company, didn't think Royall had, but Royall built houses and rented them out, witness does not know to whom. The witness was then taken up on Mr. Grow's speech at the Court House, which he testified was made in 1872, and was asked to repeat what Mr. Grow said; he replied that having advanced a few preliminary remarks and compliments, he said "that he had made an agreement or contract with Judge Reagan to build his road into Palestine, and establish his shops, roundhouses and general offices permanently and forever; that he had agreed to accept $150,000 of Anderson County bonds bearing 8%," and the witness thought that, in addition to that, he, Mr. Grow, seemed to have it in for the International Railroad. Mr. Grow said that his proposition through Judge Reagan to the voters of Anderson County was to have the bond issue of $150,000 and they would construct the railroad and put the machine shops, general offices and roundhouses at Palestine; but, however, he said before that, he had an agreement with Judge Reagan for the citizens or city of Palestine. "Q. Do you remember that after these 42 years that he put in there: 'with the citizens of Palestine'? A. Yes, sir, and I could tell you a great many things that happened back of that." The witness said he did not know anything about the law questions in the case when asked if he didn't know that Anderson County was precluded from a recovery in this case, and added "that is not the only contract." He was then asked: "Q. Well, now, say if this Anderson

County contract was the only contract alleged or sought to be proven in this case, then don't you so understand as I have asked you? A. I have heard that. Q. You know now, then, that if Anderson County, with its contract, were the only contract in this case, that the plaintiffs couldn't recover? A. I understand it since I have been so informed." The witness said that this had been his information for some time, but when asked whether or not he had understood that days before he answered "No, sir, I thought Anderson County was as much entitled to the benefits of these general offices and shops as anybody else was; it affected the entire county. Q. But the question is, you have understood before now that Anderson County, as such, alone, Mr. Ozment, couldn't recover in this case? A. I would like to ask you a question. COURT: Just answer his question, Mr. Ozment; it would not be proper for you to ask him any questions. Q. Never mind that, you just answer my questions; have you not understood for some months that Anderson County, as such, couldn't recover in this case? A. No, sir, not months; I hardly know how long, but possibly two years. Q. You have understood that proposition for that length of time? A. I guess I have, yes, sir. Q. Now, then, to get it absolutely straight: you have understood for about two years that Anderson County in this case, as such, couldn't recover? A. Yes, sir, I think I have. Q. And you have understood since the inception of this suit that the Reagan-Grow alleged contract has to be worked in here, with Judge Reagan representing the City of Palestine, as distinguished from Anderson County, in the negotiations with Mr. Grow, and not the county, for the plaintiffs to recover anything in this case with regard to that contract? A. Yes, sir, I have always understood that he was representing Palestine to get the benefits of the roundhouses and general offices. Q. Well, let's get back to this question; now, you have understood in this case that the plaintiffs have got to prove an additional

contract or something in the line of a contract outside of and independent as to the County contract? A. Yes, sir, I have said so. Q. Now, you also understand that one of these independent contracts as alleged by the plaintiffs is this alleged Reagan-Grow contract? A. Yes, sir, I so understand that. Q. Now, as you will remember the Reagan-Grow contract is the one in which you say Mr. Grow said in his speech that he had a contract with Judge Reagan? A. Yes, sir. Q. And, as you say, representing the city or the citizens of Palestine? A. Yes, sir. Q. That is the one you are referring to now? A. Yes, sir. Q. Now, under that point of the case and understanding that point of the case as you do, can you tell this jury after these 42 years, and not having heard that subject or that point raised until about two years ago; just explain to this jury how it is, after that length of time, and not hearing of this point until about two years ago, how it is you remember this fine legal point in there so well? Mr. Thos. B. Greenwood, for the plaintiffs: As the attorney says, if the court please, that is a legal question, and I think it would be better to ask the witness not these double questions regarding it; it is argumentative, and the like. Mr. Morris, for the defendant: I will change the form of the question if the court please."

Witness said that he heard Jacobs, McClure, Watts and Hughes and Mrs. Reagan testify in this case, at least in part, and Mrs. Reagan all through, and he thought that all except McClure testified to a differentiation, and the representation of the people of Palestine, as distinguished from the County. That Grow said in his speech that he had agreed with Judge Reagan that if Anderson County would vote $150,000 in bonds, that he would build the road into Palestine, establish a depot within a half mile of the Court House, connect with the International, and that the county was to furnish the bonds, and the people of the City of Palestine were to get the benefit of the

roundhouses, machine shops and general offices, and that all of this was in consideration of the issue of the bonds in the sum of $150,000. Ozment further said that he signed the petition to hold the election, and stating the proposition submitted to the people for the bond issue, which document was already in evidence; that he knew all about the Reagan-Grow contract when he signed that petition. Q. The petition was gotten up within 2 or 3 weeks after that? A. Yes, sir; along there somewhere. Questioned about the contents of the petition, he said it was an ordinary petition of that kind, is all I can tell you, "I never paid so overly much attention to it." He thought he read it over, then he stated that he did read it over. He was asked to state the substance of the petition; he answered, "just ordering an election, yes, sir, petitioning an election to vote the H. & G. N. R. R. Co., $150,000 in bonds, they to build a line into Palestine and connect with the International," and as to the balance, the witness said, "I don't remember the balance." "Q. Do you not remember anything else in that whole petition? A. I don't think I do. Q. You don't know the balance of that petition? A. I sign a great number of petitions that I don't know anything about." The witness was asked whether his memory was clearer on verbal statements which he had heard at the same time than a petition he signed at the time, and he answered that "these petitions are gotten up around town that way," and he was asked whether he read it, and he answered, "Yes, sir, I read hundreds of petitions of that kind, I don't know anything about." He further stated that he heard this very petition read into the evidence during this trial, the day before the day on which he is testifying, but that he did not listen to it. Witness was asked what the petition said about roundhouses, and answered, "I don't know." He was asked what it said about machine shops; he answered, "I don't know, I don't remember." He was asked what it said about general offices; he answered,

"That was not included in it, I don't suppose," and then said he did not remember. He was asked what was said about a depot, and he answered, "It was to be within a half-mile of the Court House." Witness said he was not writing up contracts himself, nor the petitions for the election, that was not his business, believed he was reputed to be a systematic man. He said the railroad never built the depot. "Q. Do you mean to say that the reason you did not include in the petition the contract about the general offices, machine shops and roundhouses was because Grow said he was willing to do something? A. Yes, sir, and Judge Reagan * * *. Mr. Morris, for defendant: I did not ask anything about Judge Reagan. A. Judge Reagan said he had an agreement with Mr. Grow to do it. Q. You understood that that petition was the contract being made, did you not? A. I did not have anything to do with the writing of the contract, and I am no lawyer." He said he knew it was important all the time to have machine shops, general offices and roundhouses at Palestine, and that he signed this petition to be voted on as a contract by the people, although those things were not in the petition, and although he had heard before he signed it that Reagan and Grow had made a contract by which the general offices, machine shops and roundhouses should be established in Palestine; and he was asked why he signed the petition with those things left out, and he answered he did it because everything was trusted to Judge Reagan, and he (witness) was not a lawyer. He said he could make a contract to buy 200 head of cattle, and if the contract specified only 30, and should be 200 head, he would not sign it, but in this case he was not representing the legal department; he knew that the petition called an election for a bond issue, that it specified the road was to build and equip a depot, and that he didn't protest because the other things were not in the petition and contract because he put his faith in Judge Reagan, and he believed that Mr. Grow's promise would be carried

out. He did not know whether or not Judge Reagan wrote the petition, he signed it. The witness was then taken to plaintiffs' amended petition, to which was appended an affidavit of his own. He said he had heard it read, but there had been so many pleadings that he did not know much about them now. Asked as to the contents of the petition on which the trial was held, he said it charged that the H. & G. N. R. R. Co. did not comply with its contract, but that he did not propose to understand all things set forth in that petition, the lawyers wrote it; the object of it was to make the I. & G. N. R. R. Co. move its offices back, under a contract specially made between Judge Reagan and Mr. Grow, and that it states a great many things; that he could not state the substance of the petition to the jury, as he could not catch it all, but he read it over in Palestine, and swore to it twice, that he made affivadit to it that it was true, and stated "usually a client will sign anything his lawyer writes up." He understood the object of the petition when he swore to it. He was asked if he knew the facts in the petition, and to answer that question "yes" or "no," and he answered, "Well, what do you want"? He said that he heard it read and signed it, and swore to it twice, like every client does in a case.

Here lawyer for the plaintiffs broke in, and stated that Ozment made affidavit only to a portion of the petition, that portion which applies to the rent contract, and objected to his answering that inquiry. The Court then sustained the objection to questioning him further on that point, but he was questioned further, and requested to state the substance of the affidavit he signed on December 19th, 1913, and answered: "Yes, sir, I suppose I was swearing to the contract between Judge Reagan and Mr. Grow, for the citizens of Palestine. I was swearing to an affidavit with regard to Judge Reagan making a contract representing the people of Palestine and Mr. Grow representing the railroad; that is my recollection about that

affidavit. I don't know the technical part of pleadings; never trust my mind with such things as that, because I am no lawyer, and I leave those things to my lawyer." Here the affidavit attached to the petition, made by Ozment, was read to him, and he was asked whether he made that affidavit, and he said he guessed the paper showed it.

The witness said he knew nothing about the $300,000 bond the H. & G. N. R. R. gave the County to secure the maintenance of the depot within a half-mile of the Court House, and supposed that the County Court and Judge Reagan were looking after things of that sort, but did not know it. He did not know whether Judge Reagan was counsel for the County or not, but supposed he was looking after those things. Coming back to Grow, he said that he understood Mr. Grow to say that he had a contract or agreement with Judge Reagan that if the people of Anderson County would vote $150,000 in bonds and deliver them to the H. & G. N. R. R. they would build into Palestine and connect with the International Railroad, and build a depot within a half-mile of the Court House, put the machine shops, roundhouses and general offices there, and keep them there. "That is exactly what Grow said." Witness remembered the suit brought by Williams & Word for Anderson County, against the H. & G. N. R. R. Co., in 1874; they were reliable men, living in Palestine. Witness said he was not familiar with the suit, and took no interest in it, because he wanted the people to live up to their contract; stated that Williams & Word were hired by some people in the north end of the county, and that he supposed the lawyers "wanted their fee in the case" of Anderson County and H. & G. N. R. R. Co. He understood that the suit was brought on a claim that the railroad had failed to build on through the county, that Mr. Grow had said in his speech that he was going to build the road on north to the Red River, and build a great north and south road, and in that regard the contract was that any railroad was to get $50,000 in

bonds which built to the north boundary of the county. The I. & G. N. road did not build north from Palestine, it went northeast to Jacksonville. When Williams & Word sued he did not think the general offices had been moved to Palestine. Word was a good lawyer.

Re-direct:

When Grow made his speech Judge Reagan's canvass had terminated. The speech was made only a few days before the election.

37. Geo. A. Wright, recalled by the plaintiffs, stated: "I think the rent houses built under the Hoxie agreement were all completed within a few months."

Re-cross:

He said that he and several persons were present when Grow applied to the County Court for the bonds, but he could not remember who they were besides the parties he had mentioned.

38. Mrs. John H. Reagan, recalled by the plaintiffs, testified that Judge Reagan died the 5th day of March, 1905.

39. Horace Word was introduced as a witness by plaintiffs, and testified that he lives in Palestine, and is the son of T. J. Word, who was a lawyer, and he is a brother of John J. Word, who was a lawyer, and of Jeff Word, Jr., also a lawyer, and was Deputy Sheriff in January, 1872, in Anderson County, and it was his duty to wait on the County Court during their sessions, and then testified that Mr. Grow appeared before the court to apply for the county bonds. He was then requested to state what was said and done there on that occasion, to which the defendant objected, opposing the objections set forth in their Bill of Exceptions No. 12, and again recited, and that the relations and obligations between the H. & G. N. R. R. and the County, and considerations to each other had all been settled, and that there would be no consideration for a new contract or new promises, and that declarations and admissions of Grow, if any, as agent,

were inadmissible after so long a time after the event; which objections were overruled, and the defendant then took its Bill of Exceptions No. 38, and, over these objections, the witness testified that Grow presented, as he remembered, his application to have the bonds issued; that there was opposition by someone, possibly Shattuck, who did not want to issue the bonds until the depot and general offices and shops were established and the road built into the city, and Mr. Grow told them he did not think it was proper to make such an objection; that it was well understood by the people what they were doing before they voted, and that the Company had promised to, and was able to, do these things. Then he insisted it should be done, and I believe he said it had reached the point where when either one, as he expressed it, had the courts open to them; I believe his expression was that the courts were open to them. "Q. Go ahead. A. And he told them there, in speaking of what had been understood and what had been done, he said that the county had pledged themselves to issue the bonds, and that he was entitled to the bonds; and he was just talking in a good natured, friendly way, and there did not seem to be much formality about it. Q. State whether any objection was made by anybody to the record of the bond issue, in the way in which it was about to be gotten up, and if so, what Mr. Grow had to say on that subject. A. Well, there was something said about it, but Mr. Grow seemed to have satisfied them about the contract or agreement, and some of them insisted on writing it into the record, and he took the position and told them he did not consider it necessary; that it would not be any more binding nor any more secure, and that it would hinder the handling of the bonds to write it in the record; that is, into the bond record, or into the bonds, I am not sure which; I believe he said to write it into the bonds, and that it would profit the county or people nothing, and that they were entitled to the issuance of the bonds. Q. What was the final re-

sult of that discussion on the part of Mr. Grow before the Court? A. They finally issued or agreed to issue the bonds."

Word, cross-examined by the defendant:

Had nothing to do with the matters he has testified to whatever, under no obligation to follow it up, merely giving his recollection after these many years, which is not as clear as he would like it to be, but thinks that Mr. Grow read some and talked some, read some kind of a document. Witness did not know that he could state the contents of such document, it may be that he had heard some of it read here at this trial, could not quote what Mr. Grow read, but his inability to do that does not make him doubtful about what occurred, thinks there is a better reason for remembering what he heard Mr. Grow say than what he heard him read. The substance of what he read was an application for the bonds. Shattuck's objection was, he did not think the bonds should be issued until the railroad company had complied with its undertakings, which were, as Shattuck protested, the depot, shops and general offices. Did not think that Grow offered to give a bond to cover the missing matters, did not remember that Grow said he would give them a bond in double the amount to cover any missing matter; did not know that he gave a bond; did not remember that the Commissioners' Court made an order that the H. & G. N. R. R. Co. should give a $300,000 bond to guarantee the performance of their contract. Asked whether or not Shattuck objected because the general offices had been promised, but not brought to Palestine, witness said that he gained his first impression about what the Railroad was going to do from that discussion before the County Court, and does not remember that he ever had any idea about the bonds except that. This was the beginning of his knowledge, he had just returned after having been away to school; had read Shattuck's protest recently, not over six months ago, he thinks. He was then asked to

state what was in Shattuck's protest, the written protest; he answered that he did not pay much attention to it, but was asked why he read it, and answered "posting myself up, to see if my recollection was good"; that he was expecting to have to testify about this very thing, and his recollection is that in that written protest Shattuck only mentioned the depot. The witness said he read the written protest in order to get his mind straight. He glanced through the written protest, but don't know that he read it all. That he tried to be a systematic man of business, and was a good clerical man; that he was trying to read those records over to satisfy himself about his recollection, at no one's suggestion; that he did not think anything was mentioned in the written record except about the depot. Here Shattuck's protest was read to the witness, and the witness said he did not believe that he had read all of the first ground of his objections, and did not believe he read the second ground of his objections. If there was anything in Shattuck's protest about fraud in the election, he don't think he read it. He also read through a portion of the bond record, and saw, but did not read, Grow's written application for the issue of bonds, nor the judgment of the County Court, but did read Shattuck's protest to see if he remembered correctly the date of the occurrence which was sometime in January, 1873, adding, "I remembered what I did remember very well, but was more interested to see if I fixed the exact date right." The date was about Jan. 29, 1873. He said that he might be mistaken about other things, but would not admit that a written memorandum at the time is better evidence than a man's memory, "that depends, as we have a lot of bob-tail records." At the time members of the court were present, but could not say who else, if anyone, was there. Could not say that Shattuck filed a written protest in open court, but remembers that Grow read his application there to the court.

The plaintiffs rested at this point.

DEFENDANT'S EVIDENCE.

The defendant introduced in evidence its exhibits attached to its pleadings A to M, inclusive, as follows:

(1) Exhibit A. The bill of the Mercantile Trust Company v. the I. & G. N. R. R. Co., and the mortgage sought to be foreclosed attached thereto, being the 3rd mortgage of the I. & G. N. R. R., and on which no decree of foreclosure has been entered as far as shown by the trial of this case, unless the judgment shown in Exhibit H constitutes such decree. Such 3rd mortgage was attached to the bill. This bill was filed on the 26th of February, 1908, in cause No. 2501, in the United States Circuit Court for the Northern District of Texas. The bill alleged that the Mercantile Trust Company was the trustee, and that a deed of trust had been made to it, dated March 1st, 1892, by the I. & G. N. R. R. Co., to secure $3,000,000 in bonds bearing 4% interest until September 1st, 1897, payable only out of the net earnings; that is, the interest was on the basis of an income bond until that date, but thereafter absolute; and that the I. & G. N. R. R. Co. had conveyed to the Mercantile Trust Company, as trustee, to secure the bonds and interest, all of its properties and those described, which it then had, or thereafter to be acquired, including its franchises and all its corporate rights, privileges and immunities then held or thereafter to be acquired, including the franchise of the corporation. It was alleged that bonds had been issued to the amount of $2,960,500, and bond script, that is, bonds for a less amount than $500,000, to the amount of $5,552.50, and that provision was made in the mortgage that in case of default in the payment of the principal or interest on any of the bonds for six months after demand for payment, it should be lawful for the trustee, the complainant, to sell the properties, or to foreclose upon the written request of the holders of a majority in value of the bonds outstanding, and that if no such request was made the trustee could proceed independently.

It was alleged in the bill that the I. & G. N. R. R. Co. was in default in interest to the amount of $494,620, and that it was insolvent, and that the mortgage pledged incomes, freights and fares. The complainant prayed for recovery against the defendant, and for foreclosure, and for an accounting and the appointment of a receiver. The 3rd mortgage introduced by the defendant as a part of said bill contains the provisions alleged in the bill. This mortgage secured a lien upon all of the properties of the railroad whatsoever owned at its date, or to be acquired thereafter, including its franchises, among which were enumerated the franchise to be a corporation, and all tolls, freights, rents, incomes and profits.

It was shown that this suit was docketed by the Ft. Worth Division of the Northern District of Texas, but on March 7th, 1908, had, by agreement, been transferred to the Dallas Division of the Northern District of Texas, United States Circuit Court.

(2) The defendant next introduced in evidence a copy of the appointment of Thomas J. Freeman as receiver in the above suit, made by the United States Circuit Judge on February 25th, 1908, and exhibited with the amended answer as Exhibit B. The receiver was directed to take charge of all the properties included in the mortgage of March 1, 1892, on which the bill was based, and operate the same under the direction of the court. The qualification of the receiver was shown to have been made February 28th, 1908.

(3) The defendant next introduced in evidence the bill of the Farmers Loan & Trust Company, complainant, vs. I. & G. N. R. R. Co., the Mercantile Trust Company, and Thomas J. Freeman, receiver of the I. & G. N. R. R. Co., and attached to this and along with this bill, a mortgage to the Farmers Loan & Trust Company executed by the I. & G. N. R. R. Co., on the 15th of June, 1881, commonly known as the 2nd Mortgage, being Exhibit "C" attached to the amended answer of the defendant. This suit was

filed in the United States Circuit Court for the Northern District of Texas on the 20th of April, 1908, and was docketed as cause No. 2514 Equity, at the Dallas Division of that court. As the bill and mortgage are relied on by the defendant, with other documents connected therewith, as constituting the case of the defendant, it is now set out:

NO. 2514 EQUITY.

CIRCUIT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF TEXAS.

THE FARMERS' LOAN AND TRUST COMPANY, Trustee,
vs. *Complainant,*
INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY, THE MERCANTILE TRUST COMPANY AND THOMAS J. FREEMAN, as Receiver of the International and Great Northern Railroad Company, *Defendants.*

BILL OF COMPLAINT.

TO THE HONORABLE THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, SITTING IN EQUITY.

The Farmers' Loan and Trust Company, a corporation duly created by and existing under the laws of the State of New York, a citizen of said State, and having its principal office and place of abode in the City of New York in said State, by leave of court first duly had and obtained, brings this its bill of complaint against the International and Great Northern Railroad Company, a corporation duly created by and existing under the laws of the State of Texas, a citizen of said State, and having its principal office and place of abode in the City of Palestine in said State; The Mercantile Trust Company, a corporation duly created and existing under the laws of the State of New York, a citizen of said State, and having its principal office and place of abode in the City of New York in said State; and Thomas J. Freeman, as Receiver of said International and Great Northern Railroad Company, a

citizen of the State of Texas, and having his place of abode in the City of Palestine in said State;

And thereupon your orator complains and says:

I. Your orator is a corporation duly organized and existing under the laws of the State of New York and a citizen and resident of said State, and as such corporation is fully authorized and empowered to hold in trust the property conveyed to it in trust, as hereinafter fully stated, and to execute the trusts reposed in it under and by virtue of the mortgage and deed of trust hereinafter described.

II. The defendant, International and Great Northern Railroad Company (hereinafter called the "Railroad Company"), is a corporation organized and existing under the laws of the State of Texas and a citizen and resident of said State; the defendant The Mercantile Trust Company is a corporation organized and existing under the laws of the State of New York and a citizen and resident of said State; and the defendant Thomas J. Freeman is a citizen of the State of Texas and a resident of said State.

III. Your orator is informed and believes, and therefore alleges, that the Railroad Company now owns, and until the latter part of the month of February, 1908, possessed and operated, a line of railroad in the State of Texas extending from the town of Longview, in the County of Gregg in said State, through said county and through the counties of Rusk, Smith, Cherokee, Anderson, Leon, Robertson, Milam, Williamson, Travis, Hays, Comal, Bexar, Medina, Frio, La Salle, Encinal and Webb to Laredo in said last-mentioned county; and from the town of Mineola in Wood County, to Troup, in Smith County, and from the City of Palestine, in Anderson County, through the counties of Houston, Trinity, Walker and Montgomery to Houston, in Harris County, and from the town of Spring, in Harris County, through the counties of Montgomery, Waller, Grimes, Brazos, Robertson, Falls, McLennan, Limestone, Hill, Navarro, Ellis and

Johnson to the City of Fort Worth, in Tarrant County, with branches and branch lines from the town of Overton to the town of Henderson, in Rusk County; from the town of Round Rock to Georgetown, in Williamson County; from the town of Phelps to the town of Huntsville, in Walker County, and from the City of Houston, in Harris County. to the town of Columbia in Brazoria County; from Navasota in Grimes County to Madisonville in Madison County; from Calvert Junction to Calvert, from Waco Junction to East Waco; also the railway and railway tracks and property appurtenant thereto, and certain tracts of land in and adjacent to the City of Houston, in Harris County, known as the Houston Belt Terminals; a total distance of about 1106 miles of completed railroad, all in the State of Texas; that all of such lines of railroad and branches (with the exception of the line from Austin to Laredo, a distance of 233 miles, the line from the town of Spring, in Harris County, to the City of Fort Worth in Tarrant County, a distance of 271.8 miles; and said branch lines of railroad from Navasota to Madisonville, a distance of 44.7 miles; from Calvert Junction to Calvert, a distance of 5.3 miles; from Waco Junction to East Waco, a distance of 1.7 miles; also the Houston Belt Terminals, 10.2 miles above mentioned), were so owned, possessed and operated by the Railroad Company on and prior to June 15, 1881, the latter named lines, branches and terminals having been since that date acquired by the said defendant.

IV. On or about the 15th day of June, 1881, and thereafter, the Railroad Company, by its officers duly authorized, and under its corporate seal, duly made and executed its bonds as hereinafter alleged to an amount of principal aggregating ten million three hundred and ninety-one thousand dollars ($10,391,000), said bonds being dated on said 15th day of June, 1881, and payable in gold coin of the United States of the then standard of weight and fineness, at the agency of the Railroad Company in the City of New York, on the first day of Sep-

tember, in the year 1909, and bearing interest payable upon presentation of coupons therefor annexed to said bonds at said agency, at the rate of six per cent. per annum from the first day of March, 1881, said interest being payable semi-annually, in like gold coin, on the first days of March and September in each year; all said bonds and coupons being severally in the form shown in the mortgage and deed of trust hereinafter referred to.

V. On or about the 27th day of January, 1892, by an agreement between the Railroad Company and (among others) the holders of all said bonds then outstanding under said mortgage and deed of trust, the interest upon said bonds was reduced to four and one-half per cent. per annum for a period of six years from and after September 1, 1891, such reduction to extend to and include the interest payable on September 1, 1897; and it was further agreed that after September 1, 1897, and until the maturity of said bonds, the same should bear interest at the rate of five per cent. per annum; provided, however, that in case of default continued for the period of ninety days in the payment of any coupons upon said bonds unmatured at the date of said agreement, the original rate of interest, namely, six per cent., should be restored, and such coupons should be collectible and enforceable at such original rate of interest. All the bonds thereafter issued under said mortgage and deed of trust by the Railroad Company bore interest in accordance with the provisions of the said agreement.

VI. On or about the 15th day of June, 1881, the Railroad Company, being thereunto by law duly authorized, duly made, executed, acknowledged and delivered to your orator, as trustee, its certain mortgage and deed of trust, dated on that day, a copy of which is annexed hereto marked Exhibit A and made a part hereof, and thereby conveyed to your orator, as trustee, and to its successor or successors in said trust forever, all and singular the lands, tenements and hereditaments of the Railroad Company then owned or thereafter to be acquired by it, in-

cluding all its railroads, tracks, rights of way, main lines, branch lines, superstructures, depots, depot-grounds, station-houses, engine-houses, car-houses, freight-houses, wood-houses, sheds, watering places, work shops, machine shops, bridges, viaducts, culverts, fences and fixtures, together with all its leases, leased or hired lands, leased or hired railroads, and all its locomotives, tenders, cars, carriages, coaches, trucks and other rolling stock, its machinery, tools, weighing scales, turn-tables, rails, wood, coal, oil, fuel, equipment, furniture and material of every name, nature and description, then held or thereafter to be acquired, together with all the corporate rights, privileges, immunities and franchises of the Railroad Company then held or thereafter to be acquired (including the franchise to be a corporation), and all the tolls, fares, freights, rents, income, issues and profits thereof, and all the reversion and reversions, remainder and remainders thereof, in trust, however, for the uses and purposes in said mortgage mentioned, excepting, however, and reserving from the lien of said mortgage, all land grants, lands, land certificates, town lots and town sites then or at any prior time owned or controlled by the Railroad Company, which were not, on the first day of November, 1879, and had never since been actually occupied and in use by the said Company and necessary to the occupation and maintenance of its lines of railroad; said property, premises, things, rights, privileges, immunities and franchises to be had and to be held unto your orator, or its successor or successors, in trust for the owners and holders of the bonds to be issued under said mortgage and deed of trust, as hereinafter set forth, and of the coupons thereto attached, and subject to the possession, control and management of the directors of the Railroad Company, its successors or assigns, so long as it or they should well and truly perform all and singular the stipulations of said bonds and the covenants of said mortgage and deed of trust. And your orator, the said trustee, then duly accepted the trust created by said mortgage and

deed of trust and united in the execution of the same to evidence such acceptance. Said mortgage and deed of trust was thereafter duly recorded in each of the counties in which was situated any part of the mortgaged property.

VII. The said mortgage and deed of trust was and is the proper act and deed of the Railroad Company, by it authorized, made and delivered in all respects in conformity with law, and the same was and is a valid conveyance for the purposes therein stated, and is now a valid and subsisting lien upon all said property therein described and upon all said lines, branches and terminals hereinabove in paragraph No. III. described, and upon the Railroad Company's franchises, railroads, tracks, rights of way, main lines, branch lines, superstructures, depots, depot grounds, station-houses, engine-houses, car-houses, freight-houses, wood-houses, sheds, watering places, work shops, machine shops, bridges, viaducts, culverts, fences and fixtures, together with all its leases, leased or hired lands, leased or hired railroads, and all its locomotives, tenders, cars, carriages, coaches, trucks and other rolling stock, its machinery, tools, weighing scales, turn-tables, rails, wood, coal, oil, fuel, equipment, furniture and material of every name, nature and description.

VIII. In and by said mortgage and deed of trust it was provided that the bonds that might be issued under said mortgage should not exceed the number and amount of bonds then issued under a then existing second mortgage executed by the Railroad Company on or about November 1, 1879, to Samuel Thorne, William Walter Phelps and John S. Barnes, trustees, and surrendered to your orator in exchange for bonds issued under said mortgage or deed of trust dated June 15, 1881, until the said second mortgage be satisfied and discharged of record, and should not exceed five thousand two hundred and eighty-four bonds for the sum of $1,000 each, and five hundred bonds for the sum of $500 each, with the addition of ten bonds for $1,000 each, for each mile of com-

pleted railroad which had been constructed or acquired by the Railroad Company since the first day of May, 1880, or which should be newly constructed or acquired by the Railroad Company, its successors or assigns, after the execution of said mortgage and deed of trust dated June 15, 1881; and that no bond should be issued for railroads to which the Railroad Company, its successors or assigns, had not a good and valid title; and that if there should be any lien or encumbrance upon railroads thereafter acquired by the Railroad Company, its successors or assigns, other than the two mortgages already executed by the said International and Great Northern Railroad Company and then outstanding, dated November 1, 1879, the issue of new bonds on account of such railroads should be withheld, to the amount of such lien or encumbrance, until the same be discharged; and further, that your orator, or its successor in the trust, might, in its discretion, accept a certificate, signed by the president and chief engineer of the Railroad Company, its successors or assigns, as conclusive evidence of the number of miles of completed railroad so newly constructed or acquired.

IX. From time to time the Railroad Company, under and in accordance with the provisions of said mortgage and deed of trust, and due corporate action having been had, under its corporate seal has made, executed and delivered, and your orator, as Trustee under said mortgage and deed of trust, in accordance with the provisions thereof and in the manner therein provided, has certified, in the form therein set forth, ten thousand, one hundred and forty-one (10,141) of said bonds hereinbefore and in said mortgage and deed of trust described, each for the sum of $1,000, and five hundred (500) of said bonds, each for the sum of $500, amounting in the aggregate to the principal sum of ten million, three hundred and ninety-one thousand dollars ($10,391,000), all of which bonds, as your orator is informed and believes, have been duly issued and negotiated for value by the Railroad Com-

pany, and are now valid outstanding obligations of the Railroad Company, entitled to the lien and security of said mortgage and deed of trust, so that on the first day of March, 1908, and for some time prior thereto, there had been issued and outstanding under said mortgage and deed of trust, and entitled to the lien and security thereof, bonds amounting in the aggregate to the principal sum of ten million, three hundred and ninety-one thousand dollars ($10,391,000), bearing coupons for the interest maturing on and after March 1, 1908.

The holders and owners of said bonds and coupons are numerous, and the names and residences of many of such holders are unknown to your orator, so that your orator cannot now state the same, and it is impossible that they should be made parties to this your orator's bill of complaint.

X. In and by said mortgage and deed of trust to your orator it was, among other things, provided that in case the Railroad Company, its successors or assigns, should fail to pay the interest on any of said bonds at any time when the same might become due and payable, according to the tenor thereof, and should continue in such default for six months after such payment had been demanded at its or their agency in the City of New York, then and thereupon the principal of all of the bonds thereby secured should be and become immediately due and payable, provided the said trustee should give written notice to the Railroad Company, its successors or assigns, of its option to that effect, while such default continued, which notice it should be bound to give, if required in writing to do so by the holders of twenty-five per centum of said bonds then outstanding; and that in such case, or upon the principal of said bonds becoming in any other way due and payable, and remaining unpaid, in whole or in part, after demand thereof, the said trustee, or its successor in the trust, might, in its discretion, and should, upon the request of the holders of fifty per centum of the bonds then outstanding, take, with or without entry or

foreclosure, actual possession of said railroad and of all and singular the property, things and effects thereby conveyed, and personally or by attorney, manage and operate the same, and receive all the tolls, rents, income and profits thereof, until such time as the said bonds and the interest thereon be fully paid or satisfied, and should apply the moneys so received by it, first, to the expenses of the trust thereby created, the management of the said railroad and its appurtenances, and the needful repairs thereof; next, to the payment of interest overdue upon the said bonds and interest upon delayed interest; and afterwards, to the payment of the principal of said bonds. And it was further therein provided that your orator, or its successor in the trust, upon becoming entitled to take possession of the railroad and property aforesaid, might, in its discretion, and should, on the written request of holders of at least one-half of the bonds then unpaid and outstanding, cause the premises so mortgaged to be sold, either as an entirety or in such parcels as it should deem necessary or proper, having due regard to the interests of all parties, to the highest bidder at public auction.

XI. In and by said mortgage and deed of trust it was, among other things, further provided that your orator should, after deducting from the proceeds of such sale the cost and expenses thereof, and of the execution of said trust, and all payments for taxes, assessments and counsel fees, and its own reasonable compensation, apply so much of the proceeds as might be necessary to the payment of the principal and interest remaining unpaid upon the said bonds and coupons, together with interest upon overdue coupons down to the time of the sale without giving preference to either principal or interest; and said mortgage and deed of trust declared that it was the intention thereof, that, so long as the railroad and its appurtenances should be managed by the trustee or a receiver as a going concern, the income should be applied to the payment of interest in preference to the principal,

but that after a sale of the railroad and its appurtenances no such preference should be made in the distribution of the proceeds.

XII. In and by said mortgage and deed of trust, it was, among other things, further provided that upon any sale of mortgaged premises, whether by the trustee or under decree of the Court, the holders of the bonds thereby secured or any of them, or the trustee on behalf of all of them, should have a right to purchase upon equal terms with other persons; and further that the amount of the bonds secured by the said mortgage or deed of trust should be receivable upon such sale as cash for the amount of cash which would be payable on such bonds out of the proceeds of such sale; and further, that in case of the purchase of the said property or any part thereof by the trustee, the same should be held for the benefit of the bondholders, in proportion to their respective interests in the bonds, and the property thus purchased should be conveyed to such person or corporation as might be designated by a majority in value of the bondholders present at a meeting of the bondholders in the city of New York, regularly called by the trustee, upon reasonable public notice published in two newspapers of that city, provided that such conveyance should be made upon such terms as would, in the judgment of the trustee, secure to each and every bondholder his just proportion of interest in the property purchased as aforesaid; and further that in no case should any claim, benefit or advantage be taken by the Railroad Company, its successors or assigns, of any valuation, appraisement, extension or relief laws to prevent such entry or sale as aforesaid, and that nothing in said mortgage and deed of trust contained should be construed as limiting the right of your orator, as trustee thereunder, to apply to the Courts for judgment or decree of foreclosure and sale under the said mortgage and deed of trust, or for the usual relief in the course of such proceedings; and further, that your orator as such trustee might, in its discretion, apply to any competent court

for relief by way of foreclosure or otherwise, if so advised by counsel.

XIII. The said mortgage and deed of trust contained provisions as to exchanging bonds issued thereunder for bonds of said prior issue secured by said mortgage of November 1st, 1879, to Samuel Thorne, William Walter Phelps and John S. Barnes, as trustees, and further provided that in the event of all the income bonds issued under the said mortgage to said Thorne, Phelps and Barnes being deposited with your orator or its successor in the trust, it would forthwith use its best diligence to procure from said Thorne, Phelps and Barnes, trustees of said mortgage, a satisfaction and discharge upon the record of said mortgage to them, and delivering to them, if necessary for that purpose, the said income bonds, duly cancelled, and taking all steps that might be necessary or proper for the purpose of procuring the complete discharge of the lien of the said mortgage to them, to the end that the mortgage to your orator might become a lien upon all the property therein mentioned, second only to a first purchase money mortgage, executed to John S. Kennedy and Samuel Sloan, trustees, and dated November 1, 1879.

XIV. In the said mortgage or deed of trust it was also, among other things, provided that your orator or its successor in the trust might take such legal advice and employ such assistance as might be necessary in its judgment for the proper discharge of its duties, and should be entitled to receive just and reasonable compensation for all duties performed by it in the discharge of its said trust, and for all of its reasonable expenses and disbursements, which compensation, it was provided, should be paid by the Railroad Company, its successors or assigns, and should also be a lien upon and payable out of the funds coming into the hands of your orator or its successor in the trust.

XV. In and by said mortgage and deed of trust it was further provided that upon the payment of the principal

and interest of all the bonds thereby secured, the estate thereby granted to your orator should be void, and the right to all the real and personal property thereby granted and conveyed should revert to and revest in the Railroad Company, its successors or assigns, in law and in equity, without any acknowledgment of satisfaction, reconveyance, surrender, re-entry or other act.

XVI. The said mortgage dated November 1st, 1879, so made as aforesaid by the Railroad Company to Samuel Thorne, William Walter Phelps and John S. Barnes, as trustees, has been duly satisfied and canceled and discharged of record, and the bonds thereby secured duly canceled, and the same no longer constitutes a lien upon any of the property covered by the said mortgage and deed of trust made to your orator as aforesaid.

XVII. The Railroad Company, as your orator is informed and believes, has failed to pay the interest, amounting to the sum of $259,775, on all the said bonds so issued and outstanding under said mortgage and deed of trust of June 15th, 1881, as aforesaid, which became due and payable on the 1st day of March, 1908, although demand for the payment of some of such interest was duly made at its agency in the City of New York, and said sum still continues in default and is now due and payable as interest upon said bonds.

XVIII. Your orator is informed and believes, and therefore alleges, that on or about the 26th day of February, 1908, in a certain cause in equity pending in this court wherein said The Mercantile Trust Company was complainant and the Railroad Company was defendant, brought for the purpose of foreclosing a so-called third mortgage alleged to have been made by the Railroad Company to The Mercantile Trust Company on or about the first day of March, 1892, such proceedings were had that an order was made by this court appointing the defendant Thomas J. Freeman, receiver of the said railroads, franchises and premises hereinbefore described, and the income thereof, subject as aforesaid to the lien of

said mortgage and deed of trust to your orator; and said defendant Freeman, by virtue and under authority of said order, has entered into and is now in possession of and operating all of said railroads and other property hereinbefore described, which are thereby in the custody of this court.

XIX. By means of the appointment of the defendant Freeman, as receiver aforesaid, already made, the defendant The Mercantile Trust Company, as Trustee under the mortgage to it, claims and asserts a lien or right upon and to the income, issues and profits of the said railroads, property and premises, superior to the lien of the said mortgage and deed of trust to your orator.

XX. Your orator is informed and believes and therefore alleges that the Railroad Company is insolvent and wholly unable to pay its debts and obligations and that the said property and premises covered by the said mortgage and deed of trust so made to your orator, as aforesaid, are and constitute very inadequate security for the payment of the amounts due and to become due for principal and interest upon the said bonds issued under said mortgage and deed of trust, and that the said mortgaged property and premises are so situated that they cannot, nor can any part thereof, be sold in parcels without great injury to the interests of the beneficiaries under your orator's trust, namely, the holders of the bonds secured by the said mortgage or deed of trust so made to your orator as aforesaid; that in order to protect the rights of your orator and of the said bondholders in and to the said property and premises, including the incomes, issues and profits thereof, and to preserve the said property and premises and the revenues thereof which form an essential element of the security under said mortgage and deed of trust, and so that the interests of the holders of the bonds issued under said mortgage and deed of trust may be preserved, a receiver or receivers should be forthwith appointed of the property, premises, rights, franchises, income, issues, profits and revenues covered by said mortgage and deed of trust.

XXI. Your orator is informed and believes and therefore alleges that prior to the execution and delivery to it of said mortgage and deed of trust, the Railroad Company made, executed and delivered unto John S. Kennedy and Samuel Sloan, as trustees, its so-called first mortgage and deed of trust, dated November 1, 1879, wherein and whereby it conveyed to the said trustees all and singular its lands, tenements and hereditaments then owned or thereafter to be acquired by it, including all its railroads, franchises, income, issues and profits, in trust, for the owners and holders of bonds to be issued under said mortgage and deed of trust, bearing interest at the rate of six per cent. per annum, payable semi-annually on the first days of May and November in each year and to become due and payable on the 1st day of November, in the year 1919, a large number of which bonds have been issued and are now outstanding under said mortgage and deed of trust dated November 1, 1879. Your orator is informed and believes and therefore alleges that the interest upon said so-called first mortgage bonds has been paid up to and including the instalment thereof which fell due on the 1st day of November, 1907.

XXII. Your orator is informed and believes and therefore alleges that the defendants. The Mercantile Trust Company and Thomas J. Freeman, as receiver of said International and Great Northern Railroad Company, have or claim to have some interest in or lien upon the premises and property covered by the said mortgage and deed of trust to your orator sought to be foreclosed in this suit, or some part thereof; but such interest or lien, if any, has accrued subsequently to the lien of the said mortgage and deed of trust to your orator, and is subject and subordinate thereto; that the defendant Freeman, as receiver as aforesaid, also now holds and detains and claims possession of and title to a large amount of rolling stock and equipment and other personal property which is subject to and covered by the said mortgage and deed of trust to your orator and is claimed by your orator

as trustee aforesaid under and by virtue of said mortgage and deed of trust; and that the said Freeman, as said receiver, also holds and detains and claims title to certain of the income, issues, profits, revenues and earnings of the Railroad Company which are also subject to and covered by the said mortgage and deed of trust to your orator, and are likewise claimed by it as trustee aforesaid.

XXIII. The holders of a large number of said bonds and coupons issued and outstanding under said mortgage and deed of trust made to your orator as aforesaid have requested your orator to proceed to foreclose said mortgage and to take such steps as your orator may be advised to protect and enforce the rights and interests of your orator as Trustee under said mortgage and deed of trust and of the said holders of said bonds and coupons, and your orator has been advised by counsel to apply to this Court for relief in the premises.

XXIV. By reason of the matters and things hereinbefore alleged there is due to your orator as trustee under the said mortgage and deed of trust, the amount of said coupon interest which fell due on said bonds on the first day of March, 1908, as aforesaid, to wit, the sum of $259,775, with interest thereon from said first day of March.

No proceedings have been had at law or in equity for the collection of said mortgage debt, or any part thereof, save only this suit.

XXV. In consequence of the embarrassed condition of the financial affairs of the Railroad Company and on account of the many difficulties which are manifest upon and from the allegations hereinbefore set forth, involved in the execution of your orator's said trust, it is difficult for your orator, as trustee, to execute adequately its said trust in the way and manner specified and provided in and by the said mortgage and deed of trust, without the aid and interposition of this Honorable Court sitting in equity, nor can the said trust be executed, as your orator

is advised and charges, and the rights of all parties interested be ascertained and fully protected in the premises, otherwise than by judicial sale of the mortgaged premises and all the franchises, property, premises and appurtenances covered by the said mortgage and deed of trust to your orator.

XXVI. Your orator further shows that this is a suit of a civil nature in equity and that the matter in dispute, exceeds, exclusive of interests and costs, the sum of $5,000.

In consideration whereof, and forasmuch as your orator is remediless in the premises by the rules of the common law, and can have adequate relief only in a Court of Equity, where matters of this nature are properly cognizable and relievable; to the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and that they may separately and severally answer make (but not under oath, their answer under oath being hereby expressly waived), according to the best of their knowledge, information and belief, to all the matters and charges aforesaid, and that as fully in every respect as if the same were here again repeated and they thereunto particularly interrogated; that your orator be placed in possession of the mortgaged premises personally, or that a receiver or receivers may be appointed in this cause of all and singular the rights, franchises and property, of every name and nature, including the income, issues, profits, revenues and earnings, of the said defendant, International and Great Northern Railroad Company, covered by said mortgage and deed of trust of June 15th, 1881, with power and authority to operate said railroad and carry on the business of said Railroad Company under the protection of this Court with all the usual powers and duties of receivers in such cases, and with authority to proceed to recover, by suit or otherwise, all property in the hands of other parties belonging to said Railroad Company, and all moneys justly due to it and unlawfully

withheld by any person on any pretense whatever; that an injunction may issue out of this Court, restraining and enjoining the said Railroad Company and all and every its agents and servants, and all other persons, from in any way interfering with the possession or control of the property of said Railroad Company under the control of said receiver or receivers, and from selling, transferring, conveying, leasing, or otherwise disposing of or incumbering any of the property, rights or franchises of the said Railroad Company; that all the rights and franchises, and all the property, real and personal, of the said Railroad Company may be declared subject to the lien of the said mortgage and deed of trust dated June 15th, 1881; that an account may be taken of the amounts due for coupon interest upon the bonds secured by the said mortgage and deed of trust and now outstanding, with interest thereon; that an account may also be taken of the amount of the principal outstanding and unpaid upon each and all of the bonds secured by said mortgage and deed of trust; that the amounts so found due for principal and interest may be found to be a lien on the property of the said Railroad Company according to the terms of said mortgage and deed of trust and prior and superior to the interests or liens or claims of the defendants therein and thereto; that the said Railroad Company may be decreed to pay the amounts so found to be due upon said coupons for interest, and the interest upon said coupons, within a short day to be fixed by the Court; that in default thereof, all the said mortgaged property and franchises of the said Railroad Company may be sold under a decree of this Court and according to law and the practice of this Court, to satisfy the entire amount of principal and unpaid interest upon the said bonds and coupons; that out of the proceeds of said sale, or the net earnings while in the hands of said receiver so to be appointed, there may be paid, first, the costs and expenses of your orator in this suit, including proper attorneys', solicitors' and counsel fees, with a proper compensation

to your orator for its own services as trustee, to be allowed by the Court, and that the residue thereof may be applied to the payment of the amounts due upon the said mortgage bonds and coupons thereto, with interest thereon; that if there be any surplus, it may be applied in such way as this Court may direct; that all the defendants in this suit may be barred of and from any equity of redemption of and in the said property and franchises; and that any deficiency on such sale may be entered in this cause as a judgment against the said International and Great Northern Railroad Company; and that your orator may have such other and further relief in the premises as the circumstances of the case may require and as may be agreeable to equity;

May it please your Honors to grant unto your orator a writ of subpoena issuing out of and under the seal of this Honorable Court directed to the defendants International and Great Northern Railroad Company, The Mercantile Trust Company, and Thomas J. Freeman, as Receiver of said International and Great Northern Railroad Company

to appear and answer this bill.

And your orator will ever pray, etc.

THE FARMERS' LOAN AND TRUST COMPANY,
By
E. S. MARSTON,
President.

Attest:
A. V. HEELY,
(SEAL) Secretary.

TURNER, ROLSTON & HORAN,
BAKER, BOTTS, PARKER & GARWOOD,
Solicitors for Complainant.

JAMES F. HORAN,
JAMES A. BAKER, JR.,
Of Counsel.

893

EXHIBIT "A."

INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY.

SIX PER CENT. GOLD MORTGAGE OF 1881.

THIS INDENTURE, made the fifteenth day of June, in the year of our Lord one thousand eight hundred and eighty-one, between the INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY, a corporation existing under the laws of the State of Texas, of the first part, and the FARMERS' LOAN AND TRUST COMPANY, of the City of New York, a corporation existing under the laws of the State of New York, of the second part:

WHEREAS, the party of the first part heretofore, on the first day of November, in the year 1879, executed a certain indenture of mortgage to Samuel Thorne, William Walter Phelps and John S. Barnes, trustees, to secure four thousand four hundred and seventy-four income bonds for the sum of one thousand dollars each and five hundred income bonds for the sum of five hundred dollars each, and also a series of similar bonds for the sum of one thousand dollars each, to the amount therein prescribed; all of them bearing interest to such amount, not exceeding eight per centum per annum, as should be earned within each calendar year, beginning with the year 1879, as therein set forth:

AND WHEREAS, many holders of the said bonds desire to exchange them for bonds of this company, bearing interest at the rate of six per centum per annum, absolutely and free from all contingency, to be secured in the manner hereinafter described:

AND WHEREAS, the party of the first part had, on May 1, 1881, issued five thousand two hundred and eighty-four income bonds, as hereinbefore described, for the sum of one thousand dollars each, and five hundred such income bonds for the sum of five hundred dollars each, and intends to issue in exchange for said bonds a like amount

of bonds in the form hereinafter prescribed and secured by this mortgage, and also a series of similar bonds, for the sum of one thousand dollars each, to the amount hereinafter prescribed: all of which bonds, notwithstanding the same may be issued at different times, are equally secured by these presents, are to be authenticated by a certificate signed by the party of the second part, and are to be substantially in the following form:

INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY.

No. $1,000.

INTEREST AT SIX PER CENTUM PER ANNUM.
DUE SEPTEMBER 1, 1909.

The International and Great Northern Railroad Company of Texas, for value received, hereby acknowledges itself indebted to the Farmers' Loan and Trust Company, of the City of New York, trustee, in the sum of one thousand dollars, United States gold coin, which sum the said company promises to pay, at its agency in the City of New York, to the bearer, unless this bond is registered, and if registered, then to the registered holder thereof, in gold coin of the United States, of the present standard of weight and fineness, on the first day of September, in the year 1909, together with interest thereon at the rate of six per centum per annum from the first day of March, 1881, payable semi-annually, in like gold coin, on the first days of March and September in each year, upon presentation of the annexed coupons, as they severally become due, at the said agency of the company in the City of New York.

This bond is one of a series of like tenor and date, of which 5,284 for $1,000 each, and 500 for $500 each, are intended to be issued in exchange for a like amount of income bonds issued before the first day of May, 1881, and secured by a second mortgage, and ten for $1,000 each, but no more, may be issued for each mile of completed

road thereafter constructed or acquired by the said company; all bonds of this series being equally secured by a mortgage or deed of trust, of even date herewith, executed by the said company to the Farmers' Loan and Trust Company of the City of New York, as trustee, covering the entire railroad of the said company, together with all the rolling stock, equipment, appurtenances, income, franchises (including the franchise to be a corporation), privileges and immunities of the said company, now owned or hereafter acquired, and also by the deposit with the said trustee of income bonds under the existing second mortgage upon the same property, executed to Samuel Thorne, William Walter Phelps and John S. Barnes, as trustees, to an amount equal to the bonds of this series issued or to be issued until the said existing second mortgage is fully satisfied and discharged of record: which income bonds are to be held by the said trustee for the protection of bonds of this series.

Upon default in the payment of interest on this bond for six months after it becomes payable and has been demanded, the trustee may, subject to the provisions of the said mortgage, declare the principal of all the bonds immediately payable, and must do so, if required by the holders of one-fourth of all such bonds outstanding.

This bond may be registered on the books of the company at its agency in the City of New York, after which no transfer except upon the books of the company will be valid; but it is not to be deemed registered until the name of the holder is registered upon the back of the bond as well as upon the books of the company. It may be registered in favor of "bearer," after which it will be transferable by delivery alone, until again registered in the name of the holder.

This bond shall not become obligatory until the certificate indorsed hereon is signed by the said trustee or its successor in the trust.

In witness whereof, the said International and Great

Northern Railroad Company has caused this bond to be subscribed by its president or vice-president, and assistant treasurer, and its corporate seal affixed hereto, this fifteenth day of June, in the year one thousand eight hundred and eighty-one.

THE INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY,

by

President.

Assistant Treasurer.

(COUPON.)

The International and Great Northern Railroad Company will pay to the bearer, at its agency in the City of New York, dollars, in gold coin, on , being six months' interest due that day on Bond No.

(TRUSTEE'S CERTIFICATE.)

It is hereby certified, That the International and Great Northern Railroad Company has executed to the Farmers' Loan and Trust Company of the City of New York a mortgage or deed of trust, as described in the within bond, and that no more of such bonds have been certified to by the undersigned than are authorized by said deed of trust.

THE FARMERS' LOAN AND TRUST COMPANY,

Trustee,

by

President.

NOW, THEREFORE, THIS INDENTURE WITNESSETH: That the said International and Great Northern Railroad Company, in order to secure the payment of the said bonds and interest thereon, and in consideration of the sum of one dollar to it paid by the party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, transferred and conveyed, and does hereby

grant, bargain, sell, transfer and convey unto the said Farmers' Loan and Trust Company of the City of New York, party of the second part, and of its successor or successors in this trust, forever, all and singular the lands, tenements and hereditaments of the said railroad company, now owned or hereafter to be acquired by it, including all its railroads, tracks, rights of way, main lines, branch lines, superstructures, depots, depot grounds, station-houses, engine houses, car-houses, freighthouses, wood-houses, sheds, watering places, work shops, machine shops, bridges, viaducts, culverts, fences and fixtures, together with all its leases, leased or hired lands, leased or hired railroads, and all its locomotives, tenders, cars, carriages, coaches, trucks and other rolling stock; its machinery, tools, weighing scales, turn-tables, rails, wood, coal, oil, fuel, equipment, furniture and material of every name nature and description), now held, or hereafter to be acquired, together with all the corporate rights, privileges, immunities and franchises of said railroad company, now held or hereafter to be acquired (including the franchise to be a corporation), and all the tolls, fares, freights, rents, income, issues and profits thereof, and all the reversion and reversions, remainder and remainders thereof, in trust, however, for the uses and purposes hereinafter mentioned, excepting, however, and reserving from the lien of this mortgage, all land grants, lands, land certificates, town lots and town sites now or at any prior time owned or controlled by the said company, which were not, on the first day of November, 1879, and have never been actually occupied and in use by the said company and necessary to the occupation and maintenance of its lines of railroad:

To HAVE AND TO HOLD the said property, premises, things, rights, privileges, immunities and franchises hereby conveyed, or intended so to be, unto the Farmers' Loan and Trust Company of the City of New York, party of the second part, or its successor or successors, in trust for the

owners and holders of the said bonds, or any of them, subject to the terms and stipulations of said bonds and of the coupons thereto attached, and subject also to the possession, control and management of the directors of the party of the first part, its successors or assigns, so long as it or they shall well and truly perform all and singular the stipulations of the said bonds and the covenants of this indenture.

That the bonds which may be issued under this mortgage shall not exceed the number and amount of bonds then issued under the existing second mortgage, executed by said company on the first day of November, 1879, to Samuel Thorne, William Walter Phelps and John S. Barnes, trustees, and surrendered to the party of the second part in exchange for bonds issued under this mortgage, until the said second mortgage is satisfied and discharged of record, and shall not exceed five thousand two hundred and eighty-four bonds for the sum of $1,000 each, and five hundred bonds for the sum of $500 each, with the addition of ten bonds, for $1000 each, for each mile of completed railroad which has been constructed or acquired by the party of the first part since the first day of May, 1880, or which shall be newly constructed or acquired by the party of the first part, its successors or assigns, after the execution of this mortgage; and no bond shall be issued for railroads to which the party of the first part, its successors or assigns, have not a good and valid title; and if there is any lien or incumbrance upon railroads hereafter acquired by the party of the first part, its successors or assigns, other than the two mortgages already executed by the said company and now outstanding, dated the first day of November, 1879, the issue of new bonds on account of such railroads shall be withheld, to the amount of such lien or incumbrance, until the same is discharged.

That the said trustee, or its successor in the trust, may, in its discretion, accept a certificate, signed by the presi-

dent and chief engineer of the party of the first part, its successors or assigns, as conclusive evidence of the number of miles of completed railroad so newly constructed or acquired.

That in case the party of the first part, its successors or assigns, shall fail to pay the interest on any of the said bonds, at any time when the same may become due and payable, according to the tenor thereof, and shall continue in such default for six months after such payment has been demanded at its or their agency in the City of New York, then, and thereupon, the principal of all the bonds hereby secured shall be and become immediately due and payable, provided the said trustee gives written notice to the party of the first part, its successors or assigns, of its option to that effect, while such default continues, which notice it shall be bound to give, if required in writing to do so by the holders of twenty-five per centum of said bonds then outstanding; and that in such case or upon the principal of said bonds becoming in any other way due and payable, and remaining unpaid, in whole or in part, after demand thereof, the said trustee, or its successor in the trust, may, in its discretion, and shall, upon the request of the holders of fifty per centum of said bonds then outstanding, take, with or without entry or foreclosure, actual possession of said railroad, and of all and singular the property things and effects hereby conveyed, and personally, or by attorney, manage and operate the same, and receive all the tolls, rents, income and profits thereof, until such time as the said bonds and interest thereon are fully paid or satisfied, and shall apply the money so received by it, first, to the expenses of the trust hereby created, the management of the said railroad and its appurtenances, and the needful repairs thereof, next, to the payment of interest overdue upon the said bonds and interest upon delayed interest, and afterwards to the payment of the principal of the said bonds. And the said trustee, or its successor in the trust, upon becoming

entitled to take possession of the railroad and property aforesaid, may, in its discretion, and shall, on the written request of the holders of at least one-half of the bonds then unpaid and outstanding, cause the said premises so mortgaged to be sold, either as an entirety or in such parcels as it shall deem neecssary or proper, having due regard to the interests of all parties, to the highest bidder at public auction, in the City of Austin, giving at least sixty days' notice of the time, place and terms of such sale, and of the specific property to be sold, and whether the same will be sold as an entirety or in parcels by publishing such notice in two newspapers in the City of Austin, and in one or more newspapers in the City of New York, once in each week during the said term of sixty days; and that, upon receiving the purchase money therefor, the said trustee, or its successor in the trust, shall execute to the purchaser or purchasers thereof a good and sufficient deed of conveyance in fee simple, which sale and conveyance shall forever be a bar against the party of the first part, its successors and assigns, and all persons claiming under them, of all right, estate, interest or claim in or to the premises, property, things, franchises, privileges and immunities so sold, or any part thereof, whether the said trustee is in possession thereof or not; and the receipt of the said trustee shall be a full and sufficient discharge to such purchasers; and no purchaser holding such receipt shall be liable for the proper application of the purchase money, or in any way bound to see that the same is applied to the uses of this trust, or in any manner answerable for its loss or misapplication, or bound to inquire into the authority for making such sale. And such sale, to a purchaser in good faith, shall be valid, whether said notice is given or not, and whether default in payment has been made or not.

That the said trustee shall, after deducting from the proceeds of such sale, the cost and expenses thereof, and of the execution of this trust, and all payments for taxes,

assessments and counsel fees, and its own reasonable compensation, apply so much of the proceeds as may be necessary to the payment of the principal and interest remaining unpaid upon the said bonds and coupons, together with interest upon overdue coupons, down to the time of sale, without giving preference to either principal or interest; it being the intention of this indenture that, so long as the railroad and its appurtenances shall be managed by the trustee or a receiver as a going concern, the income shall be applied to the payment of interest in preference to the principal, but that, after a sale of the railroad and its appurtenances, no such preference shall be made in the distribution of the proceeds.

That upon any sale of the said premises, whether by the trustee or under decree of the Court, the holders of the bonds hereby secured, or any of them, or the said trustee on behalf of all the bondholders, shall have a right to purchase upon equal terms with other persons; and it shall be the duty of the said trustee, if so required in writing, a reasonable time before such sale, by the holders of a majority in value of the outstanding bonds secured hereby, and upon being offered, at the same time, adequate indemnity against all liability to be incurred thereby, to make such purchase on behalf of all the bondholders, at a reasonable price, if part only of the property hereby conveyed is sold, or, in case the whole property is sold, at a price not exceeding the whole amount of principal and interest due or accruing upon the said bonds, together with the expenses of the proceedings and sale; and the bonds secured by this mortgage shall be receivable at such sale as cash, for the amount of cash which would be payable on such bonds out of the proceeds of such sale.

That in case of the purchase of the said property or any part thereof by the trustee, the same shall be held for the benefit of all bondholders, in proportion to their respective interests in the bonds, and the property thus purchased shall be conveyed to such persons or corporations

as may be designated by a majority in value of the bondholders present at a meeting of the bondholders in the City of New York, regularly called by the trustee, upon reasonable public notice published in two newspapers of that city, provided that such conveyance shall be made upon such terms as will, in the judgment of the said trustee, secure to each and every bondholder his just proportion of interest in the property purchased as aforesaid.

That it is hereby expressly agreed that in no case shall any claim, benefit or advantage to be taken by the party of the first part, its successors or assigns, of any valuation, appraisement, extension or relief laws, to prevent such entry or sale as aforesaid, and that nothing herein contained shall be construed as limiting the right of the said trustee to apply to the courts for judgment or decree of foreclosure and sale under this indenture; or for the usual relief in the course of such proceedings; and the said trustee may, in its discretion, apply to any competent court for relief by way of foreclosure or otherwise, if so advised by counsel, instead of taking possession of or selling the said property when required to do so by bondholders.

That the party of the first part, its successors and assigns, hereby covenant and agree with the party of the second part and its successor in the trust, that the proceeds of the bonds to be issued as hereinbefore mentioned, in addition to the specified number issued in exchange for income bonds then outstanding, shall be applied in good faith to the construction or purchase of additional railroad, and to the furnishing of additional equipment therefor.

That the party of the first part, its successors and assigns, further covenant and agree with the party of the second part and its successor in the trust, to make, execute and deliver all such further deeds, instruments and assurances as may from time to time be necessary, and as the party of the second part, or its successor in the trust,

may be advised by counsel learned in the law to be necessary, for the better securing to the party of the second part, and its successor in the trust, the premises hereby conveyed and for carrying out the objects and purposes of this indenture.

That the party of the second part, and its successor in the trust, may, upon the written request of the party of the first part, its successors or assigns, convey or release any lands which it or they may cease to use for its corporate purposes, by reason of any change of location of any station-house, building, or cattle-yards, connected with its railroad, or by reason of any change of the track of said railroad; provided that, at the same time, such instruments shall be executed as will cause the lien of this mortgage to attach to all lands, tenements and hereditaments taken and used by the party of the first part, its successors or assigns, in place of the lands disused as aforesaid; and that in case of the sale of any such lands, without exchanging them for other lands, the proceeds of such sale shall be paid to the party of the second part, or its successor in the trust, and be by it applied to the purchase of bonds secured by this mortgage, which bonds, when so purchased, shall be canceled, and a certificate of the respective numbers and amounts of the bonds so canceled shall be immediately furnished by the trustee to the party of the first part, its successors or assigns.

That upon the payment of the principal and interest of all the bonds hereby secured, the estate hereby granted to the party of the second part shall be void, and the right to all the real and personal property hereby granted and conveyed shall revert to and revest in the party of the first part, its successors or assigns, in law and in equity, without any acknowledgment of satisfaction, reconveyance, surrender, re-entry or other act.

That the party of the second part and its successor in the trust shall and will hold all income bonds issued under the said existing second mortgage, which may be deposit-

ed with it in exchange for bonds issued under this mortgage, in trust for the benefit of the lawful holders of the bonds issued under this mortgage, and will, if necessary, or if justice requires, enforce against the said company the income bonds so held by it and the mortgage securing the same, and secure for such bonds the full benefit of the said second mortgage on the same footing with other similar bonds not deposited with the party of the second part or its successor in the trust, except that the party of the second part and its successor in the trust shall and will accept the payment of interest upon the bonds issued under this mortgage, according to the stipulations thereof, as full satisfaction and discharge of all claims against the party of the first part, its successors and assigns, for interest upon the income bonds deposited as aforesaid, and except also that the payment of the principal of any of the bonds issued under this mortgage shall be accepted as a full satisfaction of an equivalent amount of said income bonds deposited as aforesaid, and upon such payment being made by the party of the first part, its successors or assigns, and evidenced to the party of the second part or its successor in the trust by the deposit of any bonds issued under this mortgage, paid and canceled, the party of the second part, or its successor in the trust, will cancel an equivalent amount of income bonds deposited as aforesaid, and except also that, in the event of proceedings for a foreclosure or other enforcement of the said existing second mortgage, the party of the second part or its successor in the trust will not collect or authorize the collection from the party of the first part, or its successors or assigns, of any greater amount of interest on account of the income bonds deposited with it as aforesaid, than at the rate of six per centum per annum it being the intention of the parties hereto that the said income bonds shall be held in trust and used only for the purpose of giving to the holders of bonds issued under this mortgage an equality of lien

with the holders of other outstanding income bonds, but with a rate of interest fixed at six per centum per annum.

That in the event of all of the income bonds issued under the said existing second mortgage being deposited with the party of the second part or its successor in the trust, it will forthwith use its best diligence to procure from the trustees of the said second mortgage a satisfaction and discharge upon the record of the said second mortgage, delivering to them, if necessary for that purpose, the said income bonds duly canceled, and taking every step that may be necessary or proper for the purpose of procuring the complete discharge of the lien of the said second mortgage, to the end that this mortgage may become a lien upon all the property hereinbefore mentioned, second only to the first purchase-money mortgage executed to John S. Kennedy and Samuel Sloan, trustees, and dated the first day of November, 1879; but for this purpose, the said income bonds shall not be surrendered for cancellation, until the party of the second part is reasonably satisfied that all intervening liens have been discharged or secured to be discharged.

That the party of the second part or its successor in the trust may take such legal advice and employ such assistance as may be necessary in its judgment to the proper discharge of its duties, and shall be entitled to receive just and reasonable compensation for all duties performed by it in the discharge of this trust, and for all its reasonable expenses and disbursements, which compensation shall be paid by the party of the first part, its successors or assigns, and shall also be a lien upon and payable out of the funds coming into the hands of the party of the second part or its successor in the trust.

In Witness Whereof, the said International and Great Northern Railroad Company, party of the first part, in pursuance of the authority conferred upon it by law, and of a resolution adopted by a vote of two-thirds of all the stock of the said company, at a meeting of its stockhold-

ers, regularly called for that purpose, and held on the thirteenth day of June, 1881, and also a resolution of its Board of Directors, has caused this indenture to be subscribed in its name by its Vice-President and Assistant Secretary, and the corporate seal of said company to be affixed thereto; and the party of the second part, for the purpose of testifying to its acceptance of the trust hereby created, has also, in pursuance of a resolution of its Board of Directors, caused this indenture to be subscribed in its name by its President and Secretary, and its corporate seal to be affixed hereto, the day and year first above written.

INTERNATIONAL AND GREAT NORTHERN
RAILROAD COMPANY,
By
T. W. PEARSALL,
Vice-President.

(SEAL)

Attest:
JACOB S. WETMORE,
Assistant Secretary.

THE FARMERS' LOAN AND TRUST CO.,
By
R. G. ROLSTON,
President.

(SEAL)

Attest:
GEO. P. FITCH,
Secretary.

(4) It was next agreed in open court, and admitted by the defendant, that the bonds secured by the mortgage of the 15th of June, 1881, last above set out, were duly issued by the I. & G. N. R. R. Co., and had been authorized by proper resolutions of the board of directors and of the stockholders of said company, and that all of the bonds authorized by such mortgage were issued approximately on the date of the mortgage, the 15th of June, 1881, to the persons entitled thereto.

(5) The defendant next introduced in evidence Exhibit "D" to its amended answer, being the appointment of Thomas J. Freeman as receiver of the I. & G. N. R. R. Co., on the prayer of the Farmers Loan & Trust Company in Equity cause No. 2514 above. This appointment was made April 20th, 1908, by the Judge of the United States Circuit Court, Northern District of Texas, and directed that the receivership in cause No. 2501 be extended to cover all of the properties embraced in the mortgage of 15th of June, 1881, and the receiver was directed to take possession of the same and operate the railroad subject to the further orders of the court.

(6) The defendant introduced in evidence the application of George J. Gould and others to said United States Court, for permission to file a bill against the I. & G. N. R. R. Co.

(7) The defendant next introduced the order of the said United States Circuit Court, of date June 2, 1908, in response to the prayer of George J. Gould and others in their suit No. 2525 in said court, for the appointment of a receiver of the I. & G. N. R. R. Co. This order is attached to the amended answer and marked exhibit "E," by which it appeared that the complainants held large judgments vs. the I. & G. N. R. R. not secured by mortgage; and on this order Thomas J. Freeman was appointed Receiver, and his receiverships in causes 2501 and 2514 extended to cover all the properties, real and personal, whatsoever, if any, not covered by the orders previously pointing out and directing him to take charge of the I. & G. N. R. R.

(8) It was shown that Thomas J. Freeman in the three causes numbered 2501, 2514 and 2525 had applied for the consolidation of these causes, and the order consolidating them of June 5th, 1908, being exhibit "F" to the

answer, was introduced. The court directed that they should be consolidated in the following style, to wit:

CONSOLIDATED CAUSE.

THE MERCANTILE TRUST COMPANY, Trustee,
THE FARMERS LOAN AND TRUST COMPANY, Trustee,
GEORGE J. GOULD ET ALS.,

Complainants,

vs. No. 2501.

THE INTERNATIONAL & GREAT NORTHERN RAILROAD COMPANY,

Defendant.

And the court ordered that the bills filed in said cause should stand as bills in the consolidated cause, and all parties retain their respective status as fixed by law, and that the pleadings might be amended from time to time, and that the appointment of a Receiver and directions to him should be extended as made to apply to all of the causes consolidated. This was exhibit "F" to the amended answer.

(9) The defendant next introduced the amendment of the Farmers Loan & Trust Company to its original bill, which amendment, being exhibit "G" of the answer, is as follows:

IN THE UNITED STATES CIRCUIT COURT FOR THE NORTHERN DISTRICT OF TEXAS.

THE MERCANTILE TRUST COMPANY, Trustee,
THE FARMERS LOAN & TRUST COMPANY, Trustee,
GEORGE J. GOULD, ET AL.,

Complainants,

No. 2501. VERSUS CONSOLIDATED CAUSE.

INTERNATIONAL & GREAT NORTHERN RAILROAD COMPANY,

Defendant.

To the Honorable the Judges of the Circuit Court of the United States for the Northern District of Texas, Sitting in Equity:

Your Orator, The Farmers Loan & Trust Company,

complainant in the original bill of complaint filed on or about the 20th day of April, 1908, in Equity Cause No. 2514, which was thereafter consolidated with certain other causes into the present consolidated cause under the above number and style, by leave of Court first had and obtained, brings and files this its supplemental bill of complaint, in addition to its said original bill of complaint, against said International and Great Northern Railroad Company, The Mercantile Trust Company and Thomas J. Freeman, as Receiver of the International and Great Northern Railroad Company, and thereupon complains and says:

I. That heretofore and on or about the twentieth day of April, 1908, your Orator filed its said original bill of complaint in said cause No. 2514 against the said defendants, praying among other things for the foreclosure of the mortgage and deed of trust made by the said defendant International and Great Northern Railroad Company to your Orator and bearing date the fifteenth day of June, 1881. Your Orator now refers to its said original bill and prays that all of the allegations and descriptions therein contained may be taken as herein repeated in full.

II. That, as in and by said original bill of complaint alleged, the said defendant, International and Great Northern Railroad Company, under and in accordance with the provisions of said mortgage and deed of trust, and due corporate action having been had, under its corporate seal, made, executed and delivered, and your Orator as Trustee under said mortgage and deed of trust, in accordance with the provisions thereof, and in the manner therein provided, certified in the form therein set forth ten thousand one hundred and forty-one (10,141) of the bonds in the said original bill of complaint and in said mortgage and deed of trust described, each for the sum of One thousand dollars ($1,000), and five hundred (500) of said bonds, each for the sum of Five hundred dollars ($500), amounting in the aggregate to the principal sum of Ten million, three hundred and ninety-one thousand

dollars ($10,391,000), all of which bonds, as your orator is informed and believes, have been duly issued and negotiated for value by the said defendant International and Great Northern Railroad Company, and are now valid outstanding obligations of the said International and Great Northern Railroad Company, entitled to the lien and security of said mortgage and deed of trust; so that on the first day of March, 1908, and for some time prior thereto, there had been issued and were outstanding and are now outstanding, under said mortgage and deed of trust and entitled to the lien and security thereof, bonds amounting in the aggregate to the principal sum of Ten million, three hundred and ninety-one thousand dollars ($10,391,000).

III. That, as in said original bill of complaint also alleged, it was among other things in and by said mortgage and deed of trust provided, that in case the International and Great Northern Railroad Company, its successors or assigns, should fail to pay the interest on any of said bonds at any time when the same might become due and payable, according to the tenor thereof, and should continue in such default for six months after such payment had been demanded at its or their agency in the City of New York, then and thereupon the principal of all of the bonds thereby secured should be and become immediately due and payable, provided your Orator as such Trustee should give written notice to the said International and Great Northern Railroad Company, its successors or assigns, of its option to that effect while such default continued.

IV. That, as in and by said original bill of complaint also alleged, the said International and Great Northern Railroad Company, as your Orator is informed and believes, failed to pay the interest amounting to the sum of Two hundred and fifty-nine thousand, seven hundred and seventy-five dollars ($259,775) which became due and payable on the first day of March, 1908, on all of the said bonds so issued and outstanding under said mortgage

and deed of trust, as aforesaid, at the time when the same became due and payable, according to the tenor thereof, although demand for the payment of some of such interest was duly made at the agency of the said International and Great Northern Railroad Company in the City of New York. And your Orator is informed and believes, and therefore alleges, that the said International and Great Northern Railroad Company has continued in such default for more than six months after such payment was demanded as aforesaid, and still continues in such default, and that all of such default still continues, and such defaulted interest still remains unpaid. Your Orator further alleges that since the filing of its said original bill of complaint, and after the lapse of the said six months, and during the continuance of such default, to-wit, on the 14th day of May, 1909, your Orator as such Trustee gave written notice to the said International and Great Northern Railroad Company, of its option that the principal of all of the said bonds secured by said mortgage and deed of trust should be and become immediately due and payable, and declared that the same was and had become immediately due and payable. And your Orator has elected to declare and has declared, and hereby does declare, due and payable the whole principal sum of the said bonds so issued and outstanding under the said mortgage and deed of trust as aforesaid, and the same is now due and payable and unpaid.

V. That, as in and by said original bill of complaint also alleged, on or about the twenty-seventh day of January, 1892, by an agreement between the said International and Great Northern Railroad Company and (among others) the holders of all of said bonds then outstanding under said mortgage and deed of trust, the interest upon said bonds was reduced to four and one-half per cent. per annum for a period of six years from and after September 1st, 1891, such reduction to extend to and include the interest payable on September 1st, 1897; and it was further agreed that after September 1st, 1897, and until the

maturity of said bonds, the same should bear interest at the rate of five per cent. per annum; provided, however, that in case of default continued for the period of ninety days in the payment of any coupons upon said bonds unmatured at the date of said agreement, the original rate of interest, namely six per cent., should be restored, and such coupons should be collectible and enforceable at such original rate of interest. All the bonds thereafter issued under said mortgage and deed of trust by the said International and Great Northern Railroad Company bore interest in accordance with the provisions of the said agreement.

VI. That the said default by the said International and Great Northern Railroad Company in the payment of the interest upon the said bonds which fell due on the first of March, 1908, was a default upon coupons upon said bonds unmatured at the date of said agreement of January 27th, 1892, and that said default has continued for more than the period of ninety days; that said period of ninety days came to an end since the filing of your Orator's said original bill of complaint, and the said original rate of interest, namely six per cent., has been restored as aforesaid, and there is now in default upon the said coupons which fell due March 1st, 1908, in addition to the said sum of Two hundred and fifty-nine thousand seven hundred and seventy-five dollars so defaulted as in said original bill set forth, the sum of Fifty-one thousand nine hundred and fifty-five dollars.

VII. That, as your Orator is informed and believes, the said International and Great Northern Railroad Company, since the filing of your Orator's said original bill of complaint, has failed to pay a further installment of interest amounting to the sum of Three hundred and eleven thousand seven hundred and thirty dollars on all the said bonds so issued and outstanding under the said mortgage and deed of trust of June 15th, 1881, as aforesaid, which became due and payable on the first day of September, 1908, although demand for the payment of some of such

interest was duly made at its agency in the City of New York and said sum still continues in default, and is now due and payable as interest upon said bonds.

VIII. That, as your Orator is informed and believes the said International & Great Northern Railroad Company, since the filing of your Orator's said original bill of complaint, has failed to pay a further installment of interest amounting to the sum of Three hundred and eleven thousand seven hundred and thirty dollars on all the said bonds so issued and outstanding under said mortgage and deed of trust of June 15th, 1881, as aforesaid, which became due and payable on the first day of March, 1909, although demand for the payment of some of such interest was duly made at its agency in the City of New York, and said sum still continues in default, and is now due and payable as interest upon said bonds.

IX. That by reason of the matters and things hereinbefore alleged there is due to your Orator as Trustee under the said mortgage and deed of trust, in addition to the amount alleged to be due in the said original bill of complaint, the principal of all of the said bonds so issued and outstanding as aforesaid, to-wit, Ten million, three hundred and ninety-one thousand dollars; the sum of Fifty-one thousand nine hundred and fifty-five dollars upon the said coupon interest which fell due on said bonds on the first day of March, 1908, as aforesaid, with interest thereon from the said first day of March, 1908, the sum of Three hundred and eleven thousand seven hundred and thirty dollars, the amount of said coupon interest which fell due on the said bonds on the first day of September, 1908, as aforesaid, with interest thereon from the said first day of September, 1908; and the sum of Three hundred and eleven thousand seven hundred and thirty dollars, the amount of said coupon interest which fell due on said bonds on the first day of March, 1909, as aforesaid, with interest thereon from the said first day of March, 1909; together with interest upon the said principal sum from the said first day of March, 1909.

WHEREFORE, your Orator prays that it may have the benefit of the proceedings taken under the said original bill and that this bill be taken as supplemental thereto, and that it may have the same relief as in said original bill already prayed, and, in addition thereto, prays that an account may be taken of the amounts due upon the bonds secured by the said mortgage and deed of trust and now outstanding with interest thereon; that the said International and Great Northern Railroad Company may be decreed to pay the amounts so found to be due upon said bonds; that in default thereof all said mortgaged property and franchises of the said International and Great Northern Railroad Company may be sold under a decree of this Court, and according to law and the practice of this Court to satisfy the amounts so found due, and that your Orator may have all the relief prayed for in its said original bill of complaint in consideration of the matters herein alleged as well as those alleged in its said original bill of complaint, and that the defendants and each of them may be directed to answer the matters alleged in this its amended and supplemental bill, and that your Orator may have such other and further relief in the premises as may be just.

And your Orator will ever pray, etc.,

(SEAL) THE FARMERS LOAN & TRUST COMPANY,
By E. S. MARSTON, *President.*

Attest: A. V. HEELY,
Secretary.

TURNER, ROLSTON & HORAN,
BAKER, BOTTS, PARKER & GARWOOD,
Solicitors for Complainant, The Farmers Loan and Trust Company.

JAMES F. HORAN,
JAS. A. BAKER, JR.,
of Counsel.

And in this connection it was proved that the 1st Mortgage, subject to which are the 2nd Mortgage and the 3rd Mortgage, as well as the 2nd Mortgage, were all duly and regularly authorized and issued by the stockholders of the I. & G. N. R. R. Co.

(10) Defendant introduced the decree of foreclosure of the 2nd Mortgage, being the mortgage of June 15, 1881, entered by the United States Court on the 10th of May, 1910. This is exhibit "H" to the amended answer, and being considered by the defendant a part of the bases of its defense is set out in full, but is not here copied, being set out on pages to above in this statement, and now referred to.

(11) It was next shown that the sale had been deferred by a regular order of court to a date after October 6, 1910, and that on November 28th, 1910, said United States Court made an order directing that the cause of the Marshall Car Wheel & Foundry Company should be consolidated into the previous consolidated case, but that all orders should stand; that the sale was again adjourned, but on the 12th of May, 1911, the court filed another order decreeing that the sale should be made on June 13, 1911, which order was exhibited with the answer, being exhibit "I" thereto attached. The Master Commissioner, Flippen, was directed by this order to make sale on June 13th, 1911.

(12) It ws next proved that all of the notices directed to be made as precedent to said sale, and advertisement provided for in the decree of foreclosure set out above, were all duly made, and that in accordance therewith the sale was made by the Master Commissioner, at public outcry at Palestine, Texas, on June 13, 1911, whereat Frank C. Nicodemus, Jr., was the purchaser. And defendant introduced in evidence the report of sale of Flippen, the Master Commissioner, dated September 22nd, 1911, and therewith the assignment by Frank C. Nicodemus, Jr., of his bid to the I. & G. N. R'y Co.,

dated August 28, 1911, and with the report a deed to the I. & G. N. R'y Co. of date 31st of August, 1911, executed by the Master Commissioner and the I. & G. N. R. R. Co., and by The Farmers Loan & Trust Company and Thomas J. Freeman, as Receiver, and Frank C. Nicodemus, Jr., and along with these documents a decree of the United States Circuit Court dated September 25, 1911, approving the reports of the Master Commissioner and the execution of the deed to the I. & G. N. R'y Co., and discharging the Receiver. These documents were attached to the amended answer as exhibits. As these documents are considered by the parties to be material portions of their respective cases, whether for the plaintiffs, or for the defendant, and as both parties desire them to be set out in full, they have now been set out by the desire of the plaintiffs and defendant, and being introduced by the plaintiffs above, are all set out above, on pages to .

(13) The defendant next introduced its charter of date December 8, 1911, a certificate of approval thereof by the Attorney General and the filing of same. This document is attached to the amended answer, marked exhibit "K." This document was also introduced by the plaintiffs, and is set out on pp. above.

(14) The defendant next introduced a deed from Flippen, Master Commissioner, and others, to itself, of date August 31, 1911, being exhibit "L" to its answer. A true copy of this is set out above, being attached to the report of the Master Commissioner, except that the deed shows the execution by Flippen, Master Commissioner, to the I. & G. N. R. R. Co., Thomas J. Freeman, as Receiver, The Farmers Loan & Trust Company, and Frank C. Nicodemus, as purchaser, and the defendant, all successively appending their names at one place. This instrument was duly acknowledged, and is shown to have been delivered, and also it was shown that the defendant

having acquired the properties described in the deed as above shown, was operating the same.

(15) It was shown, as proven above, that the bid of Nicodemus, at the sale of the property, was $12,645,000; and that he deposited, at the time of his bid, $100,000, and on or about September 13, 1911, he paid an additional amount in cash of $144,253.45, making a total cash payment of $244,253.45, and that he made the remaining payment under the terms of the decree, as follows, and through the Farmers Loan & Trust Company, of the 2nd Mortgage bonds of 1881, of face value, that is, for the principal amount, to which was to be added the amount of accrued interest, to wit:

On or about September 13, 1911 .....$9,337,500
On or about June 13, 1911..... 999,000

Total in bonds (principal), not including interest $10,336,500, and furthermore, it was shown that to these bonds were attached the coupons maturing March 1st, 1908, and subsequently, and that the distributive value under the decree of these bonds, used in payment, was $1,199, 704595/1,000,000 per bond, equals $12,400,746-55/100.

And it was thus shown that by such payments the total amount of the bid, under the terms of the decree, of $12,645,000 had been paid, and that the apportionate amount under the decree applicable to the 2nd Mortgage Bonds not used as amounts of payment of the bid, was for the principal amount of $54,500, and that there was paid out of the cash payment on the bid, to apply thereto and take up the same as, the apportionate amount applicable thereto, by the terms of the decree, $65,383.89, and it was thus shown that the purchase was made under the decree, that is, with the 2nd Mortgage Bonds, with the exception of $244,253.45, and that the bonds used in the purchase were owned by Nicodemus, or the persons whom he represented; and furthermore, it was shown that the amount due under the foreclosed 2nd Mortgage and bonds

secured thereby was not realized by the sale, but that there was a deficit of $317,387.72 unrealized by the owners of the 2nd Mortgage bonds foreclosed, if the cancellation is only made to the date of sale, and no interest calculated to a later date, on the bonds.

(16) It was agreed, as stated above, that all the notices provided for in the decree of foreclosure, and the orders referring the sale, had been given, but it was not admitted or proved that the Court had directed the Master Commissioner to publish a notice at least once a week for a period of four weeks, in one or more newspapers requiring holders of any claims and unpaid debts or liabilities to present the same for allowance within three months after the publication of such notice; as it was decreed the Master Commissioner should do, when ordered by the court; nor was it proved that the Master Commissioner had published any such notice, the decree of foreclosure requiring that the Master Commissioner should publish such notice when ordered by the Court.

(17) Defendant introduced resolution of Dec. 8, 1911, of its board of directors, attached to its answer, marked exhibits "M" and "N," and certain proceedings of its directors. The relevant part of these proceedings being as follows: "The chairman stated that under the terms of decree of sale under which the property and franchises of the I. & G. N. R. R. Co. were purchased by this Company, the purchaser or his assignee had six months from completion of the sale and delivery of the deed, within which to elect whether it would assume leases and contracts of the old Company, and to evidence its election by filing notice with the Clerk of the United States Circuit Court for the Northern District of Texas, at Dallas Texas; that the President had prepared a list of leases and contracts which it was thought desirable for this Company to elect not to assume, though many of these leases and contracts could be renewed on other terms to the advantage of the

Company, and suggested that the Board take action to authorize the filing of the necessary notice that this Company elected not to assume said leases and contracts, a list of which was presented to the Board. On consideration whereof, the following resolution was presented, and on motion duly seconded was unanimously adopted:

Resolved, that this company, as the assignee of the purchaser at the sale under the decree of foreclosure entered by the United States Circuit Court for the Northern District of Texas, on or about May 10, 1910, in a certain cause therein pending, wherein The Farmers' Loan and Trust Company, trustee, is complainant, and International and Great Northern Railroad Company, and others are defendants; and the owner of all the railroads, property and franchises sold at said sale and conveyed to this company by deed of the Master Commissioner appointed by said decree, and others, which said deed was delivered to this company on or about September 16, 1911, does hereby elect, pursuant to the provisions of said decree, not to assume the leases or contracts, or alleged leases or contracts, which are described, as follows, to wit: Then followed the identical list of leases and contracts set out below, and the list of transactions denounced. The resolution then proceeded: "And that the proper officers of this company be and they are hereby authorized and directed to file with the Clerk of the United States Circuit Court for the Northern District of Texas, in the cause above mentioned, notice of the election of this Company not to assume the above-mentioned leases or contracts, or alleged leases or contracts, as provided by said decree of foreclosure and sale entered on May 10, 1910; such notice being in such form as may be prepared or approved by counsel for this compnay, and to give such notice and take such further action as may be necessary or proper, and as said counsel may advise, in order to make effective the election of this company as above expressed."

(18) The defendant next introduced a true copy of the

denunciation by it subsequent to the above resolution of the alleged contracts by the defendant in this case, and proved that the original of the same was filed with the Clerk of the United States Court at Dallas, Texas, within the time provided by the decree of foreclosure of the 2nd Mortgage set out above, that is, within six months after completion of the sale and delivery of the deed of the Master Commissioner. This denunciation is exhibited with the pleadings marked Exhibit "N," and was signed by the I. & G. N. Ry. Co., by Thomas J. Freeman, its President, Wilson & Dabney, its Attorneys, was under seal of defendant, and attested by its Assistant Secretary, and was as follows:

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF TEXAS.

THE MERCANTILE TRUST COMPANY, TRUSTEE, THE FARMERS' LOAN AND TRUST COMPANY, TRUSTEE, GEORGE J. GOULD, ET ALS., MARSHALL CAR WHEEL & FOUNDRY CO., ET AL.,

Complainants,

—VERSUS—

CONSOLIDATED CAUSE No. 2501.

INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY,

Defendant.

THE FARMERS' LOAN AND TRUST COMPANY, TRUSTEE,

Complainant,

—VERSUS—

EQUITY CAUSE No. 2514.

INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY, THE MERCANTILE TRUST COMPANY AND THOMAS J. FREEMAN, AS RECEIVER OF THE INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY,

Defendants.

In the above-entitled and numbered proceeding now

comes International and Great Northern Railway Company, the assignee of Frank C. Nicodemus, Jr., the purchaser of the properties and franchises of International and Great Northern Railroad Company sold by virtue of the decree of foreclosure and sale in said receivership proceedings of date May 10, 1910, and through him the owner of the properties and franchises of the International and Great Northern Railroad Company sold at said sale, and, in accordance with said decree of sale, of date May 10, 1910, rendered in the above-entitled and numbered proceedings, files in this court in this proceeding within six months after the completion of the sale and delivery of the deed of the Master Commissioner, which said deed was delivered on September 16, 1911, this its election not to assume or adopt the following leases and contracts, or alleged leases and contracts, made or claimed to be made by the International and Great Northern Railroad Company, the defendant railroad company in the above proceedings, or by any other corporation under which it holds or whose rights it has acquired by consolidation or otherwise, or by any receiver of any of said corporations; and, filing this election not to assume or adopt or be bound by any lease or contract herein described made by the International and Great Northern Railroad Company, or by any other corporation under which it holds or whose rights it has acquired by consolidation or otherwise, or by any receiver of any of said corporations, the said International and Great Northern Railway Company states that it does not admit in any instance that any such contract or lease was in fact made by the International & Great Northern Railroad Company or other person or corporation, or, if made, that it was made with the formalities required by law, or is valid and enforceable against the International and Great Northern Railroad Company or other party therein, or that there are not valid and sufficient defenses thereto; but states that in the event such contract or lease was made by the International and Great Northern Railroad Company, or

other person or corporation, the Railway Company filing this election hereby expressly files its election not to assume or adopt any such lease or contract, or alleged lease or contract, and not to be bound thereby.

The leases and contracts and alleged leases and contracts which the International and Great Northern Railway Company hereby elects not to assume or adopt are the following, which are stated in substance and effect and with approximate accuracy, all dates to be considered as stated on or about, it not being practicable to give a description thereof more than sufficient to identify the alleged leases or contracts which are not assumed:

All the leases following, either made or claimed to have been made by the International and Great Northern Railway Company, the sold-out corporation:

Lease No. 498. Lessee, Nicholson & Jannin; property leased, a small tract of land at San Antonio for a storage house; date of lease, November 19, 1900; term, for a period of twenty-five years, with privilege of renewal; assigned April 26, 1905, to Laura P. Jannin and F. Johnson & Co.

Lease No. 508. The Longview Ice, Light & Bottling Co., of a tract of land at Longview, for an ice manufacturing plant; lease dated on or about March 23, 1901, and running for a period of fifty years, with privilege of renewal.

Lease No. 535-915, to Wm. Basse Hardware Co., of a hardware warehouse site at San Antonio, Texas; dated February 15, 1902, and running for a period of ten years, with privilege of renewal for an equal term.

Lease No. 558, to the Houston Rice Milling Company, of a site for a rice mill at Houston, Texas; dated April 1, 1902, running for ninety-nine years, said lease being also No. 1310.

Lease No. 563, to Armour Packing Co., of location for cold storage plant at San Antonio, Texas; dated January 15, 1900, running for twenty-five years, with the privilege of renewal. This lease was assigned November 8,

1908, to J. Ogden Armour, and assigned by J. Ogden Armour to Armour & Company of New Jersey on May 29, 1909.

Lease No. 592, to J. B. Mayfield, of a site for a wholesale warehouse at Tyler; dated August 25, 1902, for a term of twenty-five years, with privilege of renewal. On January 1, 1907, this lease was assigned to Human Brown Grocery Company, which, on the 17th of July, 1905, assigned the lease to John Jacob Brown of New York, who sub-leased the land on January 1, 1907, to the Mayfield Grocery Company. John Jacob Brown then assigned the lease to Mrs. J. B. Brown.

Lease No. 602, to Swift & Company, of a site for a cold storage plant at San Antonio, Texas; dated October 1, 1902, running for a period of twenty years, with privilege of renewal. This lease was assigned on November 18, 1908, to Swift & Company, a Delaware corporation.

Leases Nos. 615, 693 and 1418. All of these leases are to the same property under different conditions, being lease to the Moore-Star Mayfield Company at Palestine, dated January 20, 1899, and running for a period of ten years, with privilege of renewal. This lease was transferred to Star, Hartnett & Edmonston on January 20, 1903, and Star, Hardnett & Edmonston transferred same to the Ezell Grocery Company about January 20, 1906, and the Ezell Grocery Company assigned the lease to the Moore Grocery Company about January 13, 1909.

Lease No. 621, to F. W. Madden, of site for oil mill at Taylor; dated July 30, 1898, running for a period of twenty-five years, which was extended to a period of forty-five years, dating from July 30, 1898.

Lease No. 665, to National Coffee & Manufacturing Co., of a site for a coffee plant at Houston, Texas; dated March 21, 1903, and running for a period of twenty-five years.

Lease No. 693 (see 615, 1418), to Ezell Grocery Company at Palestine, of site for a warehouse at Palestine;

dated January 20, 1903, running for a term of six years, with privilege of renewal.

Lease No. 899, to Navasota Compress Company, of site for a compress at Navasota, Texas; dated September 22, 1902, running for ninety-nine years.

Lease No. 921, to Western Grocery Company, of warehouse site at San Antonio; dated February 1, 1905, for twenty-five years, with privilege of renewal.

Lease No. 928, to Cardz Milling Company at Austin, Texas. Lease of a mill site; dated February 14, 1905, running for ninety years, with privilege of renewal; said lease was assigned by Cardz Milling Company to Henry Cardz October 30, 1906.

Lease No. 690, to J. W. Shipman, of warehouse site at Jacksonville; dated May 6, 1905, running for a period of ten years, with privilege of renewal.

Lease No. 1019, to Industrial Cotton Oil Company, of site for oil mill at Hearne; dated May 24, 1905, for ten years, with privilege of renewal.

Lease No. 1028, to Texas Company, of site for oil tanks at Houston, Texas; dated July 31, 1905, running for a period of twenty years.

Lease No. 1051, to Sames-Moore & Co., of warehouse site at Laredo; dated June 1, 1905, running for twenty-five years, with privilege of renewal.

Lease No. 1071, to Pintsch Gas Company, of site for a gas plant at San Antonio; dated October 31, 1901, good for twenty-five years, with privilege of renewal.

Lease No. 1092, to Star Grocery Company, of warehouse site at Jacksonville; dated March 1, 1906, and good for twenty-five years.

Lease No. 1128, to the Texas Company, of site for oil tanks at San Antonio; dated October 31, 1907, and good for twenty-five years.

Lease No. 1116, to Henry Ash, of warehouse site at Palestine; dated January 10, 1899, good for ten years, with privilege of renewal.

Lease No. 1127, to Taylor Can & Pickle Company, of

site for canning factory at Tyler, Texas, dated December 30, 1906, running for twenty years, with privilege of renewal.

Lease No. 1116, to Walter Tipps, of warehouse site at Austin; dated September 5, 1906, running for twenty-five years.

Lease No. 1169, to Farmers Union Gin Company, of site for a gin plant at Round Rock; dated December 2, 1906, for ten years, with privilege of renewal for five years.

Lease No. 1170-1261, to the American Coffee Company, of site for a coffee roaster and for storage of commodities in coffee business at Houston, running for a term of eighteen years. This lease was assigned to W. H. Rogers on July 29, 1908. Said lease marked canceled.

Lease No. 1189, to Wm. Volke & Company, of site for factory and warehouse at Houston, Texas; dated January 1, 1907, and running for thirty years.

Lease No. 1205 (see 592), to Mayfield Grocery Company, of site for warehouse at Tyler; dated January 1, 1907, running twenty years, with privilege of renewal, being the same property as Lease No. 592 above described.

Lease No. 1209, to H. E. Piper, of site for ice and electric light plant at Hearne, Texas; dated January 17, 1907, and running for twelve years.

Lease No. 1216, to Henderson Lumber Planing Mill, of site for a planing mill at Henderson, Texas; dated April 28, 1907, and running for a term of twenty-six years.

Lease No. 1302, to Otto Wahrmund, of site for saloon at Austin, Texas; dated December 14, 1907, for a period of ten years.

Lease No. 1310, to the Houston Rice Milling Company, of site for rice mill at Houston, Texas; dated August 9, 1907, for a period of ninety-four years.

Lease No. 558, to the Houston Rice Milling Company, of site for rice mill at Houston, Texas; dated April 1, 1902, for ninety-nine years.

Lease No. 1313, to Sames-Moore & Company, of site for brick yard at Laredo; dated July 19, 1907, for a period of ten years.

Lease No. 1329, to Derby Brothers, of site for brick yard at Laredo; dated August 20, 1907, for twelve years. This lease was assigned to Derby Brick Manufacturing Company.

Lease No. 1339, to Sames-Moore & Company, of site for brick yard at Laredo; dated October 29, 1907, for a period of ten years.

Lease No. 2252 (see 1092), to Star Grocery Company, of site at Jacksonville, Texas, for a wholesale grocery business, running for a term of twenty-five years; dated 1st day of March, 1906.

Verbal lease, made several years since, with the Mart Compress Company for site on which to erect cotton compress at Mart. Said compress company has refused to sign the written lease when presented to it, and has now been holding said property for a considerably longer period than one year without having any written lease authorizing it to do so.

Verbal agreement for spur track made with Mart Compress Company, some time since, the said compress company having refused to sign the written agreement for spur track when presented to it. Said spur track to be used in connection with the compress of the Mart Compress Company erected on land of railway at Mart, Texas.

Any agreement or agreements claimed to have been made by the Internaational and Great Northern Railroad Company, or by the Houston and Great Northern Railroad Company, or by the International Railroad Company, or by any of the companies composing the International and Great Northern Railroad Company, or by any other corporation under which it holds or whose rights it has acquired by consolidation or otherwise, or by any receiver of any of said companies, or by any person purporting to act for them or any of them, whereby said companies, or any of them, or any receiver, is

claimed to have made any agreement with reference to establishing or maintaining the general offices, public offices or principal offices, machine shops, roundhouses, or any other structures at Palestine, Texas. The assign of the purchaser of the franchises and property of the International and Great Northern Railroad Company, to wit, International and Great Northern Railway Company, denies that any such contract or agreement was ever made; but in the event any such contract or agreement was made, the Railway Company, filing this election, hereby expressly elects not to assume or adopt same, but on the contrary said Railway Company hereby repudiates same, and elects not to assume same and not to be bound thereby.

The contract entitled "Joint Track Contract between the International & Great Northern Railroad Company and the Missouri, Kansas & Texas Railway Company of Texas," dated December 21, 1905, granting to the Missouri, Kansas & Texas Railway Company of Texas certain trackage rights over that part of the line of the International and Great Northern Railroad Company extending from the City of Austin in Travis County to San Marcos in Hays County, including the bridge of the International and Great Northern Railroad Company across the Colorado River, as well as all other bridges constituting parts of the line of railroad of the said International and Great Northern Railroad Company between the Cities of Austin and San Marcos, for the purpose of running and operating the trains, engines and cars, loaded and empty, of the Missouri, Kansas & Texas Railway Company of Texas thereover, upon certain terms and conditions named in said written contract; said contract being signed on behalf of the International and Great Northern Railroad Company by George J. Gould, its President, and on behalf of the Missouri, Kansas & Texas Railway Company of Texas by Henry C. Rouse, its President.

It is expressly understood that the said International

and Great Northern Railway Company, by filing this notice of its election not to assume or adopt the leases and contracts, or alleged leases and contracts, above set forth, does not mean that any lease or contract not by it above listed is by it adopted or assumed, but that the said Railway Company may, from time to time, within the period allowed by the order of sale before named, file in this court and in this proceeding a description of other leases or contracts which it may elect not to assume.

Said International and Great Northern Railway Company also elects not to assume the following leases and contracts:

Lease No. 915 (see 535), to Wm. Basse Hardware Company, of a site for a warehouse at San Antonio, dated February 15, 1905, and running for a period of seven years, with privilege of renewal.

Lease No. 1246, to Rusk County Planing Mill Company, of a tract of land for a planing mill at Henderson; dated on or about March 20, 1907, and extending for a period of ten years.

Lease No. 1257, to the Pruitt Commission Company, of a warehouse site at San Antonio; dated December 1, 1906, and running for a term of ten years.

Contract No. 2224, between the International and Great Northern Railroad Company and the Gulf Colorado and Santa Fe Railway Company, for use of tracks of the International and Great Northern Railroad Company between Houston and Conroe by the Santa Fe Railroad Company, and for use of tracks of the Santa Fe Railway Company between a point just north of Navasota River Bottom and Conroe; said contract being executed on behalf of the International and Great Northern Railroad Company by L. Trice and on behalf of the Gulf Colorado and Santa Fe Railway Company by L. J. Polk, on the 20th day of August, 1901.

Contract between the International and Great Northern Railroad Company and the Western Union Telegraph Company; dated September 16, 1882, and executed by the

Western Union Telegraph Company by John Van Horn, Vice-President, and by the Missouri Pacific Railway Company as the duly authorized representative of the International and Great Northern Railroad Company, the Galveston, Houston and Henderson Railway Company, and the Missouri, Kansas and Texas Railway Company, and the St. Louis, Iron Mountain and Southern Railway Company; and a supplement thereto, adopting the contract as executed by the Western Union Telegraph Company and the Missouri Pacific Railway Company, being signed by the St. Louis, Iron Mountain and Southern Railway Company and the Missouri, Kansas and Texas Railway Company and by the International and Great Northern Railroad Company, and by the Galveston, Houston and Henderson Railway Company; said contract providing for use of the wires of the Western Union Telegraph Company on the line of the International & Great Northern Railroad Company, and of other roads mentioned therein, and providing for other matters in relation to the telegraph wires and lines along said railroad and the other railroads named in said contract; all of which matters are set out fully in the contract referred to.

INTERNATIONAL AND GREAT NORTHERN
RAILWAY COMPANY
by THOMAS J. FREEMAN,
Its President.

WILSON & DABNEY
(SEAL) *Attys.*

Attest:
H. B. HENSON,
Assistant Secretary.

(19) The defendant next introduced a copy of the notice to the Judge of the County Court of Anderson County, and its commissioners, dated January 20th, 1912, and proved that it was duly read to the Judge and the Judge and the Commissioners, on the 12th day of February, 1912. This is Exhibit "O" of the amended answer,

and it stated that the defendant was the assignee of the purchaser at sale under the foreclosure mentioned above, and that the defendant denied that it had any contract or that there was any contract of itself or of any of its predecessors whereby it was agreed that the general offices, public offices, principal offices, machine shops, round-house or other structures owned by it, and which had come down to it, should be established or maintained at Palestine, Texas, but stated that if any such contract or agreement covering these matters had ever been made, the defendant elected not to assume or adopt the same, and did this pursuant to the decree of foreclosures of the Federal Court of May 10, 1910. This notice was signed by the defendant by its President, and attested by its Secretary under its seal.

(20) The defendant next introduced a notice served on the Mayor and City Council of the City of Palestine, and shown to have been served and read to them on the 13th of February, 1912, at a regular meeting, and executed as the last notice, and it was substantially the same as the last notice, except that it was addressed to the Mayor and City Council of Palestine, being exhibit "P" attached to the amended answer.

(21) The defendant next introduced the document, a copy of which is attached to the amended answer, marked exhibit "Q," being a decree of the Circuit Court of the United States for the Western District of Texas, in cause No. 138, entitled John A. Stewart and Wm. H. Osborne, trustees, plaintiffs, against the International Railroad, the International & Great Northern Railroad, and Barnes and Pearsall, Trustees, and Taylor and Dodge, Trustees, and made April 15, 1879. This decree foreclosed a mortgage of the 1st of April, 1871, executed by the International Railroad to Stewart and Osborne, Trustees, and declared it a valid mortgage. It was therein decreed that the I. & G. N. R. R. Co. was the successor of the mortgagor, and that it assumed its obligations,

and that there was due on its mortgage, on the 1st of April, 1879, $5,457,678.20, in gold, with which the International and the I. & G. N. R. R. Co. were both chargeable, and it was directed that all of the properties described in the mortgage and below described in the deed made under the decree of foreclosure, should be sold, including all corporate rights, privileges and franchises of the International Railroad, among which were the franchises of that company to be a corporation. B. G. Duval was appointed Master to make the sale. The property was to be sold in one parcel, for not less than $500,000 in gold, the Master to make report to the Court, and deed to be made in confirmation.

(22) Defendant next introduced the decree of confirmation of sale of date August 4, 1879, entered in said Circuit Court in case 138, being exhibit "R" to the amended answer. The decree reciting that the master making the sale had filed his report, and that all parties thereto requested its confirmation, and that the court approved the report, that all notices had been made in accordance with the decree of foreclosure, and that the sale was fairly made, and the properties sold to Kennedy and Sloan, Trustees, under the terms of the sale, upon payment to him of the balance of the bid of $500,000 in gold, $25,000 having been paid in accordance with the decree.

(23) The defendant next introduced the deed of the Master to John S. Kennedy and Samuel Sloan, Trustees, dated October 14, 1879. This deed recited the decree of foreclosure above, and the report of sale and confirmation of the report, and stated that the properties had been sold to John S. Kennedy and Samuel Sloan, Trustees, for $500,000, all of which had been paid at the date of the deed, and made conveyance to the purchasers as Trustees, in fee simple, of the International Railroad Company's properties owned by it on April 1st, 1871, or thereafter acquired, including all corporate rights of

that road, and its privileges and franchises, and also the charter powers thereto belonging to the International Railroad Company, and of the I. & G. N. R. R. Co., as far as the latter succeeded to the title of the International Railroad, granted them by virtue of their charter or other laws of the State or Nation.

(24) The defendant next introduced the decree in cause No. 132, entitled Barnes and Pearsall, Trustees, complainants, vs. The I. & G. N. R. R. Co., by the Circuit Court of the United States for the Western District of Texas, entered on August 4th, 1879. This was a decree of foreclosure, and is exhibit "T" attached to the amended answer. The decree foreclosed (1) the mortgage of 15th of January, 1875, executed by the International Railroad, to Barnes and Pearsall, as Trustees, and declared it valid, and (2) also the mortgage of the 15th of January, 1874, executed by the H. & G. N. to Barnes and Pearsall, Trustees, and declared it valid; and furthermore, decreed the I. & G. N. R. R. Co. to be the successor of the International and H. & G. N. R. R. Co., and to have assumed its obligations, and that there was due on said mortgages $8,297,226.93, interest and principal, on the 1st of August, 1879. That by the mortgage of the International Company, its railroad and properties, corporate rights, privileges and franchises had been mortgaged, and all of them, owned and to be owned, and that by the mortgage of the H. & G. N. R. R. its railroad and all its properties owned and to be owned had been mortgaged. It was directed that all of the properties of the railroad should be sold by the Master to make the amount due.

(25) The defendant next introduced the decree confirming the Master's report of sale made on October 14, 1879. This decree recited that the Master reported this sale as having been made on the 14th of October, 1879, of all of the properties of the International Railroad and the H. & G. N. R. R. The decree recited that all notices had been given, and the sale made and properties

struck off to Kennedy and Sloan, as Trustees, for $10.00 cash, and was in all things confirmed. This document was exhibit "U" attached to the defendant's answer.

(26) The defendant next introduced deed from the special Master making the sale to Kennedy and Sloan, Trustees. This deed recited payment of the consideration, and the provisions in the decree of confirmation of the sale, and conveyed to Kennedy and Sloan, as Trustees, the railway of the International Railroad, and its various properties, not including lands other than those necessary for right-of-way, depot and shop grounds; and the railway of the H. & G. N. and its properties, not including lands other than those necessary for right-of-way, depot and shop grounds; and the various properties including the right of the International Railroad and of the H. & G. N. R. R. and of the I. & G. N. R. R. Co. in any of the properties conveyed, and also the corporate rights, privileges and franchise of the International road, and all of their property mentioned in the decree of foreclosure. This document is exhibit "V" attached to the amended answer, and was dated Oct. 14, 1879.

(27) The defendant next introduced the decree of foreclosure in Equity case No. 137, United States Circuit Court, Western District of Texas, dated April 15th, 1879, in the suit of Taylor and Dodge, Trustees, vs. H. & G. N. R. R. Co., I. & G. N. R. R. Co., Stewart and Osborne, Trustees, and Barnes and Pearsall, Trustees. This was exhibit "W" attached to the amended answer, and was dated April 15, 1879. The decree declared that the I. & G. N. R. R. Co. was the successor to the H. & G. N. R. R., and had assumed its obligations; that the mortgage executed by the H. & G. N. R. R. to Taylor and Dodge had been duly accepted, and was in all respects authorized, and that there was due and unpaid the whole amount secured thereby, to wit: on the 1st day of April, 1879, $5,404,827.75; that the mortgage covered the whole properties of the H. & G. N. R. R., and road to be built, and

935

franchises and rights, except lands not necessary for right-of-way, depot and shop grounds. The properties were directed to be sold and a master appointed to make the sale.

(28) The defendant next introduced the decree confirming the report of the sale, directed to be made under the last decree, being exhibit "X" attached to its amended answer. This decree was made by said United States Court, and recited the previous decree of foreclosure, declared that all notices had been given, the sale regularly made to Kennedy and Sloan, as Trustees, for $500,000 in gold, and directed the Master to deliver a deed of conveyance upon the payment of the amount of the bid.

(29) The defendant next introduced deed from the Master Commissioner to Kennedy and Sloan, Trustees, dated October 4, 1879, made under the last mentioned decree of confirmation. It recited the complete payment of the amount of the bid, the decree of foreclosure, and the confirmation, and conveyed all of the railway of the I. & G. N. R. R. Co., as far as the latter succeeds to the chises and properties, except lands not necessary for right-of-way, depot and shop grounds, and the charter powers and privileges of the H. & G. N. R. R. and the I. & G. N. R. R. Co., s far as the latter succeeds to the title of the H. & G. N., granted them by their charters or other laws of the State of Texas. This document is exhibit "Y" attached to the amended answer.

(30) The defendant next introduced a map, being exhibit "Z" attached to the amended answer, showing its line in red, which is as follows:

(31) The defendant next introduced the parts of Transcript in the suit of Anderson County vs. the H. & G. N. Railroad Company, hereinabove set out on pages to , and showed by said Transcript that no claim was made in that suit, on account of any of the matters herein asserted by the plaintiffs. This Transcript was complete of all the proceedings, in that case, and was a certified copy, made by the Clerk of the Supreme Court, of the whole of such Transcript, and showed that the judgment of the lower court had been affirmed by the Supreme Court, and this is the case which is reported in 52 Texas, commencing at page 228.

(32) The defendant next introduced the order of the County Court of Anderson County, and a bond of the Houston & Great Northern Railroad Company given in pursuance thereof, which order and bond are set out above, pp.

It was proved that this bond had been authorized and was ratified by the H. & G. N. R. R.

(33) The defendant next introduced deposition of David S. H. Smith, as follows, being all of that portion thereof introduced by the defendant to the jury, and not excluded by the court, in answer to the direct questions. The witness testified that he lived in St. Louis, and has lived there for thirty-two years, and had been in the employment of the International and I. & G. N. Road, and had lived in Texas, but left Texas in 1881, and lived in St. Louis, where he was local Treasurer of the M. P. Railway Company until 1906. That he entered the employment of the International Railroad in 1871, and that when it was consolidated with the H. & G. N. R. R. he entered the employment of the I. & G. N. R. R. Co. That he was first Land Agent for the International, and afterwards Treasurer and Paymaster for the I. & G. N., and in 1871 lived at Hearne, in the fall of 1872 moved to Houston, and in the summer of 1875 moved to Palestine, where he resided until he left the State in 1881. He does

not think he was ever in the employ of the H. & G. N. R. R. Co. alone. The witness said that he knew H. M. Hoxie; met him first in the spring of 1871, Hoxie then being Superintendent of the International Road, and that during the whole period of the witness' residence in Texas of ten years, he lived in Hoxie's house, first in Hearne, then in Houston, then in Palestine, and was quite intimate with him; that Hoxie was General Superintendent or General Manager while witness was Land Agent or Paymaster and Treasurer. That in 1875 the I. & G. N. R. R. Co. moved its official headquarters to Palestine, being influenced to do this because Palestine was the center of the system and more convenient and economical for the operation of the Road from this central point than from one of its extremities; and that the witness knew why the Railroad was moved to Palestine, as this was a general topic of conversation in the offices, and discussed among the officers, including Hoxie and himself, and that the contract between Grow, President of the H. & G. N. Road, and the citizens of the County, by means of which $150,000.00 in bonds of Anderson County were voted, is of record and in writing, and speaks for itself. The witness stated that he never heard of any contract between Hoxie on the one hand or any person or persons of Palestine on the other, whereby the official headquarters of the I. & G. N. R. R. should be moved to Palestine and the people of Palestine should put up rent houses to be rented to the employes of the I. & G. N. Railroad Company at reasonable rentals. The reasons for moving the official headquarters to Palestine in 1875 were what the witness had already stated, that is, to be in the center of the system, and so to be able to manage the Railroad more conveniently and economically. He also said that the contract whereby the H. & G. N. made a junction with the International Railroad at Palestine, and in consideration of which the people of Anderson County voted $150,000.00 in bonds to the H. & G. N.

Railroad, is well known, and is of record, and was lived up to faithfully on both sides. The witness said he never heard of any other contract than the above, whether claimed to be verbal or written, between the people of Palestine or Anderson County, and the H. & G. N. Railroad or the International Road, or any of its officers, including Hoxie, and, further, that after the consolidation of the International and H. & G. N., witness was Paymaster and Treasurer, and on intimate relations with the officials of the I. & G. N. R. R., and would have been almose certain to be acquainted with any new or important policies to be adopted, and that his relations with Hoxie were of the most intimate character, and that he lived in the same house with him during his ten years' stay in Texas, at Hearne, Houston and Palestine; that as to any written agreement between Grow and Judge Reagan, they must exist in writing, and if they can be shown, and as to any parol agreements between them, he knows nothing of them, and as to any parol agreements between Hoxie, Wright and Ozment, he has never heard of them. That witness, so far as he can remember, was a director of the I. & G. N. Railroad, but he cannot be positively certain at this late date. He was its Secretary, and kept its Minutes, and signed them. That he must have been director after they moved to Palestine, in 1875, if he was a director, and that as Secretary he must have acted after they moved to Palestine in 1875; and acted as Secretary until some time after his removal to St. Louis in '81, but that he cannot recollect the dates, and refers to the records of the I. & G. N. R. R. to show them. That neither as Secretary or director, nor in any other way or capacity, did he ever hear of the parol contracts alleged to have been made by Grow with Reagan, or by Hoxie with Ozment, Wright and others, which, as set out in the petition, were stated to the witness in the interrogatories addresed to him.

(34) Defendant next introduced the testimony of Ira H. Evans, by deposition, as follows:

He stated that he was 69 years old, and resided at Austin, Texas, and in 1873 was elected Secretary of the H. & G. N. Railroad, and in 1874 Secretary of the International R. R., and in July, 1874, was elected Secretary of the I. & G. N., and was a director of the I. & G. N. on April 5th, 1875, and continued as a director, with the exception of two years, until November, 1909, and as Secretary until the beginning of 1880. That Galusha A. Grow was President of the H. & G. N., and when witness became Secretary, it is the witness' recollection that Grow was President of the International Railroad; but that he is uncertain whether Grow was President of the I. & G. N. when he became Secretary. When Grow's connection terminated, he cannot say, but the records will show. H. M. Hoxie became General Superintendent of the I. & G. N. Railroad Co. in 1874, to the best of witness' memory. That he was intimately associated with Grow, and not so intimately with Hoxie, for the reason that Hoxie was Superintendent of the Railroad, and not its Chief Executive, so that witness was in no way under his direction or control, but that he knew both Grow and Hoxie very well. Further, that the General offices of the H. & G. N. Railroad were maintained in Houston during his connection with that Company, and during its consolidation with the International under the title of the I. & G. N., that the offices of the I. & G. N. were maintained at Houston, Texas, from the time of their consolidation until their removal to Palestine, about August 1st, 1875. The witness stated that he distinctly remembered the removal of the general offices of the I. & G. N. from Houston to Palestine, and that so far as his recollection goes the offices were removed from Houston to Palestine because the latter was considered the most central part of the system, and the most convenient place for its operation. That he had no recollection of hearing any other

reason given for the removal of the offices from Houston to Palestine, and that at this time Captain Hayes was Vice-President and General Manager, Hoxie, General Superintendent, D. S. H. Smith, Treasurer, and witness Secretary, and that they were all intimately associated in the conduct of the business of the Road, and witness did not recall any other reasons than those stated for the removal of the offices.

The alleged contracts claimed by the plaintiffs, as set out in their pleading, were stated to the witness, and he was asked if he had ever heard of them, and he stated that he had never heard of them until recently, and also that Captain Hayes was the General Manager of the I. & G. N. in 1875, and not Hoxie; and furthermore, that he never heard of any contract, agreement or understanding between the H. & G. N. Railroad, or the I. & G. N. Railroad and the people of Anderson County or Palestine in any way connected with the bond issue, other than the written contract between the H. &. G. N. Railroad and the people of Anderson County, for the extension of the Road to Palestine, and the putting up of a depot within one-half mile of the Court House, at the junction point with the International Railroad, in consideration of $150,000.00 in bonds of Anderson County, and that this matter of a different contract or a supplementary contract had only been brought to his attention recently. That he, witness, was Secretary of the I. & G. N. Railroad, and as such had intimate, personal knowledge of all such matters as those inquired about, and as custodian of the records of the Company was acquainted with all of its official acts. That he had no official connection with any of the Companies in 1872, nor was he in position to know what took place before he became Secretary of the H. & G. N. in September, 1873. The records of the Company would show when Grow ceased to be President of the I. & G. N. R. R. Co., and R. S. Hayes became its Vice-President and General Manager, which he thinks

was sometime in 1874, and stated that thereafter, Hayes was the Chief Executive Officer of the company in the State of Texas, and that both Hoxie, as Superintendent, and witness, as Secretary, were under Hayes' orders and direction, and further, "it does not seem possible to me that any such action as that claimed on the part of Mr. Hoxie could have been taken by him on his own responsibility, or even with the added approval of Captain Hayes as Vice-President and General Manager, without action thereon by the board of directors, whose Secretary I was, and all of whose records were kept by me." The witness further said that he was Secretary of the H. & G. N. and the I. & G. N., and kept the Minutes of the stockholders and directors, and had same carefully and correctly recorded in the Records of the Company, and that neither as Secretary or as director in these companies, or in any way whatever, did he ever hear of the parol contracts alleged to have been made by Grow with Reagan, or by Hoxie with Wright, Ozment and others, and that the first he ever heard of such alleged contracts was after the removal of general offices from Palestine to Houston, within recent years. That he did not think that Hoxie, as General Superintendent, had any authority to bind the I. & G. N. by contract to establish, keep and maintain the general offices, shops and roundhouses, or any of them, at the City of Palestine, or at any other place, without prior authority having first been given by the board of directors, nor that he could ratify any such contract, previously made by any other person, in this regard, in the absence of authority granted by the board of directors of the I. & G. N. Railroad Co.

The defendant read the answers to cross-interrogatories as follows: That he, Evans, did not know the whereabouts of Grow in February, March and April, 1872; that to the best of his recollections he, the witness, was in Hearne, Texas, during the months of February and March, 1872, and in Houston, Texas, in April and May, 1872. That

as far as his personal knowledge extends, Hoxie was Superintendent of the International R. R. Co. until its consolidation with the H. & G. N. in 1874, and thereafter General Superintendent of the I. & G. N. R. R. Co. until he severed his relations therewith. That he did not recollect that he (Hoxie) was ever officially connected with the H. & G. N. That Hoxie remained General Superintendent of the I. & G. N. from 1874 for several years, but was not the General Manager of it in Texas, as Hayes was Vice-President and General Manager, and the witness thought this fact well known to the public, as Hayes' election had been published in the leading papers of the State. That Hayes was a strong man, who performed his duties well, and was generally recognized as a very able man, and passed upon all matters of great importance to the interest of the Company in Texas, and his decision was final therein, unless he referred same to the Executive Committee or the Company, or the board of directors for their action. That Hoxie performed the ordinary duties of a General Superintendent, and also had under him the Traffic Department, both freight and passenger. That Hayes had great confidence in his judgment and ability, but did not always agree with him, or hesitate to assert his superiority in case of difference. That both were very able men, and got on well; that Hoxie had been a politician of much experience before coming to Texas, and was accustomed to dealing with newspaper men, and with the public, and was exceedingly skillful in such lines of action, but that Hayes was more modest, and that it was quite possible that the general public may have assumed that Hoxie possessed more authority that he did. That he, the witness, Evans, was a director of the I. & G. N. from 1875 to November, 1909, with the exception of two years, according to his recollection, and that while he was director, as far as he recollected, all annual meetings of the stockholders were held at Palestine, after the removal of the offices thereto, and that he thought that he ceased to

be Secretary of the I. & G. N. about the close of 1879, but kept its records and minutes until he ceased to be Secretary, and thinks that he was succeeded by D. S. H. Smith or A. R. Howard; the records will show.

(35) W. L. Maury was called by defendant, and testified that he is the Consulting Auditor of the defendant, and was Auditor of the I. & G. N. R. R. Company from May, 1888, to April, 1913, and that the I. & G. N. Railway Co., the defendant, had paid out $1,345,000.00, the amount accepted by it as a liability, and growing out of the liabilities imposed by the statute of September 1, 1910, commonly known as the I. & G. N. Act. This is the Act which was approved September 1, 1910, and is Chapter 4 of the General Laws of the State of Texas, passed at the Fourth Called Session of the 31st Legislature, and now contained in the Revised Statutes of 1911, Articles 6624 and 6625. The witness stated that that sum of money, $1,345,000.00, was the total amount of the extra burden resulting from said legislation placed on the I. & G. N. Railway Company, and paid out as provided for in that Act, and which, but for that Act, it would not have been bound to pay. There maybe some small errors, but the statement is approximately correct, and the witness would safely say that the amount paid out under such burdens exceeds $1,000,000.

The witness entered the employ of the I. & G. N. R. R. Company in December, in St. Louis, and moved to Palestine, he believes, in May, 1888. Before that he had been in the service of the M. P. Railroad, which used the same offices in St. Louis as the I. & G. N. from July, 1881, to May, 1888, where they were operating the Missouri Pacific there. There was a consolidation for operation of the Railroads, to wit: Of the I. & G. N. R. R., the Missouri, Kansas & Texas Railway, the St. Louis & Iron Mountain, called the Iron Mountain, and the Texas & Pacific Railroad, until the Receivership came up; all of these roads were operated under one set of officers, from

St. Louis. They were consolidated for operation, but not under one charter, and were all operated from St. Louis from in 1881 up to in 1888, and all of the accounts were handled there for these Roads, including the I. & G. N. R. R. Company, which was in the consolidation for operation, and managed from St. Louis. Outside of handling accounts, the operation was conducted, during the St. Louis period, by Hayes as Vice-President, and Hoxie as General Manager, for a portion of such St. Louis period, except that Traffic and freight matters were in charge of A. A. Talmage until he left, and then, witness thinks that Hoxie was put in charge of the Traffic, as well as the General Operation. This operating consolidation absolutely covered the I. & G. N. from in 1881 until 1888. The operation was, as stated, in consolidation of these various Roads, from St. Louis, during said period, and the witness thinks that they had a President for the whole System, and possibly a Vice-President for each road, or something like that. The central branch of the Union Pacific was under a lease, and brought into this arrangement. During this consolidation and operation from St. Louis, during the period from 1881 to in 1888, Hoxie was in charge of the operation and traffic with the qualification as to the traffic during the portion of the time stated above, when Talmage had charge. Warner was General Auditor, D. S. H. Smith was Local Treasurer, John C. Brown was General Solicitor until he was appointed Receiver of the Texas & Pacific. These were a part, at least, of the general officers. May was Chief Engineer of the M. P. Lines—witness did not think that he covered other Roads. These officers resided in St. Louis, where the general offices were, and witness was working in these offices first, he believes, as Chief Clerk of the Auditor's Office of the Distribution Department, and when the I. & G. N. general offices were moved back to Palestine in 1888, witness became Auditor of the I. & G. N. R. R. separately. During the St. Louis period, from in 1881 to in

1888, these officers, and the respective heads of the different departments, in carrying on this operation in consolidation, had their forces and employes with them in St. Louis. The general offices were in the Equitable Building there, with the exception of the Auditor's office, which was in another building. This last was first only for the M. P., but, when all of the Roads came together in 1881, it was used as the Auditor's office for all of them. Witness would make an estimate that in these general offices of all of these roads, consolidated in operation, there were in St. Louis, during said period, about six hundred employees. As to the Traffic Department, witness changed the statement made, and said that he thought Hoxie was first the head of the Traffic Department, and afterwards Newman, but he doubted his memory on that. The Minutes of the Stockholders' and Directors' meetings of the I. & G. N. Railroad during this period, from 1881 to in 1888, remained in Palestine, but all records, except these primary records, including vouchers, etc., were sent to St. Louis, and remained there during such period, and from the Auditor's Office in St. Louis, payments were made. When the witness came to Palestine in 1888, upon the return of the offices of the I. & G. N. to Palestine, Texas, he then found there already, the Superintendent of Transportation, Boyd, the Assistant Claim Agent, Kane, living then in Palestine, and Baker, Botts & Baker, General Attorneys, living at Houston; and he thinks that Kane was acting as Assistant Secretary at that time; and Mr. Maxwell had just died. He thinks that a very few carloads of records were brought back to Palestine from St. Louis, and that they were mainly left in St. Louis, and they started afresh in Palestine, and set up there in 1888, the Auditor's, Treasurer's, General Freight & Passenger Agent's Offices, and that the General Manager's office came a little later; first Gladden coming down as General Superintendent, and then Eddey as General Manager, and that he should say that in beginning afresh at Palestine,

there were employed in the general offices from fifty to sixty persons, about thirty in the Auditor's office, the biggest. When he came down from St. Louis there was no Auditor's office running in Palestine before he got there, nor a General Freight Office, though he thinks Galbreth, who became General Freight Agent, had been an Assistant, with an office at Galveston or Dallas before that, but none at Palestine, nor did he find any General Manager's office running at Palestine, but he thinks that when he got to Palestine there was a Chief Engineer's office running there, filled by Baker, and thinks he had been there for some time, but does not know how long. When he came down from St. Louis in 1888, he found no Treasurer's office running there. When the offices were again set up in Palestine, he thinks Galbreth became the first General Freight Agent in 1888. He (Galbreth) did not come from St. Louis, but from Dallas or Galveston and that Howard then became the Treasurer. He came down from St. Louis with the witness in 1888, and Eddy as General Superintendent, came from Omaha, having been connected with the St. Louis offices, working on the M. P. It was stated to the witness that the plaintiffs had demanded of the defendant to produce a certain letter stated to have been written by Grow to Hoxie about July or August, or along there some time in 1875. The witness stated that this demand had been handed to him, and that he had made search, commencing about two weeks prior to the time of his testimony for this letter, and that he understood that this demand had reached defendant's lawyers about a day before it was handed to him. That he went to Palestine, and instructed the custodian of the old records to make thorough search among the records of the General Superintendent's office, which, according to his understanding, was the proper place for the letter to be, if it existed, and that these old letter files had not been moved to Houston, but, generally speaking, all other records had. However, that he made

a search also in Houston and Palestine himself, a conscientious and honest search, and found no such letter.

Cross-examination of Maury by plaintiffs:

The witness stated he did not know why the I. & G. N. General Offices broke up in St. Louis and returned to Palestine in 1888, but could only give the information obtained by him from Waldo, the General Auditor of the combined operation at St. Louis, who, at the very time he gave the information, was the Head of the Department in which at St. Louis the witness was working, and who was then discussing the matter as such department head. Defendant objected to any such testimony as immaterial, irrelevant and hearsay. The objections were overruled and the defendant excepted, and the witness stated that he understood it was on account of the action of the Attorney General of Texas threatening to forfeit the charter. That a General Freight Agent's office was established at Palestine in May, 1888, or very soon afterwards. The General Passenger Agent, the Auditor himself and the Treasurer all came to Palestine in May, and the General Manager he thinks about the first of June, 1888. The witness thinks that perhaps Kane was Vice-President in Texas, about that time, and Assistant Secretary, and later on General Claim Agent and one of the Vice-Presidents, resident in Texas. From the time the witness came to Palestine in May, 1888, up to September, 1911, the general offices and general officers of the I. & G. N. Railroad Company were at Palestine. That he could not state from memory the pay-roll of the general officers of the defendant at this time. When he was Auditor the pay-rolls passed through his hands, but he could not approximate the result from recollection, or give estimates of amounts month by month, but that the books would show. The witness did not recollect how long he was on the Board of Directors of the I. & G. N. Railroad Company, but thinks that he succeeded Rice of Houston. The witness did not recollect whether, on the 5th of October, 1889, Eddey had

any connection with the Railroad, other than through the then existing receivership, or was General Manager of the Road as distinguished from Receiver of the Road. In the General Offices building at Palestine there is a vault on the ground floor, then on the first and second floors, divided into two compartments, and the third floor was occupied by the Auditor's office, just one big vault extending through the three stories. The vault was built of brick, with ordinary fire-proof steel doors, and was understood by the witness to be fire-proof, and the records were kept there for thirty or forty years, the most valuable records, and some are still stored at Palestine.

Re-direct:

When the offices were moved to Houston, records were carried to Houston, and some left at Palestine. The Palestine building was inadequate to hold the records.

36. Defendant next introduced findings 10, 11 and 12, being part of the findings of fact by Judge Townes in the suit of the State of Texas v. The I. & G. N. Railroad Company brought by Attorney Hogg and tried in the month of June, 1888, District Court, Travis County, Texas, from the complete transcript of which suit the plaintiffs introduced an excerpt set out above, and also in connection therewith the defendant read an excerpt from the State's petition in such transcript, which excerpt from the petition was as follows:

"That said Respondent Company has not, and is now without, any *bona fide* managing or controlling or directing officers of its own within the State of Texas, nor has it a general or other public office within this State, where the general business of the corporation is transacted, or its transfers of stock are made, or its books containing the record of the amount of its capital stock subscribed, or the names of the owners of the stock, the amount of its assets and liabilities, &c., are recorded or kept; but for many years the said officer, officers and books had been

kept in the City and State of New York and in the City of St. Louis, in the State of Missouri."

This petition, from which the copy was made, was filed December 30th, 1887. The case was tried without a jury, and Judge Townes' findings of facts Nos. 10, 11 and 12 are as follows:

"10th. Under these leases the Missouri Pacific Co. took charge of the road of Respondent and of the M. K. & T. Co., in 1881, and continued to operate Respondent's road until after the institution of this suit, to wit: the 2nd of May, 1888.

"11th. That on taking charge of Respondent's line the Missouri Pacific Co. began to operate it as part of the Missouri Pacific System using the road from Longview to Houston as part of one trunk line and in connection with other roads under its control, and the line from Taylor to Laredo as part of another trunk line in connection with the M. K. & T., and other connecting lines, and those portions of Respondent's line between Taylor and Palestine and Troupe and Mineola, respectively, as connecting or branch lines.

"12th. That under this lease there has been no executive officer of Respondent's road living in this State. The general and principal offices of the Company have been removed out of the State and to St. Louis, Mo., and kept there till after the institution of this suit, since which time they have been brought back to Palestine. That during all the while, except a short interval after the death of one —— Maxwell who had held such position, there has been an Assistant Secretary of Respondent resident at Palestine. The duties of this office are not disclosed. There has at all times been a general claim agent and General Road-master and Superintendent, employed and paid by the Missouri Pacific Company, assigned to duty on Respondent's line, resident at Palestine. The stockholders and Board of Directors of Respondent have

each year held a meeting at Palestine, and a stock book of the Company has all the while been kept there."

37. Defendant introduced affidavits of J. W. Ozment to the amended and original petitions. They were the same in both cases, and their purport was that Ozment swore that he was a party to the contract and agreement between the citizens of Palestine and the I. & G. N. R. R. Co. made on about the first of the year 1875, and that the averments in the petition relating to such contract and agreement, and relative to compliance therewith by the citizens of Palestine, to the satisfaction of the Company, are true.

38. The legislative charter of August 5, 1870, of the International Company, and acts relating to the I. & G. N. R. R. Co. of April 24, 1874, March 10, 1875, and the legislative charter of the H. & G. N. R. R. of October 22, 1866, and of the Houston Tap and Brazoria Railroad Company of September, 1856, having been introduced by the plaintiffs, the defendant introduced the other special acts relating to said railroads, or any of them, as follows:

The Victoria and Columbia Railway, incorporated 13th of November, 1866, by act approved that date. Various persons were created a body corporate with authority to construct a railroad from Victoria in Victoria County to the Brazos River at the town of Columbia, or from Columbia on the Brazos to Victoria. In this legislative charter it was provided, "the board of directors shall have immediate control and management of the affairs of the company."

The Huntsville Branch Railway was incorporated April 4, 1871, by act of that date, and was authorized to construct a railroad from a convenient point on the H. & G. N. R. R. to Huntsville, in Walker County. It was provided, "The direction and control of affairs of said corporation shall be vested in a board of not less than five nor more than nine directors, as the by-laws may provide," and, furthermore, that "contracts in writing signed by the

President and countersigned by the Secretary or other officer, duly authorized by the Board of Directors under the seal of the company, when the same is in execution of the order of the board, shall be binding and valid."

The H. & G. N. R. R., the H. T. & B., the V. & C. R. R. and the Huntsville Branch Railway, were consolidated under the name of the H. & G. N. R. R. by an act of May 8, 1873, and all of these roads, other than the H. & G. N. R. R., were declared to be parts of the H. & G. N. R. R., "and shall be under control and management of the H. & G. N. R. R. in like manner as any other part of their railroad; and all rights, privileges and franchises granted or secured from the charter of either or all of the aforesaid corporations shall inure to and be exercised and enjoyed by the H. & G. N. R. R. Co., as fully and to the same extent as they could have been by either of said companies."

By the act of April 24, 1874, it was recited that litigation has arisen in the claims of the International Railroad for bonds under the act of August 5, 1870, incorporating the road; and this was amended, and the bond obligation of the State limited to the portion of the road constructed and thereafter to be constructed between Jefferson and San Antonio, it was proposed that this amendment should be accepted by the International Railroad, and by the act of May 1, 1874, a land donation was provided for the construction of the road west of San Antonio.

39. The defendant then introduced in evidence three letters written by Judge John H. Reagan:

"Palestine, Texas, March 26th, 1872.

"J. Sanford Barnes, Esqr.

"Prest. Int. R. R. Co.

"Hearne, Texas.

"Dear Sir:

"We have met the people of this county, in small numbers, at six places in the northern part of this county, canvassing the question of donating one hundred and fifty thousand dollars to the Houston & Great Northern R. R.

Co. to build that road to its intersection with the International at this place; and I am to meet them at Washington Mills tomorrow, and in the Southern and Southeastern parts of the county on next Friday and Saturday.

"The necessary petition has been presented to the County Court, and it has to-day ordered an election to take the vote on the question commencing on the 1st day of May; and the Registrar has given the necessary notice for the special registration of the voters.

"From what I have seen, if there is no great change, we shall carry the donation. Very respectfully,

"JOHN H. REAGAN."

"Palestine, Texas, May 7th, 1872.

"J. Sanford Barnes, Esq.,

"New York City.

"Dear Sir:

"Your favor of April 19th reached me some days ago, since which we have held our election on the giving a donation of $150,000 to the Houston & Great Northern R. R. Company. The whole number of voters who registered were 1008, necessary to carry the donation 672. Number of votes for the proposition 716, number of votes against the proposition 93. So you will see we got the necessary two-thirds votes and 44 over. And our County Court has made the necessary orders to carry into effect the vote of the people. It cost us a hard struggle, and some of us are much gratified at the result.

"The donation of Smith County to the same company has also been carried by a better majority than here.

"I regret very much the course which the Attorney General and Comptroller of Texas have adopted in refusing to issue the State bonds due the International R. R. Company. It seems to me to be in disregard of the pledged faith of the State, and to be calculated to do serious injury to our prospects now apparently so good for securing the construction through our State of important

lines of railroad, by deterring capitalists and driving capital elsewhere for investment which we so much need here. I trust most sincerely, however, that there is no danger of the people of Texas, when they can speak, dishonoring themselves by an attempt to repudiate their liabilities in this or any other respect. And, if necessary, I will unite with others, at the proper time, in an appeal to the people to avoid this evil to themselves and wrong to others. I hope the great work you are engaged in of building the International Railroad may go rapidly and successfully on as it has done. I cannot believe you will find the people unfaithful to their obligations, if you should find it necessary to appeal to them instead of to the courts. Many disapproved of the general recklessness of our last legislature, but none will assume, I suppose, that they did not have authority to grant your charter, and to enter into the terms they did with your company; and this being done, and the faith of the State pledged, they cannot afford to repudiate the action then taken.

"Mr. Grow tells us the Houston & Great Northern will be built to this place by the latter part of November, next, and we are looking forward to considerable improvement in our little town and in the county generally. We learn that it is expected the cars of the International will cross the Trinity in three or four weeks, and from that time there will be an increase of the travel and trade on it.

"Very respectfully,

"JOHN H. REAGAN."

"Palestine, Anderson County, Texas, Nov. 20th, 1874.

"Capt. R. S. Hayes,

"Gen. Manager Int. & G. N. Railroad,

"Houston, Texas.

"Dear Sir:

"Your telegram of yesterday, and also the letter of your Secretary, Major Evans, in relation to our taking charge of your interests in the case of Anderson County

against the G. N. Railroad are received. And I think it right that I should state more fully than I did in yesterday's telegram the reasons why I thought improper for me to go into the defense of that case.

"I was active and earnest in my desire to get both the International & Great Northern Railroads into our county and to our town. I, at considerable sacrifice, the loss of one term of our court, got up the private donations to secure the depot of the International at Palestine. I advocated, & in doing so lost another term of our court, the giving of the subsidy by our county to secure the junction of the Great Northern with the International at this place, though I thought the subsidy required of us was too large. And I have thought and said all the time, since the question was raised, that the State ought to consent to a proper settlement of its bond debt to the International R. R. Co. Besides this your company has kindly given us your legal business in this county. All this has caused the people of this county to regard me as specially friendly to these roads, which so far is true. But some have gone beyond this and charged me with being interested in them; with having $20,000 of stock, & some, I hear, charge me with owning fifty thousand dollars stock in these roads. This everybody acquainted with the affairs of these roads will know to be wholly false. And, utterly false as it is, I have been ashamed to defend myself against such a charge.

"Added to this, crops have been short, & our people as a whole are hard run, & under such circumstances a one per cent. tax is seriously felt by them, & many think they will be unable to pay it. And a few have made this railroad subsidy a political hobby, & many false statements, & much false reasoning, has maddened a considerable number of the people of this county. Among other things it is charged that the election, at which the subsidy was voted, was fraudulent. And though I do not know that there are any charges against me of participat-

ing in the alleged fraud, still I feel that for me to undertake the defense of this case, and especially if I were to do so and get it disposed of on some technical ground, as your company would have a right to expect me to do if I could, this would be used by heartless & bad men to convince our people that the charges which have been falsely made against me were true, & would place me in an attitude before my country-men which money could not induce me to occupy.

"Other complaints are often made to me here. Upon the assurances of Mr. Barnes and Mr. Grow, successive presidents of these roads, I urged on the people that one of the benefits to our community which would result from the junction of these roads here would be the establishment here of the companies' machine shops, and that this would give us an increase of population, business & wealth. And this argument was used to get the people of this county to vote the subsidy. A good while has gone by & this has not been done, & the people tell me that I either suffered myself to be deceived, or aided the company in deceiving them. I have told them it is still promised; but they answer me it never comes. You will understand the disappointment on this subject, & how it affects me.

"From the foregoing you will see, I trust, sufficient reasons why I could not undertake the defense of the suit in question. I regret that these circumstances prevent me from doing so, inasmuch as I am both poor and in debt, & need all the business I can get. But I would rather suffer from continued poverty than be even unjustly suspected by my neighbors. Very respectfully,

"John H. Reagan."

This last letter was written on the letterhead of Reagan, Greenwood and Gooch, lawyers of Palestine, a firm composed of Judge Reagan, Thos. B. Greenwood and Jno. Young Gooch.

40. The defendant next introduced portions of certain letters, and it was stated in the record and agreed that the defendants had made diligent search and given instructions to Mr. Maury, who made the search, to find and bring with him to this court everything in the correspondence files of the company that he could find and did find, including all copies, which may have any bearing whatsoever upon the controversy in this case, and that he had done so, and had numerous letters, and that the defendant had permitted the plaintiffs to go through and investigate all of such letters and correspondence as far as they (plaintiffs) saw fit, and that the plaintiffs had done so. The statement being made, the defendant introduced in evidence excerpts from the following letters:

Letter headed International Railroad, General Superintendent's office, dated Hearne, Texas, October 5, 1872, from H. M. Hoxie to J. Sanford Barnes, who was addressed as President of the International R. R. Co., New York. The relevant portion of the letter was as follows: "Dear Sir:

"With reference to entry made your favor 25th ultimo relative to shops for both roads, I would say that at present I think it would be better to wait until both roads are under one management (as near as may be practicable), and then to go over the entire lines and look at the fact with regard to future requirements. On the line of this road we can only find one place, which approaches suitableness, that has a supply of water; and that is at Wells Creek, 5¾ miles east of Palestine, and there the ground is not the best for the purpose, although it can be made available. Messrs. Grow and Noble say there is a place on the Great Northern between Crockett and Palestine. In this matter we should delay long enough to get the locomotive divisions as correct as may be, in order to get a sufficient amount of work out of enginemen and trainmen, and I beg to ask for time. We can do all the repairs

needed for the present and for some little time to come at Houston and Hearne."

At this time the consolidation of the roads had been arranged as appears above, and was approved and concluded by the stockholders in September, 1873.

Letter from Hoxie, General Superintendent, written on the letter head of the International Railroad, General Superintendent's Office, Hearne, Texas, May 28, 1872, to Barnes, President I. R. R., New York. The relevant portions of the letter were as follows: "I had concluded not to put up the wood tools until it was determined definitely where our shops would be located. * * * The Company or joint board of directors should determine at an early date where they will build the shops, and when the location is determined on should get vigorously at work, so that by another winter we can be at work in them. Both companies have engines that have been running for 12 months, and which in the coming six months will have to be thoroughly overhauled. * * * I had a short conversation with Mr. Grow last week, and he expressed himself very anxious to have shops by the time the roads should be well at work together. Of course, in determining the location, some questions are required to be settled. The first and most important one being a supply of good water sufficient for running stationary engines, washing out boilers and supplying locomotives. Next accessibility to both roads, health of employes and returns to the companies in the way of compensation for town lots, etc. The latter, however, would give way to water supply and health. I trust that the question will soon be determined as to location, and that we may prepare for work about September 1st, next. * * * At the request of Mr. Grow I forwarded to Mr. Wetmore a list of all the tools on hand and ordered by this company, Mr. Grow having sent his Master Mechanic to New York to select some tools, and did not wish to duplicate ours."

Letter from Hoxie, General Superintendent, to Wet-

more, Financial Agent, and dated June 25th, 1873, the relevant portion of which is: "Our trains being slow and the general offices at one end of road delays reports. If shops are located at Palestine, as they should be, the general offices should also be there. It would be much better for several reasons, chief among which are that the General Superintendent should be at the largest shops, and that Palestine is near the center of the road, and is above the yellow fever district. I am losing some of the best of my men who are afraid of an epidemic. Our mechanics all come from the north and fear the coast country. I trust that the question of location of the shops will soon be decided, and I strongly recommend Palestine as the place for shops and offices. Be good enough to bring this question up for decision at an early date."

Letter dated Palestine, July 13th, 1875, on letterhead of I. & G. N. R. R. Co., and addressed to Sloan, President, written by Hayes, Vice President. This letter contained a statement of the values of properties at Palestine and Houston for the purpose of having them insured, and listed the property at Palestine. At Palestine it was stated that there was a roundhouse with 14 stalls valued at $3500, blacksmith and machine shops valued at $2500, car repairing shops valued at $800, and paint shops valued at $700, and in them tools and machinery valued at $8000, and rolling stock valued at $59,000; and that there was at Houston a machine shop valued at $1500."

Defendant next introduced a letter dated March 3, 1873, from Hoxie, General Superintendent, to Wetmore, Financial Agent. It stated that the writer and President Grow had just returned from an extended trip over the whole road, which is the first trip it is said Grow had taken over the Brazos Division since elected President of the International, and further, "we must soon decide as to point for building shops and invest at least $50,000 and perhaps more in them. We have at last found water at Palestine, and we think in sufficient quantity for all purposes, or

40,000 gallons per day. Palestine is above the yellow fever belt, and is in the center of the road, and for these, and other reasons, seems to be the most available place. However, I will write on this subject when required to do so."

Letter from Hoxie, General Superintendent, dated June 3, 1872, and addressed to Grow, President I. & G. N. R. R., at Houston. This letter stated that the International Addition to Palestine had been laid off "last week, and up to Saturday the Company had sold $8,000.00 worth of property," and that Smith, the Land Agent there, stated that there was great excitement about town property, and that a hotel and eating house would be needed to accommodate the patrons of the road, and suggested that it would be a good plan to reserve a good lot or lots on which the joint companies would build an eating house or hotel, and that an A-1, good for all purposes, hotel could be put up for $10,000.

Letter dated December 3rd, 1874, written by J. S. Kennedy, President I. & G. N. R. R. Co., from New York, on the paper of the I. & G. N. R. R., addressed to R. S. Hayes, General Manager, etc., of the I. & G. N. R. R. Co., Houston, Texas. The letter first referred to a conversation between Hayes and himself, stated to relate to the management and operation of the road in Texas, and then stated that the tools required would probably be shipped within the next week. The writer expressed the hope that arrangements would be made to commence and carry on slowly, as circumstances required, the repairs and improvements suggested, but that for the present matters must be held in abeyance until the Board of Directors have had time to see for themselves the situation, and determine upon the matter, "which all shall approve of and unite in carrying out."

Letter dated December 3, 1874, written by Kennedy, President, to Hayes, General Manager I. & G. N. R. R. Co., and marked "Private." This letter was addressed, "My

dear Hayes." The writer said that there was a strong feeling with a majority of the board that all expenditures which could be with safety postponed must be postponed, until the result of the application to the legislature in January was determined, and, further, "I will, of course, send you the tools wanted, and you must arrange for such temporary shops at Palestine as you proposed when I was with you, and which you said could be put up for $6,000 cash spread over three months and the balance in dicker. We must squeeze along for 2 or 3 months yet to see whether we can get our bonds, and then, if we do not, we will have to go to work and carry out the program I talked to you about."

Letter from Hoxie, General Superintendent, dated at Palestine, June 17, 1875, and addressed to Sloan, President I. & G. N. R. R., New York, which stated: "Our offices were moved to Palestine, and in a few days will be in order."

Letter from W. P. VanDeusen, Auditor, I. & G. N. R. R., dated Houston, Texas, February 13, 1873, on printed letter head, with this legend, "I. & G. N. R. R. Co.'s Auditor's Office," and addressed to D. P. Barhydt, Secretary, at the bottom of which occurs the statement signed by Grow set out below. "I recommend that the general offices of the International Railroad Company be removed to Palestine, where the company have a Division Superintendent, who can receive and notify the proper officers of the company of legal notices, etc. (Signed) W. P. VanDeusen." Below this is written, "The recommendation of Mr. VanDusen is approved, and I suggest that the board authorize the necessary publication. Yours respectfully, Galusha A. Grow, President."

The defendant next introduced certain excerpts from the annual report of Galusha A. Grow, President, to the stockholders of the H. & G. N. R. R. Co. at their annual meeting December 2, 1872. This was signed by Grow for himself and the directors. It stated that, "On the 28th

of March contract was made with Shephard & Henry for the construction of the road from Trinity station to Palestine, a distance of 65 miles, intersecting with the International Railroad. This division of the road is now about complete," and also a statement that, under the law of the State of Texas, authorizing counties, cities and towns to aid in the construction of roads, the County of Anderson voted a subsidy to the H. & G. N. of $150,000 in county bonds, the County of Smith of $200,000, the County of Hopkins of $189,000; the city of Tyler of $50,000. This report was headed, "Office of the Houston & Great Northern Railroad Company, Houston, Texas, December 2nd, 1872," and nowhere in this report was any mention made of the alleged contracts sued on in this case. The report covers 20 printed pages.

42. The defendant introduced a sketch showing the line of the H. & G.N.R.R. built from Houston to the Trinity River, and thence a project North unbuilt, shown by line passed East of Palestine through Cherokee County in the vicinity of Rusk. This map was made anterior to the construction into Palestine.

43. Defendant then introduced a letter, dated April 20th, 1875, from Baker & Botts, General Attorneys of the I. & G. N. R. R., addressed to Ira H. Evans, Secretary of the I. & G. N. R. R. This letter stated that it was in response to a letter from Evans, Secretary of the I. & G. N. R. R. Co., requesting to know if there were any legal impediments to the removal of the principal offices of the company from Palestine. It said, "The language of the charter of the H. & G. N. (Sec. 13) would seem to locate the principal office of that company at Houston. The railroad of that company, however, with its property, rights, powers and franchises, have been consolidated and merged with the railroad property, rights, powers and franchises of the International Railroad Company; and by the charter of that company (Sec. 8) its principal office may be at such point on its line as may be most convenient, and may be moved from time to time to such place as the progress of the work may render expedient or necessary. We think the act of consolidation gives the new company all the rights in this respect which either had prior to the merger. We, therefore, see no objection to the removal. The general railroad law of the State, Art. 4888, Pas. Dig.) also permits the removal of the principal office of any road to any point on its line (having once established and located it) by giving public notice of such change."

44. HORACE BOOTH was called by the defendant and testified: That he is General Freight Agent of the defendant, and has been a railroad traffic man in the service of the I. & G. N. for 20 years, and has been General Freight Agent since 1911, and that his position requires him to understand the problems of inter and intrastate commerce; that he is familiar with Palestine, and knows the railroad situation of the State of Texas generally, as he has to keep up with and study the problems of rates, and take care of tonnage and freight business generally with connecting lines, the getting of it from connecting

lines, and the distributing of it to connecting lines. The map, last introduced, was shown to the witness, and he said that he was familiar with the connections of the defendant, and it was doing a large amount of interstate business, about 50 per cent. of the whole business of the road, which has a mileage (all in Texas) of over 1107 miles, and connects with other lines for a joint business over the entire nation, and with water lines doing a large interstate and foreign business; and that, in his opinion, if all of the general offices were moved back to Palestine and the general officers required to live there, doing this would interfere with the operation of the road, and have a detrimental effect, because of the inaccessibility of Palestine and there getting out of touch with business and connecting lines. The witness then looked at the map, and explained the lines of the railroad as shown thereon; that it went to Fort Worth, to the Rio Grande on the Mexican Border at Laredo, connecting at Longview with the Texas & Pacific, and had connection with the Iron Mountain and Missouri Pacific on to St. Louis and with the Texas & Pacific for New Orleans and other directions, and interchanged at Laredo, Texas, with the National Lines of Mexico, where, before the present war, it did a very large interchange business at Laredo. The witness explained that his road connected at Fort Worth with the T. & P., Cotton Belt, the F. W. & D., Frisco and Rock Island Lines and the F. W. & R. G., the M. K. & T., and G. C. & S. F.; at San Antonio with the G. H. & S. A., S. A. & A. P., M. K. & T. and the S. A. U. & G., all of which roads had interstate business. The G. H. & S. A. being a continental road, as is the T. & P. Ft. Worth is 32 miles from Dallas, with which the defendant connects over the T. & P. It runs into Galveston over the G. H. & H., of which the defendant is a tenant line from Houston to Galveston, a little over 48 miles. Galveston is the greatest seaport in the United States, and the I. & G. N. R'y connects at Galveston with water lines, and is the largest cot-

ton carrier in Texas. Galveston is a large seaport for other business. The G. C. & S. F., M. K. & T., T. & B. V., I. & G. N., G. H. & S. A., and G. H. & H., are all import roads running into Galveston, and handle interstate and foreign commerce. Houston is the largest railroad center in Texas, and that point is entered by the following roads: I. & G. N., M. K. & T., G. C. & S. F., G. H. & H., T. & B. V., B. S. L. & W., the St. L. B. & M., H. E. & W. T., H. & T. C., T. & N. O., G. H. & S. A., and S. A. & A. P., known as the "SAP." That all of these roads are engaged as interstate carriers; that the S. A. & A. P. has its general offices in San Antonio, the G. H. & H. and G. C. & S. F. at Galveston, the M. K. & T. at Dallas, the St. L. B. & M. at Kingsville, and all the others have their general offices in Houston. The St. L. B. & M. is in the hands of a receiver located at Houston. Kingsville is smaller than Palestine. With the exception of the St. L. B. & M., domiciled at Kingsville, and the Cotton Belt, domiciled at Tyler, all of the big roads have their general offices in cities and not in small towns; in Houston, Galveston, Dallas, Ft. Worth and San Antonio. Houston, Dallas and San Antonio are the three largest cities in Texas, with a population of about 125,000 each. At Palestine there is no railroad other than the defendant, except the Texas State Road, which runs from Rusk to Palestine, and is a very small railroad, and the interchange with it is insignificant indeed.

The interstate and foreign business of the defendant is nearly all obtained by interchange with water and other rail lines at Galveston, Longview, Laredo, Houston, Ft. Worth and San Antonio; these are the principal interstate points. The defendant does a very large amount of import and seaboard carriage. The Ship Channel extends from Houston down to Galveston, and will provide for ocean facilities, the witness thought, by a 15-foot draught up to Houston, which would affect interstate and exchange business and foreign business. That the I. & G.

N. R'y Co. has considerable frontage on this channel at Houston, and this would build up connections with ocean-going vessels; it now does a considerable amount of the inbound traffic out of the port of Galveston, which is increasing, and when the Panama Canal is completed it will be much greater. It is necessary, and in the witness's opinion it is absolutely necessary, for the Traffic Department of the defendant and the General Manager's department to be in close touch and contact with these interchanges and connections, in order to serve the public best, on account of the conditions mentioned, and that it would be a considerable, and a very serious handicap, if the railroad was required to move these departments back to Palestine. And the witness said that this was so, because it is absolutely essential and necessary, in order to control the traffic the road is entitled to, to keep in very close touch with the important business centers and with the connecting lines from which the traffic comes, and to which the traffic goes, and with the large business centers where most of this business originates. He said that it is a rather hard question to say what would be the effect of being at Palestine upon ability to get traffic, and that it had more to do with the general operation of the railroad than anything else. The witness said he was testifying from the point of operating the traffic and not the railroad. The competition between the Texas railroads, for business, is very intense; and the witness was of the opinion that it was absolutely necessary for his department, and the general departments of the railroad in carrying on this competition, to be at the center, and as close as possible to their competitors.

Cross-examination of Booth by plaintiffs:

The witness stated that there had been changes of connections and traffic matters all the time; but as to interchanges and interchange points the conditions remained substantially unchanged during the last four years, and that up to September, 1911, the traffic business

was conducted from the general offices in Palestine. The witness had been General Freight Agent only since that date, and could not, in detail, give all the different arrangements in regard to connections and interchanges for ten years back. The connections have been growing all the time more or less, particularly at Galveston with the steamship lines. With the exception of one railroad construction, connections at the large cities have been the same, but at Galveston the business is always increasing, and the cities are growing and the connections growing all the time. Outside of changes due to growth and development and to new railroad construction, the traffic business, in so far as operation is concerned, is substantially the same as it has been for twenty years, except that the cities are growing, and the number of connections have increased, and the witness stated that he did not know that there was any other difference except that due to the growth of the cities and the increase of connecting lines. At San Antonio, within the last twelve months, an important connection has been made, to wit, the S. A. U. & G. Railroad, not existing five years ago, running from San Antonio to the Southwest and to Corpus Christi, but no other change at San Antonio or connections within five years. This new connection is one of the most valuable of the defendant, furnishing about 30 per cent. of interchange business at San Antonio, on an estimate. In addition, at San Antonio, the defendant connects with the S. A. & A. P., the M. K. & T. and the G. H. & S. A. Railways. The first furnishing about 10 per cent. of the interchange business of the defendant, the second about 40 per cent., and the third about 10 per cent. There has been no change within five years of the connections of defendant at Dallas, which is 32 miles East of Ft. Worth, nor at Ft. Worth, within that period, in the number of connections; though the relations between connections often change; but the witness could not state that there had been any such change at Ft. Worth within that pe-

riod, nor at Austin, nor at Galveston, of rail connections; but there has been at Galveston during that period an increase of steamship connections, which is always increasing. Five years ago the defendant had its general freight office at Palestine, and Mr. Turner was General Freight Agent, and had been for some ten years, and the witness assistant at Houston, where he did not have full authority over freight matters to attend to all interchanges at Houston. Now no General Assistant Freight Agent is kept at Houston except the witness himself, who is General Freight Agent. When the witness was assistant to Turner he did not have to refer all freight matters to Turner, but quite a number he did; he had authority to solicit business at Houston, and he exercised more authority than that, though his authority at Houston was restricted and not very clearly defined, and over a great many matters he had no authority to handle, and exercised none of the authority of the General Freight Agent, though he did exercise very broad authority. There are a great many matters which come up which must be handled by the General Freight Agent alone. There was a railroad wire between Houston and Palestine, and he communicated with the General Freight Agent at Palestine by railroad wire or mail or phone, and once a month the witness thought he would have to go to Palestine and stay there about twelve hours. While he was away his chief clerk attended to his duties. That was the way the business was handled when the General Freight Agent's office was in Palestine. The witness was asked who was the Traffic Manager of the I. & G. N. Railroad Company up to September, 1911, when the offices were taken away from Palestine. The defendant objected that matters sought to be elected were immaterial, irrelevant and prejudicial. The objection was overruled, defendant excepted, and the witness answered that N. M. Leach succeeded Mr. Turner as General Freight Agent at Palestine, and performed his duties as such from Palestine, and that, when the offices

left Palestine, he thought Leach's title was Traffic Manager, and that his title was changed during the receivership. He did not think that Leach lived at Palestine while he held that title, but did while he was General Freight Agent. Thought that Leach and his wife lived at San Antonio, having an office at Palestine all right. While he was Traffic Manager he had an office at Palestine, in the General Office Building. Originally, with the I. & G. N. R. R. Co., Leach had the title of Traffic Manager, and lived at San Antonio after the removal from Palestine, but did not think he bore that title after the removal, nor that Leach was his superior when Leach was residing at New Orleans, but was Assistant to the President. There is a considerable difference, the witness said, between the duties performed by Leach, under the title of Assistant to the President, and those previously performed by him under the name of Traffic Manager. As Assistant to the President, his jurisdiction is the same over traffic matters with the President, that is, that he is the mouthpiece of the President in regard to traffic matters, and correspondence from the witness' office is now conducted with Leach as Assistant to the President. When he was the Traffic Manager he was the witness' immediate superior, and he conducted his correspondence with regard to traffic matters with him. Now higher matters of this sort are conducted with the President, but his immediate superior, and with whom he corresponds about traffic matters, is Mr. Leach. There are some matters that the President has to handle, and the witness would handle these matters with the President, if Mr. Leach did not exist, and he considers that there is a great deal of difference since the change. The witness being asked to state the difference between the matters handled by Mr. Leach now and the matters handled by him as Traffic Manager, said that he did not know that he could explain these differences in detail, but they existed; but that Leach, as Traffic Manager, had jurisdiction over the

freight and passenger traffic, and that as Assistant to the President his jurisdiction over the freight and traffic is the same that the President has, and he is handling the same matters the President would handle, if he did not exist, and that he is simply the Assistant to the President in that particular line of work. Prior to the time of giving him the title of Assistant to the President, he handled these same matters and others besides. The witness said that he did not know where was the second largest ticket sale office of the defendant, nor that it was Palestine, nor that such sales there were greater than at Houston. This was a matter outside of witness' jurisdiction, but from general information he would say that the largest ticket sale office was San Antonio, nor would he say, from general information, that Palestine came after San Antonio in contributing more money to the railroad and general traffic than any other town.

As to freight traffic, he could not give revenue of different towns precisely, without his records, but would not say that Palestine ranked third or fourth. He would prefer to have the records, that he got reports every month showing the traffic at each station, and could not offhand, from his mere recollection, state with precision the order in which they stood. But being asked to state, he said that he would put Palestine about seventh or eighth in order of freight revenue among the stations on the line, Houston first, San Antonio second, Galveston third, Austin fourth, Taylor fifth, and would not undertake to go further down than that without the records, but is positive that Taylor contributes more to the freight revenues than Palestine. There are two railroads at Taylor, the other being the M. K. & T., and two at Palestine, the other being the State Railroad. There is a great difference between the M. K. & T. and the State Road, but not a great deal of difference in the proportion of interchange business at the two points, and he would consider the Texas State Road an insignificant factor in this business, and does not

mean that there is any comparison between the defendant's competition with the M. K. & T. and the State Railroad. There is a great difference between the value of the M. K. & T. as a feeder and the State Railroad at Palestine, as to the local freight originating at the two places, Palestine and Taylor. Palestine does not stand third in rank in freight receipts, but somewhere about the seventh, and the witness was sure it did not stand fourth, was sure the records do not show that it stood third or fourth for fifteen years. When he was Assistant Freight Agent his territory included Palestine, not Taylor, and this was for about ten years. The witness would prefer to live in Houston to Palestine on account of his family, but personally had no preference.

Re-direct:

Witness stated that as General Freight Agent he had charge of the traffic of the defendant. That the S. L. B. & M., connecting with the defendant, was built within the last few years, as was the T. & B. V., which is a strong competitor between Houston and Ft. Worth and with the defendant's Ft. Worth division. The New Orleans branch of the Frisco, from Houston to New Orleans, had commenced to operate through, the witness thought, three or four years ago. The I. & G. N.'s connection into New Orleans was over the T. & P. The witness thought that he had the same authority that all other General Freight Agents on the different Texas roads had, and that in some cases he had more than some of them had. All of the departments of the road were under the supervision of the President. The witness had jurisdiction over all traffic matters, employment of traffic representatives, the publication of all tariffs and rates, and reported only such matters to the President of general interest, affecting the affairs of the company generally, as he thought he, the President, should know; and that it was a matter of his own discretion what to report to him and what not to report to him.

45. It was here admitted in evidence that all the bonds authorized by the Second Mortgage were issued at approximately its date, June 15th, 1881, and also that the Houston & Great Northern Railroad Company authorized the execution of the $300,000.00 bond to protect the maintenance of the depot at Palestine in connection with the issue of $150,000 bonds of Anderson County to the H. & G. N. R. R.

The defendant rested.

Plaintiffs introduced in rebuttal as follows:

1. The plaintiffs offered in evidence answer of Evans to cross-interrogatory No. 28, to which the defendant objected, because it stated a mere matter of opinion, which objection being overruled, the defendant excepted, and the answer was read as follows: "I state that in my opinion Palestine was, in 1875, and has ever since been, the logical and best location for the I. & G. N. general offices and shops, because it is the most central point on its system of railroad for such purposes. It is located on high ground, in a healthy country, where in my own time we found, by experience, that we could work with much more efficiency than we could at tide water at Houston; and it was generally agreed, by all the officers of the company at the time of the removal, that such removal was very desirable from every point of view, not only because of the central location, but also because of the healthfulness and elevation of Palestine above sea level. Apparently, in my judgment, the I. & G. N. R. R. Company made a great mistake, from the standpoint of its own interest, in the operation of the railroad and the efficiency of its office force, in removing the general offices from Palestine to Houston."

The plaintiffs offered answer of Evans to cross-interrogatory No. 30, which was objected to by the defendant as not the best evidence, and as giving an opinion, which objections were overruled, and the defendant excepted, and over the same the answer was read: "I think it is a

fact that the stockholders of the I. & G. R. R. Company remained the same following the sale of its railroad properties and franchises in 1879 to Kennedy and Sloan, its trustees, as they were before the sale, but I cannot be positive."

The plaintiffs read the answers of the witness Evans to all the remaining cross-interrogatory, save crosses, Nos. 31, 33, 34, 35, 36, 37, 38, 39 and 40, as follows:

"Galusha A. Grow was President of the H. & G. N. R. R. Co. when I became its Secretary in September, 1873, and I think he was the first President of the I. & G. N. R. R. Co." He could not give the names of the general officers of the H. & G. N. R. R. Co. from 1871 to 1874, as he only became connected with the company officially in September, 1873. At that time Grow was President, and Chas. E. Noble was Chief Engineer, and witness Secretary. To the best of his recollection as to the International, from early in 1872 to the time of consolidation of the two railroad companies, R. S. Hayes was Vice-President and General Manager, H. M. Hoxie was General Superintendent, and D. S. H. Smith was Treasurer. He removed to Houston in the spring of 1872, and became acquainted with Messrs. Grow and Noble at that time, and understood that Mr. Noble was Chief Engineer of the H. & G. N. R. R. Co., and so had charge of the location and construction of the H. & G. N. Railroad. From the time of his removal to Houston in the spring of 1872 until December, 1872, it was his understanding that G. A. Grow, then the President of the road, was its General Manager, and he understood that he was a member of the Board of Directors of the H. & G. N. R. R. Co. He did not know the date when the H. & G. N. R. R. Co. was constructed into Palestine, and did not know anything about the delivery of the bonds of Anderson County to the H. & G. N. R. R. Co., as he did not have any official connection with that company until September, 1873. He did not know the date on which R. S. Hayes became the Vice-President and Gen-

eral Manager of the I. & G. N. R. R. Co., but he thought it was some time in the summer or early fall of 1874.

He did not remember who was President when Hayes was Vice-President, but does not think that such President had anything to do with the actual management and operation of the property in Texas. He could not state the exact date of the removal of the general offices of the I. & G. N. from Houston to Palestine, but thinks he moved with his records about the 1st day of August, 1875. The building first occupied by the general offices of the I. & G. N. R. R. Co. at Palestine was a low, one-story frame building near the shops, and such offices were occupied by the Vice-President, General Superintendent, Treasurer, Secretary, Auditor, and the Engineering Department, as far as he could recollect. According to his recollection, the officers of the I. & G. N. R. R. Co. were elected at annual meetings of the Board of Directors held at Palestine, Texas, from 1875 to 1911, though possibly one or two of such meetings were held in New York. To the 26th interrogatory, as follows: "Is it not a fact that you knew that certain bonds were voted to the H. & G. N. R. R. Co., by Anderson County, but that you do not know or remember what the conditions were on which they were voted?" he answered: "I have no personal knowledge on this subject, as I was not officially connected with the H. & G. N. R. R. Co. at the date said bonds were understood to have been voted." "Q. Did you accompany Mr. Hoxie to Palestine at any time to arrange for the removal of the general offices from Houston to Palestine? Is it not a fact that Mr. Hoxie acted for the Railroad Company in whatever negotiations took place with the citizens of Palestine relative to such removal? A. I do not know." He could not state what change, if any, there was in the stockholders of the I. & G. N. R. R. Co., just before and just after the sale to Sloan and Kennedy as trustees.

2. The plaintiffs read the answers to the cross-inter-

rogatories to D. S. H. Smith, witness for defendant, as follows:

"Of my own personal knowledge, I know nothing of the relations or the duties of Mr. Grow during the time he was President of the H. & G. N. R. R. Co. in 1871, 1872 and 1873. I had nothing to do with the affairs of the H. & G. N. R. R. Co. at that time.

"I do not know where Mr. Grow was in the months of February, March, April and May, 1872. In the months mentioned, I think I was at Hearne, or somewhere on the line of the International Road." "I believe it to be a fact that throughout the year 1872 Mr. Charles E. Noble was the Chief Engineer of the H. & G. N. R. R. Co."

"It may be a fact that during the year 1872 Mr. Grow was a member of the board of directors of the H. & G. N. R. R. Co., and President of that company, but not having had anything to do with the company at that time I cannot speak of my own personal knowledge."

"I do not remember the date upon which the H. & G. N. Railroad was constructed into Palestine; I do not remember the date on which the bonds of Anderson County, in the sum of $150,000, were delivered to the H. & G. N. R. R. Co."

"I believe it to be a fact that in the year 1872 Mr. R. S. Hayes was Chief Engineer and Superintendent of Construction of the International R. R. Co., with headquarters at Hearne, Texas."

"Mr. Sam Sloan, of New York, was President of the I. & G. N. R. R. Co. when Hayes was Vice-President. I cannot state the date upon which these gentlemen were elected to their positions. Mr. Samuel Sloan, the President, did not perform any practical duties in the State of Texas, while he was President. He lived in New York."

"I do know it is a fact that certain bonds were voted to the H. & G. N. R. R. Co., but I do not remember what I testified on October 14, 1911. My present recollection of the conditions on which they were voted is, that there

was to be a junction between the H. & G. N. and the International Railroad at Palestine, within a certain distance of the Court House, and that there were no other conditions attached, either verbal or in writing."

"Yes, it is a fact that the general offices of the I. & G. N. R. R. Co. were removed to Palestine about June, 1875."

"It is a fact that the officers of the I. & G. N. R. R. Co. were elected at annual meetings of the board of directors, held at Palestine, each and every year from 1875 and onwards. At such meetings officers were elected by the board of directors. I believe it to be a fact that the annual meetings of the stockholders of the I. & G. N. R. R. Co. were held in Palestine each year from 1875 to 1911."

"The letter which I wrote to Mr. Thomas B. Greenwood speaks for itself. I do not remember exactly how it reads, but I have said nothing in that letter which I do not acknowledge to be true at the time at which I wrote it. It is very possible that I may have said that I did not know what the conditions were, upon which lands were donated by the citizens of Palestine to the I. & G. N. R. R. Co., or that I did not know what were the conditions under which the Anderson County bonds were given to the Houston and Great Northern Railroad Company; but I have learned since—were it only by reading these interrogatories—that the bonds donated by Anderson County to the H. & G. N. R. R. Co. were so donated in consideration of a junction made and to be made between the H. & G. N. Railroad and the International Railroad at Palestine."

In connection with the above answers plaintiffs read a portion of a letter set out below. As to the part of this letter which is not in parentheses the defendant objected that it was immaterial, irrelevant and hearsy, and gave an opinion, which objections were overruled, and the defendant excepted, and over these objections the portion of the letter hereinafter copied was read. The part of the letter which is in parentheses was read by request of defendant's counsel. The letter referred to was dated St. Louis,

October 14th, 1911, addressed to T. B. Greenwood at Palestine. Portions introduced were as follows:

"Dear Sir: In answer to your letter of the 14th I beg to say the I. & G. N. R. R. moved its offices and headquarters to Palestine in the summer of 1875. Certain bonds were voted to the H. & G. N. R. R. Company, and certain lands were donated to the consolidated company by citizens. What the conditions were, if any, that were attached to these donations, I do not remember. One forgets many things in 36 years. (Here is a suggestion from a layman. I give it to you for what it is worth. The I. & G. N. R. R. Co. today is not the company of 1875, Since this last named year the company has been through two receiverships or bankruptcies. The company today is simply the owner of the property of the company which immediately preceded it, which property it acquired by the legal forced sale. The question is: Can the company of today be held for the promises of the company of 1875? It bought the property which it possesses in good faith and during the bankruptcy proceedings, and had no notice of the claims which are now advanced.")

3. The plaintiffs introduced in evidence certain letters and portions thereof, and a telegram obtained by them from the files of defendant, all of which had been by the defendant voluntarily turned over to the plaintiffs for inspection.

First, letter from Hoxie, General Superintendent, dated July, 1873, to J. W. Ozment and others. This letter stated that the writer had received a letter requesting the railroad to subscribe to the building of a wagon road, and that applications from other towns had all been declined. That the road was doing all it could by making rates and furnishing transportation to build up the country. The writer was glad to see that Palestine was not behind in this work. "Our company has been spending money for substantial improvements at your place, and intend to continue, and we trust that we will be able to secure the

trade we should. So that we may reap reward for what we have spent."

Telegram from Sloan, President, dated Charleston, S. C., April 13th, 1875, to Moses Taylor, New York, stating that telegram had been received from Hayes, in Texas, asking authority to place about $3000.00 of county bonds at 65c. in payment of some buildings at Palestine which he had approved, such buildings being required for offices to be removed from Houston, which reduces expenses, "and is in accordance with an understanding with Hayes when in New York." It is stated that the bonds had no market value, and the trade was considered a good one.

Letter from Hayes to Sloan dated April 30th, 1875, on letterhead of I. & G. N. Railroad Co. Vice-President's Office, Houston, Texas. This letter contained the following: "At Palestine we can obtain no additional ground by donation, the donations of land and money having been made to the International, and county bonds to the H. & G. N., before construction; and we have all the grounds we desire there for our own use, besides a surplus, which the Texas Land Company now owns and sells in town lots."

A letter from John S. Kennedy to R. S. Hayes, written on letterhead of the I. & G. N. R. R. Co. at New York, dated 13th of February, 1875, and which stated that the ownership of the house in Houston, in which Hayes and Hoxie had resided, had passed from the railroad to the Texas Land Company, and that some arrangements would now have to be made with the Texas Land Company in regard to rent of it, and requested Hayes to advise to what date he had paid rent to the railroad company, and how much the taxes are, and what arrangement he would like to make regarding it; it being stated that the object of the inquiry was to enable Kennedy to make the most favorable arrangements for Hayes and Hoxie he could.

Portion of letter dated May 8th, 1875, to Sloan, President, from Hayes, Vice-President, written on letterhead

printed I. & G. N. R. R. Company, Houston, Texas, President's Office: "The carpenter shop which we intend using for offices at Palestine at present will be completed June 1st, and we will then commence moving the offices from here, although it will be July 1st before we will have comfortable means of living there. I have given the notices required by law making June 15th as date of removal, and enclose copy of notice cut from the News." This notice was attached and was signed by Evans, Secretary, dated May 8th, 1875, and stated that notice was given that the principal office of the I. & G. N. R. R. Company will be established at Palestine, in Anderson County, Texas, from and after 15th of June, 1875.

Letter of June 30th, 1875, to Sloan, President, signed by Hayes, Vice-President, written on letterhead of the I. & G. N. R. R. Company from Palestine, Texas, in which it was stated: first, that certain letters of G. A. Grow and Jas. B. Simpson referred to him had received attention; and then, our "offices here are all in working order, but will probably not have our house completed for a fortnight yet."

4. Horace Booth, recalled by the defendant, testified: That the increase of the freight revenue of the defendant, during the first year of its operation at Houston, compared with the last year of its operation at Palestine, was over $1,000,000, something over 10 per cent. of the gross revenue, and the second year at Houston showed an increase of $650,000 over the first year of its operation from Houston; but during the present year this increase has not been maintained account of the failure of the peach crop, short cotton crop, and the Mexican situation, and the witness stated that having the general offices at Houston had been a very important factor in the increase.

On cross, he said that the increase was due, in his opinion, in part to the fact that some of his competitors had a strike during the period of increase; but he did not know that the receipts had decreased during the present

year. He had seen no statement of how much the earnings of competitors involved in strikes had decreased, and could not estimate same. The Southern Pacific strike had been settled about 12 months. Comparing the freight earnings of the defendant for the last 12 months with the last 12 months of the operation from Palestine, the witness said the increase during the last 12 months would be over $1,500,000. There had been floods during the last 12 months, and a loss of earnings as compared with last year. All of these things, like strikes, floods, etc., are factors, as well as the location of the general offices; but the general increase of business between 1911 and 1914 in commerce has not been anything like the extent of the increase of earnings of the road since its location at Houston, though there has been an increase throughout the South.

Re-direct:

Notwithstanding the floods of the last six months, the revenues were better than the last six months at Palestine, when there were no floods.

Re-cross:

Witness did not think the strikes affected the service of the S. P. Railroad at present, but they did for about 12 months, having begun 2 years ago. The I. & G. N. has had no strike.

Re-direct:

The Frisco lines, M. K. & T., S. A. & A. P., the Brownsville, and T. & B. V., are competitors of the defendant in the same territory, and have had no strikes during the period.

Re-cross:

The M. K. & T. had some trouble, which the witness did not think lasted as long as a year. It is not now apparent in their service. He don't know whether it has ever been settled.

5. Judge N. A. Stedman was called by plaintiffs, and testified that he was one of the attorneys for the defend-

ant in this case; that he had been a member of the Texas Railroad Commission, and throughout the years 1898 and 1899 was general attorney for the I. & G. N. R. R. Co., with offices in the general office building at Palestine.

Here the witness was asked the following question: "Is it not a fact, Judge Stedman, that some time during the year 1898, Mr. Trice, the then President and General Manager of the I. & G. N. R. Co. at Palestine, requested your opinion upon the subject of the right of the company to remove the general offices from Palestine to some other point?" and thereupon the defendant objected to this evidence, for the reason, first that it is shown that Judge Stedman, at the time, was general attorney and counsel of this railroad company, and therefore it would be a privileged communication between attorney and client of the very highest order, and a confidential communication or advice passing between attorney and client; and, second, the whole matter offered is immaterial and irrelevant; and, third, the question of notice is entirely immaterial as to any issue or issues in this case, and the whole matter is therefore confusing, and is prejudicial to the rights of the defendant in this case, which objections were overruled, and the defendant excepted, and Judge Stedman answered: "I think, Mr. Greenwood, that it was in the year 1898 that he requested my opinion on that subject. I think that was the year, that it was some time during that year." "Q. And is it not a fact that following that request you examined the county records only, and upon that examination you reached the conclusion, and so advised Mr. Trice, that you saw no impediment or anything in the way of removal of the general offices?" To this question the defendant interposed the same objections as those last stated, which were overruled, and the defendant excepted, and thereupon Judge Stedman answered: "I "I made at the time what I considered a very exhaustive investigation and examination of the County records, and all that I found on the records was this matter which has

already been introduced in evidence, with regard to the H. & G. N. R. R. Co. and Anderson County, with reference to the bond issue. I also requested the custodian of the records of the International Railroad Company and of the H. & G. N. R. R. Co., who was Mr. Howard, to make a particular and exhaustive search among the records in his office in view of discovering anything that I didn't find on the County records, which might be among the records of the Company. Q. And you did not find anything at that time except what was placed upon the County records? A. That is my recollection about it, and found these matters and a duplicate of the same things on record in the County records. That is my recollection of just what was found in this investigation and examination which I made and had made."

The witness further testified that on or about the 16th day of May, 1899, he was still the General Attorney for the I. & G. N. R. R. Co., performing his duties as such in the general offices at Palestine; that Mr. Leroy Trice was then Second Vice-President and General Manager of the Company, and was the Company's highest executive officer in Texas at that time; that Mr. A. R. Howard was then Secretary of the I. & G. N. R. R. Co., and a member of its Board of Directors; that Mr. W. L. Maury was then Auditor of the Railroad Company, and, the witness thought, until he heard Mr. Maury testify that he succeeded Capt. Rice, that he was also a Director at that time, but, since hearing Mr. Maury's testimony, he was not sure about his having then been a Director; that Mr. G. L. Noble was then Assistant General Manager of the Railroad Company; that witness himself was also a member of the Board of Directors of the I. & G. N. R. R. Co. on May 16, 1899.

The witness was then asked the following question: "Is it not a fact, Judge Stedman, that on or about the 16th day of May, 1899, you read in one of the newspapers of general circulation at the time in the City of Palestine,

a letter from Judge John H. Reagan, which I now hold in my hand?" being the letter afterwards read in evidence, to which the witness answered: "Yes, sir, I read it * * *," and thereupon the defendant objected to all of this upon the following grounds, first, beacuse it necessarily refers to something taking place between Judge Stedman, as general attorney, and his client, and is a privileged communication with regard to all of these matters; and, second, the entire matter is immaterial and irrelevant as to any issues in this case; and, third, the question of notice is entirely immaterial as to any issue in this case, the rights of the parties could not be affected thereby, and therefore the whole matter about the newspaper article is confusing; and, fourth, it is likely to be prejudicial to the rights of the defendant in this case, and it is hearsay, and it was offered only, as defendant understands, in support of a matter or transaction alleged to have been conducted by Judge Reagan himself, in which he was a principal party, and therefore it could not be in explanation of the letters which he wrote away back in 1872 and 1874 with regard to this matter, and that the newspaper article contained self-serving declarations, and further, that after such a great lapse of time the newspaper could not become a part of the transaction, and further, the newspaper article shows it is merely a political article, written many years after these transactions, and, therefore, it is not admissible, and no inquiry about the same is admissible; and further, because it states conclusions and not facts, and further because it is prejudicial in its character, and the defendant objected to it, or to any proofs regarding it, for all the reasons just stated, as well as all other reasons heretofore stated, and also because it is hearsay, and immaterial and irrelevant as to any issues in this case, and the court overruled the objections, and the defendant excepted.

The witness was then asked: "Now, Judge Stedman, after you read this article, did you call it to the atten-

tion of the chief executive officer of the International & Great Northern Railroad Company at Palestine about May 16, 1899?" to which question the defendant objected for all of the reasons heretofore stated, which objections were overruled, and the defendant excepted, and the witness answered: "Mr. Greenwood, my impression is that I mentioned this matter to Mr. Trice, who was Second Vice-President and General Manager; it is barely possible that he mentioned it to me first, but I feel sure we discussed it together."

The witness was then asked: "Now, state who were the other persons whom you know were members of the Board of Directors at that time, and to whom you also called their attention to this letter," to which the defendant renewed its objection, for all of the reasons heretofore stated, which was overruled, and the defendant excepted, and the witness answered: "I would not state that it is a recollection, but it is an impression that I have that I mentioned that to Mr. Howard, who I know was a Director. I would not be at all sure about that, but say it is my impression that I did, and I am about equally certain that I mentioned it to Mr. Maury, who I thought until he testified yesterday, was a Director at the time, but I guess he was not from his testimony here yesterday as to succeeding Capt. Rice of Houston.

The witness further testified that Mr. Maury was then Auditor of the Railroad Company, and that it was his impression that he mentioned the newspaper article to Mr. Noble, but that he would not say positively that he mentioned the article to these gentlemen, for it is barely possible that they first mentioned it to him. The witness was sure that they talked about the article.

The witness testified that he thought he did acquaint Mr. Trice, Mr. Howard and Mr. Maury with the substance of this article; that he knew that the article was discussed, but, as he had already stated, it was barely possible that they mentioned it to him first; but, anyway,

he was sure they were acquainted with the article in some way. He was sure that after he read the article he had filed it away with other documents pertaining to the railroad's business, in the safe in his office, where it remained for several years, he having been general attorney until 1906, and general solicitor until 1908.

The witness further testified that he thought it was probably correct that his advice, whatever it may have been, to the Vice-President and General Manager of this Railroad, had been given and concluded sometime before he read this newspaper publication.

Before Judge Stedman was called to the stand, he had stated in open court to judge and counsel, the jury being out, that he did not regard the communications between himself and others, with regard to the newspaper article, as privileged, but defendant, by leading counsel, did not concede this.

The witness was asked to state why he called the attention of the other gentlemen to the paper, when defendant objected upon all the grounds heretofore stated, which objection was overruled, and defendant excepted, and the witness testified that the newspaper article related to a subject which was so connected with the Railroad Company that he thought the other gentlemen were interested, and would like to have the information which the article contained, and, for that reason, he had communicated it to them.

The witness was asked whether at the very time of this communication he considered that he was acting for or advising those to whom the communication was made, as attorney, when defendant objected that the question called for an opinion, and the objection was sustained by the court.

The witness testified further that the article appeared in two newspapers, both of which were in general circulation in Palestine, and that, at that time, all the general officers in charge of the operation of the Road resided

at Palestine, only two executive officers, viz.: Mr. Geo. Gould, President, and Mr. Frank J. Gould, Vice-President, residing in New York.

Cross-examination:

Being crossed by defendant, the witness was asked: "We will ask you if after reading this letter which is now offered by the plaintiffs, and after the discussion of it with the parties with whom you did discuss it, if you didn't advise them that in your opinion as a lawyer it did not place any obligation at all upon the part of the I. & G. N. R. R. Co. in connection with the matter, and the discussion of it, if you didn't so advise them as a lawyer?" To which question the plaintiffs objected, because it called for the opinion of the witness, when the court ruled that, under the circumstances, he would permit the witness to answer the question, and then the witness stated: "My impression is, without a perfect recollection about the matter, that I hold Mr. Trice that I did not regard that article as stating a contract, with respect to the general offices, machine shops and roundhouses; and that if it did, I didn't think it would be admitted in evidence, in view of the written records I had discovered in the Court House at Palestine."

Thereupon, the defendant moved the court, on the statement of the witness on cross-examination, showing that he was acting in his official connection with the Road at the time, as well as upon all other objections previously made, to strike from the record all of Judge Stedman's evidence on direct examination, which motion was overruled by the court, and the defendant excepted.

The plaintiffs then offered in evidence the newspaper article referred to by Judge Stedman, which was printed in the Daily Visitor of Palestine, Texas, May 16, 1899, and was signed by John H. Reagan, and the defendant having been satisfied that the article was authentic, so admitted, and waived any proof of the original article's genuineness, the defendant insisting, however, upon all

other objections thereto, and then the defendant objected to the introduction of said letter in evidence for all the reasons last heretofore stated, and for the further reasons that the document, on its face, is incomplete, and goes back and refers back to other letters and matters, and other documents, to which it is in reply, and without which it is undefined and indefinite, and was unsworn, and the court overruled all of said objections, and the defendant excepted, and took its Bill of Exceptions No. 28, and over such exceptions the article by Judge Reagan was read to the jury, and is as follows:

COPY

From the Daily Visitor, Published in Palestine, Texas.
Tuesday, May 16, 1899.

Deming & Gibson, Publishers.

"Judge Reagan Writes.

Gives the History of the Consolidation of the Great Northern and International Railroads.

"The original of this was today sent to the Advocate, and we publish this by courtesy of Mr. Wright:

"Austin, Texas, May 15, 1899.

"To the Advocate,

"Palestine, Texas.

"An editorial in the Advocate of the 14th inst., contains statements which ought to be corrected. Its purpose seems to be to show the people of Anderson County and those of Palestine were opposed to the consolidation of the Houston & Great Northern Railway with the International Railway. In that editorial, after saying that I supported the clause of the Constitution which prohibits the consolidation of parallel and competing railroads under the same management and control, it states that I, in common with the people of Anderson County, and particularly those of Palestine, 'was outraged in feeling, as well as in interest, that the competition the people here

had so long sought and had so much earned had been destroyed, and a monopoly had been builded on the ruins of that competition by the consolidation of those roads.'

"The writer of that editorial is evidently unfamiliar with the history of that matter, and puts the people of Anderson County and of Palestine in a false position.

"The International Railroad Company was chartered August 5, 1870. The Great Northern was consolidated with it by the acts of April 24, 1874, and March 10, 1875, that is, before the Constitution of 1875 was adopted. This Constitution, being ratified by the people, became operative and effective on the 3rd day of April, 1876. So, it is seen that the consolidation of these railroads took place before the present Constitution went into effect.

"The Great Northern Company preliminarily assumed the line of its road from Houston, North to the Trinity River, at Riverside, Walker County, and thence by way of Pennington, in Trinity County, Randolph, in Houston County, and Alto, in Cherokee County. The people of Houston County and of the town of Crockett, and those of Anderson County and the town of Palestine, were anxious to get this road built through Crockett, and that it should make its junction with the International at Palestine, and at a public meeting which was held in Palestine, the citizens appointed Geo. A. Wright and myself to meet with Mr. Grow, the president of these companies, and with the representatives of Houston County, at Crockett, in order to offer such inducements as would secure the building of this road through Crockett, and its junction with the International at Palestine. Mr. Wright and I, at that meeting, offered in behalf of our people, to pay $100,000 in bonds for the junction of these roads at Palestine, with the understanding that their general offices and machine shops should be at Palestine. Mr. Grow rejected this offer. We returned to Palestine and reported to another public meeting the foregoing facts, and

after full discussion that meeting determined to offer a bonus of $150,000 in seven per cent. bonds of the County of Anderson, to secure the junction of these roads at Palestine, with the understanding that the general offices and machine shops of the companies should be located at Palestine. This question was submitted to the vote of the people of Anderson County, at an election lawfully held on the 1st, 2nd, 3rd and 4th days of May, 1872, at which they determined to give to the Great Northern Railroad a bonus of $150,000 in 7% bonds, to secure the junction of that road with the International at Palestine, and to secure the location of the general offices and machine shops of the two companies at Palestine. This, it will be seen, took place before the final consolidation of the two roads, and before the adoption of the present Constitution, and I venture the statement, as I know the facts to be, that there cannot be found a man in Anderson County, or in Palestine, who lived there at that time, who will say that there was any question or any discussion about or for or against the consolidation of these roads. The points the people there sought to gain were to secure a shorter and direct line of railroad communication to Houston and Galveston, with cheaper and more expeditious transportation, and to secure the location of the general offices and machine shops of these companies at Palestine. All this has been accomplished, the subsidy bonds and their interest have been paid off. This has caused large sums of money to be expended by these companies in Palestine annually, has caused a very large increase in the population and business of Palestine, making it a respectable little city, and furnishing a valuable market for the products of the surrounding country.

"Does the Advocate wish to undo all this, to have one of these railroads wiped out of existence in order to avoid the consolidation of these two railroads, to compel the people to go by way of Hearne in order to reach Houston and Galveston, rather than by the shorter and direct

route, to remove the general offices and machine shops from Palestine, to put the town back into the condition of a one-horse village, and to deprive the people of the surrounding country of the market they now have?

"Is this what the Advocate wants and is seeking to obtain? If not, why this editorial? For what other purpose could it have been written?

"Will the Advocate be good enough to give this paper to its readers?

"JOHN H. REAGAN."

6. Gov. T. M. Campbell testified for the plaintiffs: He was formerly Governor of Texas; has resided at Palestine since 1892, and had his office there since 1871; was receiver of the I. & G. N. R. R. from January 26, 1891, until in July, 1892, and General Manager from July, 1892, to May, 1897, and, during this aggregate period of six years and five months, had supervision of the traffic and all of the departments of the road, and was then and is now familiar with its lines and with its connections. Witness was asked what, in his opinion, is the burden which would be put upon the road, especially with regard to joint traffic, if it should be required to maintain its general offices at Palestine, instead of Houston. Defendant objected that that called for a conclusion or opinion, and it was not shown that the witness was an expert, which objections were overruled, and the defendant excepted and took its bill of exceptions, and over the exceptions the witness answered that he could not conceive of any burden whatever; that he believed and has always believed that Palestine is the logical point for the general offices and shops, from the standpoint of efficient operation, for traffic, and from every other standpoint.

Cross:

Left the railroad service in 1897, and has not been engaged in railroading since. The Ft. Worth division of the road has been built since that time, from Houston to

Ft. Worth, and the T. & B. V. since that time, and the Brownsville line since, and the N. O. T. & M. since, from Houston to New Orleans.

Re-direct:

Witness stated that he did not consider the construction of these new lines had any effect upon his opinion as to the proper location of the general offices of the I. & G. N. Ry. Co.

(7) G. H. Turner, called for the plaintiffs, testified: From 1880 to 1897 he was in the employ of the T. & P. Ry. Traffic Department, last serving the T. & P. as Assistant General Freight Agent at Dallas, and became General Freight Agent of the I. & G. N. in 1897, and continued into 1908, residing at Palestine, and was familiar with the whole road, and all towns on it, and all connections, and has been a railroad man in the traffic business 30 or 40 years. Booth was his assistant at Houston, and there were assistants at all the different large cities. It was Booth's business to look after business in the Houston territory, and it was left largely to him. The witness visited Houston as often as he could, and Galveston and other points, but in the main the local representatives looked after the traffic business, and were responsible therefor in their several territories. That, in his opinion, it would not make any difference, or add any burden on the Company, or its property, or on interstate commerce, to operate the defendant from Palestine instead of Houston; that the defendant still has a freight office in Houston, which Booth used to fill, and a Division Freight Agent there; and this man was responsible for the Houston business; that the defendant was supposed to have similar men at Ft. Worth, Waco, Dallas and San Antonio and the larger cities, and that the General Freight Agent went around and visted them and conferred with them; that he would consider Palestine the most logical point for the location of the general offices, because it is central for both general offices and shops and a good point

994

to live at, and healthy, and cheaper, and more comfortable than Houston, and just as convenient. The General Freight Agent ought to be out on the road a good deal, wherever his office is.

Cross:

A man should grow up with the traffic business. Galveston is the greatest seaport of Texas; Houston is a port, and also Aransas Pass and Sabine Pass are ports. The oil, lumber and rice interests are within a radius of 100 miles of Houston, and produce a very large tonnage, and Galveston is now the second largest port in the United States for exports. In exports it is larger than New Orleans, and is constantly increasing. The I. & G. N. has a very valuable territory near Houston, and a large commerce is carried down the bayou from Houston, a very large barge traffic and some ship trade, and that is going to be a very valuable territory, and commanding a good share of the business when the ship channel is completed. He presumed the I. & G. N. was preparing for that condition at Houston. The Ft. Worth division runs from Houston to Ft. Worth, through a thickly settled portion of the State, and was built long after the establishment of the shops and general offices at Palestine. The Madisonville branch runs through Grimes and Madison Counties, connecting with the Ft. Worth division, and was comparatively recently constructed. The witness was asked whether there was competition at present at Palestine, and said that there was some pretty good sized interests in Palestine, and that the State road went there, but that this was a little road, from Rusk to Palestine, and there was no other system there except the I. & G. N., and that the State road's competition was insignificant; that the great railroad systems at Houston made the competition there keen, and that most of these great railroad systems came into Houston, the Texas & Pacific does not. It is called a Gould line. The S. P. lines, the M. K. & T., the Frisco Lines, the I. & G. N., the other Gould lines.

the Rock Island, the C. B. & Q., the F. W. & D., and others, have connections into Houston, the witness thought, and none of them with Palestine, except that the Rock Island has a connection for Palestine at Houston, over the I. & G. N. The witness stuck to his point that the I. & G. N. would not be disadvantaged by having its general offices at Palestine or Longview. It was the witness' view that the General Freight Agent should be out over the line generally. He said the I. & G. N. had acreage on the ship channel at Houston, and operated over the G. H. & H. between Houston into Galveston. He was then asked whether or not he would think it to be for the best interests of the defendant to be tied down at Palestine with its general offices and general shops "forever." He answered the question by asking whether he could answer that question in regard to the General Freight Agent. The question was insisted upon, and he said that he thought they could operate the road just as well from Palestine now and forever, "if you want it that way," it was as good as any other, as far as he could see; that Longview would be an excellent place, or Hearne. The question was insisted upon as asked, whether or not it would be disadvantageous for the road to be tied down to Palestine as to its shops and general offices "forever." The witness wanted to ask a question, but the question was insisted upon, and he answered, "Well, if that means if I say or do not say 'forever,' that you can move them away, then I say 'forever.' I mean if they can move away without that, then I say 'forever,'—." "Q. And you say that you would mean forever, only in the event the railroad company moved at its option?" Witness answered that he was trying to answer the question, and that the questioner wanted him to say forever, and he did say forever. Under the direction of the Court, the witness answered, and he said that he would say that it would be a good thing forever. He was then asked, supposing Palestine should become a little hamlet, and the growth of

the State in other directions, would he adhere to the same opinion, and he said he would. But he stated that he was talking about the obligations to perform an agreement, and that his answers were based upon the supposition that there had been a contract. He was instructed by the Court to exclude the idea that there was any contract, and he said that he could not get it out of his head that there was a contract. He was then questioned upon the theory that if there was no agreement whether or not he considered it a good thing for the shops and general offices to be tied down at Palestine forever, and he said he did. He was again pressed with the question, and finally said that putting out of his mind any idea that there was an existing contract, or any moral obligation, he would not think that it would be a good idea to make a contract to bind the shops and general offices down to Palestine "forever." That no one knew certainly what would happen, and that it would not be desirable, in his opinion, for anybody to make a "forever" contract; that there might be an earthquake at Palestine, but that eliminating the supposition of an earthquake, he would not be in favor of making a "forever" contract of any kind; that no one could tell what would happen.

A. L. Bowers, recalled by the plaintiffs, testified: That he had been Superintendent for the defendant; that he commenced work for the defendant in 1888, in the capacity of superintendent in charge of operations, and served in that position for two or three years; and was Superintendent of Construction for four years, of the Ft. Worth division, and has been for the last 40 years acquainted with the defendant's lines, and its interchanges of traffic in intra-state and interstate commerce, and did not think that the defendant would be burdened by requiring it to operate its roads from general offices at Palestine instead of Houston. He was asked why he expressed this opinion, and said he could not see how it would lose business by it, it had Division Freight Agents at different

places, to look out for the different territories, and that he thought it would be decidedly to the defendant's interests, as Palestine was less expensive, and just as accessible as Houston. The through main line of the defendant goes through Palestine to Mexico, and not through Houston. There are three lines of the defendant out of Palestine, Palestine to Laredo, 461 miles; Palestine to Houston, 150 miles, and Palestine to Longview, northeast, 81 miles, From Valley Junction to Palestine is 94 miles. The Ft. Worth division of the I. & G. N. crosses the main line at Valley Junction, from Valley Junction to Spring it is, say, 70 miles, and from Valley Junction to Ft. Worth is about 130 miles. The Ft. Worth division connects with the Palestine-Houston line of the defendant at Spring, 22 miles north of Houston, and does not extend to Houston. In the witness' opinion, it is a great advantage to have the machine shops and general offices at the same place, because in the shops department you have general officers, and you obtain best results when all are kept in close touch. Besides, clerk hire and living expenses are higher in Houston than in Palestine, which required the payment of increased salaries.

Cross:

The witness stated that he was in the building department of the I. & G. N. for a number of years, and was Superintendent of Construction of the Ft. Worth division. He was also Superintendent of all lines, and he had the operation of the whole road, except the traffic department and Master Mechanic's department and the auditing department; that is he had charge of everything under the General Manager; that he is not testifying as a traffic expert, but as an operating expert, and does not consider himself a traffic expert. He was asked whether or not he thought it would be to the advantage of the defendant to be bound down as to its shops and general offices at Palestine "forever", and answered, "as far as I or anybody else can see, at the present time, it is all

right." He was then asked if he thought it best to have a railroad's offices and shops tied down for all time to come, and answered that he thought Palestine was as good a place at Houston. It was insisted that that was not the question that he should answer; he refused to answer, and appealed to the court. The court sustained the witness in his position. He was again asked if it would be any disadvantage to be tied down with the general offices "forever," and he answered that he did not think that there would be any disadvantage, he did not see how it could be.

997

No. 6415.

ANDERSON COUNTY et al.

vs.

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.

It is hereby agreed that the foregoing pages, Nos. i to iv, and relating to the trial of the Plea in Abatement to the Jurisdiction before the jury trial, and also the Statement immediately following thereafter, pages 1 to 364, inclusive, are a true, correct and complete Statement of all facts proved on the trial of this case, and all matters in evidence bearing upon any controverted issues of fact, both on the trial of the Plea in Abatement and to the Jurisdiction before the Judge, and on the jury trial after such Plea was overruled, this Statement being complete of all evidence whatsoever, oral or by deposition or documentary, adduced upon the trial of this case.

Witness our hands this — day of March, 1914.

ANDERSON COUNTY ET AL., *Plaintiffs,*
By A. G. GREENWOOD,
CAMPBELL, SEWELL & STRICKLAND,
JAS. T. PERKINS,
JNO. C. BOX,
R. O. WATKINS,
JNO. B. GUINN, &
T. B. GREENWOOD,
Its Attorneys, Representing all of the Plaintiffs in this Case.

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY,
By WILSON, DABNEY & KING,
F. A. WILLIAMS,
N. A. STEDMAN,
ANDREWS, BALL AND STREETMAN,
MORRIS AND SIMS,
NORMAN, SHOOK & GIBSON,
F. B. GUINN,
W. E. DONLEY,
Its Attorneys.

998 The foregoing Agreed Statement of Facts being this 17 day of March, 1914, submitted to me, is by me in all things approved, having been found by me to be correct, both as to the trial

of the Plea of Abatement and to the Jurisdiction, as well as to the jury trial, and I do now direct it to be filed.

A. E. DAVIS, *Judge.*

Filed Mar. 18, 1914. J. J. Bolton, District Clerk Cherokee Co., Texas.

999 THE STATE OF TEXAS,
County of Bowie:

I, E. T. Rosborough, Clerk of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, do hereby certify that the foregoing 366 pages of printed matter is a true and correct copy of the Original Statement of Facts filed in my office on the 28th day of April 1914, in the case of International & Great Northern Railway Company, Appellant, vs. Anderson County et al., Appellees, No. 1351, on the Docket of said Court.

In testimony whereof I hereunto set my official signature and seal of said Court at Texarkana, Texas, this the 24th day of July A. D. 1916.

[Seal Court of Civil Appeals of the State of Texas.]

E. T. ROSBOROUGH,
Clerk of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas.

1000 In the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas at Texarkana.

No. 1351.

INTERNATIONAL AND GREAT NORTHERN RAILWAY COMPANY, Appellant,

v.

ANDERSON COUNTY et al., Appellees.

Appeal from the District Court of Cherokee County.

The appellees, the County of Anderson, the City of Palestine, and certain citizens suing for themselves and in behalf of all other like interested and situated members of the public in the City of Palestine, brought this suit in the District Court of Anderson County, Texas, against the appellant company. Properly construing the appellees' petition in the light of the facts therein set out and in accordance with the relief asked by the prayer, the suit is in the nature of the prevention of the continuance of an illegal act upon appellant's part in violation of applicatory legislative provisions of the state to railway companies in respect to location and maintenance of general offices, machine shops and roundhouses, working injury especially to appellees without remedy at law, and seeking to interrupt the continuance of such wrongful violation of the statutes governing appellant by equitable interference at the hands of the court. Under the facts given in the petition the prayer was for a decree "enforcing the public duty of defendant to forever keep and maintain its general offices, machine shops and roundhouses in the City of Palestine" and "for a mandatory injunction commanding the defendant to at once desist and refrain from keeping or maintaining any other general offices in connection with the operation of said railroad at any other place than the City of Palestine, and commanding and requiring the defendant to keep and maintain all of the general offices for the operation of said railroad at the City of Palestine." Statement of such pleading is fully made in the former appeal in 156 S. W. 499, which is here adopted and can be referred to. The appellant
1001 seasonably filed a plea of privilege of trial in the District Court of Harris County, Texas, which was overruled; and the venue then was, on motion, changed to Cherokee County. Appellant plead to the jurisdiction of the district court of the state to hear and determine the controversy, averring to the effect that if any claim or liabiliy in the matter plead existed in favor of the plaintiffs, decree of foreclosure in the United States Court for the Northern District of Texas had reserved jurisdiction to try and determine same and had exclusive jurisdiction thereof. As the matters averred in that respect fully appear in the record without dispute, it is deemed unnecessary to repeat them here. Besides demurrer and special exceptions to the petition, and denials as to the merits of the controversy, the appellant plead statutes of limitation of two and four years, and the statute of

frauds, in bar of the action. Appellant further specially seasonably interposed by proper pleas defenses as federal questions founded upon the Constitution of the United States, which later on will be specifically adverted to.

A trial to a jury resulted in special findings of fact affirming the existence of the material facts plead by appellees. On these findings a decree was entered in accordance with the prayer of the appellees' petition, perpetually enjoining and restraining the appellant company from changing the location of the machine shops and roundhouses from Palestine, and from keeping and maintaining general offices at any other place than Palestine, Texas.

In deference to the findings of the jury, as having support in evidence, we find that on or about the 15th day of March, 1872, the Houston and Great Northern Railroad Company, acting by its president, contracted and agreed with the citizens of Palestine, acting by John H. Reagan, to extend its line of railroad to intersect the International Railroad at Palestine, to establish a depot within a half mile of the court-house at Palestine, to commence running cars regularly thereto by July, 1873, and to thereupon locate and forever maintain

the general offices, machine shops and roundhouses of the

1002 Houston and Great Northern Railroad at the City of Palestine

for and in consideration of an agreement by John H. Reagan to make a thorough canvass of Anderson County to induce the electors of that county to authorize the issuance of interest-bearing bonds of the county in the principal sum of $150,000.00, and upon the further consideration that Anderson County, on authorization of its electors, should issue and deliver its bonds in the principal sum aforesaid. John H. Reagan made a thorough canvass of Anderson County to induce the electors to vote the bonds, and Anderson County, on authorization of its electors, issued and delivered to the Houston and Great Northern Railroad Company its interest-bearing bonds in the principal sum of $150,000.00 within a year from the date of the contract and agreement mentioned above. Proceedings in respect to the ordering and issuance of the bonds are in the record for reference. In part performance of and in compliance with the contract and agreement mentioned, the machine shops and roundhouses of the Houston and Great Northern Railroad and of the International and Great Northern Railroad were established at Palestine on or about July, 1873, and thereafter maintained at that place. There is evidence to support the finding that the Houston and Great Northern Railroad Company and the International and Great Northern Railroad Company in point of fact authorized and ratified the action of Galusha A. Grow in making the contract and agreement so made. About the first of the year 1875 the International and Great Northern Railroad Company, acting by its general superintendent H. M. Hoxie, contracted and agreed with the citizens of the City of Palestine, among whom were the appellees George A. Wright and J. W. Ozment, to fully and completely perform the previous contract and agreement between the Houston and Great Northern Railroad Comuany acting by Galusha A. Grow, and the citizens of Palestine acting by John H. Reagan, by at once locating the general offices of the International

and Great Northern Railroad at Palestine and by thereafter permanently keeping and maintaining the general offices, machine shops and roundhouses of the International and Great Northern Railroad at Palestine, for and in consideration of certain bonds of
1003 Anderson County theretofore issued to the Houston and Great Northern Railroad Company, and for the further and additional consideration that said citizens should at once construct and complete or cause to be constructed and completed at their own cost and expense, any and all houses at Palestine, Texas, which might be demanded by said company, in accordance with such plans or directions as might be furnished by the company through its officers, for occupancy at reasonable rentals by employes of said company and their families, and especially by general officers, their families and clerks. The citizens of Palestine within twelve months from the date of the agreement caused to be constructed and completed, at their own cost and expense, certain houses at Palestine, which were all the houses demanded by the International and Great Northern Railroad Company, in accordance with the plans and directions furnished therefor by the company through an officer of same, for occupancy at reasonable rentals by employes of the company and general officers thereof, their families and clerks. There is evidence to support the finding that in point of fact the International and Great Northern Railroad Company authorized and ratified the action of H. M. Hoxie in making the contract and agreement of date early in 1875 mentioned. The jury made a negative answer to a special question as to whether, in the event the appellant should be required to keep and maintain its shops in Palestine permanently, any burden or injurious effect in point of fact would thereby be placed upon or suffered by interstate commerce.

It was further proven that the Houston and Great Northern Railroad Company was chartered by legislative act of date October 26, 1866, set out in the record, and that the International Railroad Company was chartered by legislative act of date August 5, 1870, set out in the record. It was proven that written articles of agreement were entered into February 19, 1872, between the International Railroad Company and the Houston and Great Northern Railroad Company, whereby the two companies agreed "to unite, merge and consolidate their several properties and franchises." The stockholders
1004 jointly of both companies ratified this agreement on September 23, 1873. At a meeting of the stockholders of the International and Great Northern Railroad Company, the consolidated company, held September 24 and 27, 1873, by-laws were adopted and put in force. By special act of the legislature in evidence, of date April 24, 1873, the International and Great Northern Railroad Company was authorized to issue bonds and to secure same by mortgage on its road, and, besides other things, provided: "All acts heretofore done in the name of either of said companies shall be of the same binding force and effect upon the said International and Great Northern Railroad Company that they were upon the respective companies." A further special act of the legislature is in evidence, of date March 10, 1875, entitled "An act for the relief of the Inter-

national Railroad Company, now consolidated with the Houston and Great Northern Railroad Company under the name of the International and Great Northern Railroad Company." A complete merger and amalgamation in fact of the two companies into the new company under the name of the International and Great Northern Railroad Company was proven. On April 5, 1875, the president, vice-president and general officers of the new company were elected; and also on that date the board of directors of the company, at the meeting held in Houston, Texas, passed the following resolution: "Resolved, that the general offices of this company be moved to Palestine in Anderson County, Texas, as soon as practicable, and that it be the duty of the Secretary to give timely notice of such removal in the Houston Daily Telegram and the Galveston Daily News." Meetings of the stockholders and directors were thereafter held there. A list of stockholders of the International and Great Northern Railroad Company was given, and it was proved that all of the annual meetings of the stockholders of the International and Great Northern Railroad Company were held at Palestine, Texas, upon published notice that they would be held "at the general offices of the company at Palestine," from 1881 to 1911. It was also proven that directors meetings were held at Palestine from 1881 to 1888 inclusive, but were not held after 1888 until April, 1893, on account of injunction proceedings at the instance of the state in the suit of State v. Ry. Co., appearing in the record. A lease of the International and Great Northern Railroad was made in 1881 to the Missouri, Kansas and Texas Railway Company, appearing at length in evidence. The state brought suit to cancel the lease, and it was dissolved in 1888.

From the date of the lease the general offices were removed
1005 from Palestine to St. Louis, and remained there until 1888, when they were returned to Palestine, and have been there since to 1911. The machine shops and roundhouses of the International and Great Northern Railroad Company were moved to and established in Palestine, Texas, about July, 1875, and have remained there continuously since that time. The decree of mortgage foreclosure, the sale, purchase, deed, proceedings, and the charter of appellant all appear in the record; and it is the purpose to have included in this statement, as a part hereof, all documentary evidence in the record, as same was without dispute, to relieve the necessity of extending this statement; and it should be so understood and considered.

After Stating the Case.

The articles of incorporation of the appellant railway company, of date August 8, 1911, and filed with and certified by the Secretary of State on August 11, 1911, contain, as far as material, the following:

"Second. This corporation is organized for the purpose of acquiring, owning, maintaining and operating the railroads heretofore forming the International and Great Northern Railroad and purchased by Frank C. Nicodemus, Jr., one of the undersigned, at a sale thereof, held on June 13, 1911, pursuant to a decree of foreclos-

ure and sale entered on or about May 10, 1910, in certain judicial proceedings brought for the foreclosure of a mortgage of the International and Great Northern Railroad Company known as its second mortgage, said decree having been made and entered by the United States Circuit Court for the Northern District of Texas, in a certain cause therein pending wherein The Farmers' Loan and Trust Company, Trustee, was complainant and International and Great Northern Railroad Company and others were defendants, which said decree was subsequently adopted and entered, in certain ancillary causes between the same parties, by the Circuit Courts of the United States for the Southern District of Texas, the Eastern District of Texas and the Western District of Texas; said railroads being described as follows, to wit: (Here follows description.) This corporation shall have all of the powers and privileges conferred by the laws of the State of Texas upon chartered railroads, including the power
1006 to construct and extend.

"Third. The place at which shall be established and maintained the principal business office, the public office and general offices of this corporation is the City of Houston, in Harris County, State of Texas."

Offering this charter as a defense, as appellant does, and the rightfulness to be a corporation for the purposes and objects declared in the second section thereof being an admitted legal right by statute of this state, there is at once present, and should be decided, the question, as one purely of law, as to whether or not there is any legal restraint or disability by law or operation of law upon the present incorporation in respect to designating, as the third section certainly does, the "City of Houston" as the precise and exact locality within the state in which to establish and maintain its general offices. Plainly stated in another way, is article 6423 R. S. applicatory to appellant, a new corporation? The question is important of decision, in that if the proposed incorporation was legally at liberty to freely choose the locality in which to establish its offices, then the absolute right to do so would be a complete defense to the controversy; otherwise not so. The controversy here, it may be remarked, is in that very particular. The present corporation comes into existence by authority of article 6625 R. S., which expressly confers the personal right upon the purchaser of the property and franchises of a railway company, in virtue of sale in mortgage foreclosure proceedings, as here, of forming a corporation "under Chapter 1 of this Title, for the purpose of acquiring, owning, maintaining and operating the road so purchased, as if such road were the road intended to be constructed by the corporation." The act further provides that "when such charter has been filed the new corporation shall have the power and privileges then conferred by the laws of this state upon chartered railroads, including the power to construct and extend," but, as further set out, "provided, that by such purchase and organization no right shall be acquired in conflict with the present constitution and laws in any respect, nor shall the main track of any railroad
1007 once constructed and operated be abandoned or moved." The "Chapter 1 of this Title," under which the corporation is

required to be formed, provides, among other articles, that the incorporators shall adopt and sign articles of incorporation, which shall contain, among other things, "3. The place at which shall be established and maintained the principal business office of the proposed corporation." Requiring, as does the section just quoted, that the precise and exact locality of the principal business or governing office of the proposed corporation shall be given in the articles of incorporation, it was incumbent on the incorporators so to do, in order to have legal compliance with the terms of the section in that respect. And if the general language of the section is alone to be regarded as controlling in defining the right of the incorporators with respect to the choice of locality, then plainly the incorporators had warrant of law and were at liberty to freely make the selection of locality for the governing offices of the railroad. But to regard the general language of the section mentioned as controlling and conclusively defining the right of the incorporators to freely make choice of any locality, would be to ignore the effect of the conditions and limitations provided in art. 6625 that the "organization," or proposed incorporation, should come into existence as a corporation and acquire the franchise of operating the "road so purchased" with "no right" that would be in conflict with applicatory "laws in any respect." Such conditions and limitations would be legal compulsion, having the force of a charter requirement, upon the proposed incorporation, that it come into existence only upon applicatory legislative provisions. And it is believed that art. 6625 means, and it should properly be so construed, that in giving the proposed corporation the authority to be a corporation "for the purpose of acquiring, owning, maintaining and operating the road so purchased" it was so done upon the same applicatory legislative provisions to its predecessor. The corporation owning previously "the road so purchased" being under charter obligation to the state to operate the railway as a public carrier for a specified term of years, the state by the statute was in effect insisting that the purchaser and his succeeding corporation should perform that charter obligation to the state, and should not cease by reason of the foreclosure sale to operate that railway as a public carrier during such contractual period of time and under same laws applicable to its operation. By taking over the property burdened with such obligation to the state, the purchaser and his succeeding corporation assumed to perform it. We understand the effect of the ruling of the Supreme Court to be that in the former appeal. As the effect of the act is to withhold from and disable the "organization," or proposed corporation, from acquiring any right in conflict with ap-
1008 plicatory legislative provisions of its predecessors, it would necessarily follow, as a consequence of such prohibition or restraint, that a provision in the present articles of incorporation which is not responsive to a specification in the law applicatory to the franchise of operating the "road so purchased" would have no force or effect. So considered, art. 6423, which is applicatory to location of the offices of railway companies, should be read in conjunction with section 3 above quoted, as consistent with and defining section 3 in

specification of the place. Referring to art. 6423, it is provided that any railway company chartered by the laws of Texas "shall keep and maintain permanently its general offices within the State of Texas," either (1) "at the place named in its charter," or, (2) "if no place is named in its charter where the general offices shall be located and maintained, then said railroad company shall keep and maintain its general offices within this state where it shall have contracted or agreed or shall hereafter contract or agree to locate its general offices for a valuable consideration," or, (3) "if said railway company has not contracted or agreed for a valuable consideration to maintain its general offices at any certain place within this state, then such general offices shall be located and maintained at such place on its line in this state as said railway company may designate to be on its line of railway." The act also provides that the shops and roundhouses shall be kept and maintained at the locality where the company may have contracted to keep and maintain them; and further provides that if the railway company makes location of offices, shops or roundhouses at a place on the line of the road, in consideration of the issuance of county bonds, such locality shall thereafter be the place for its general offices, shops and roundhouses. By requiring, as the article does, that railway companies shall permanently keep and maintain their general offices "at such place within this state," there is intended by that language an express prohibition against changing the place for the general offices, as well as machine shops and roundhouses, that are once definitely so located by operation of the
1009 statute. City of Tyler v. Ry. Co., 90 Tex. 491, 91 S. W. 1; error to U. S. Supreme Court dismissed, 53 L. ed. 649. A restraint or prohibition against changing the locality so fixed by the statute for the general offices carries as a necessary consequence prohibition or restraint against the exercise of any right to voluntarily amend or change the charter privilege in that respect, in the absence of further legislative authority to do so. Thus it would plainly appear, we think, that if the International and Great Northern Railroad Company, the predecessor of appellant, stood restrained by force of art. 6423, which had united with its charter as a part thereof, of the privilege of changing the locality for its general offices and machine shops and roundhouses, a voluntary change thereof on the part of the International and Great Northern Railroad Company would be in violation of law. Hence, that same statute applicatory to its predecessor would attach with all its force to appellant, and be the law governing the appellant in designating the location of its offices, upon the ground that the statute authorizing the new corporation to exist operates to withhold and restrict any right to the proposed incorporation to obtain a charter privilege which is denied by terms of law to its predecessor. I. & G. N. Ry. Co. v. Anderson County, 156 S. W. 499. It follows, therefore, that if the appellant had the legal right to fix the "City of Houston" in the articles of incorporation, it would rest entirely upon the ground that art. 6423 has not application under the facts in the record to its predecessor, or, if it has application to its predecessor under the facts, that art. 6423 is not a valid and binding statute upon constitutional grounds urged.

It then becomes necessary to decide whether or not the record discloses a state of facts under which art. 6423 would have application to the International and Great Northern Railroad Company. Here it was proven there was a completed consolidation in 1873 in point of fact of the Houston and Great Northern Railroad Company and the International Railroad Company, under the name of the International and Great Northern Railroad Company. By
1010 the compact each company agreed "to unite, merge and consolidate their several properties and franchises." Each of the two railroads was, in the first instance, chartered by special act of the legislature. By section 13 of the act chartering the Houston and Great Northern Railroad Company it is provided that Houston, Texas, shall be the principal office. By section 8 of the act chartering the International Railroad Company it is provided "that the principal office of the company shall be established at such point on the line of said railway as may be deemed most convenient for the transaction of its business, and may be moved from time to time to such places on said lines as the progress of the work of construction may render expedient or necessary." This company was further given the authority that "said company shall have the right to connect itself with any other railroad company, and under such terms as it shall deem best to operate and maintain said railroad in connection or consolidation with any such other railroad company." By special act of the legislature in 1874 "the International and Great Northern Railroad Company" was empowered to issue bonds and to secure same by mortgage on its road, and it was further provided that "all the acts heretofore done by either the Houston and Great Northern or International Railroad shall have the same binding force upon the said International and Great Northern Railroad Company that they had upon the respective companies." A further special act of the legislature in 1875 was "for the relief of the International Railroad Company, now consolidated with the Houston and Great Northern Railroad Company under the name of the International and Great Northern Railroad Company," granting to it and its successors and assigns certain state lands in aid of construction, and exempting the consolidated company from taxation for a period of twenty-five years, and providing that if a majority of the stockholders of the consolidated company should vote in favor of accepting the provisions of the act this act should become obligatory upon said company and its successors, "and shall be held to be an irrepealable contract and agreement between the state and the said company, its successors and assigns." It is not doubted that it was competent for the legislature at that date, by curative acts,
1011 as is the effect of the acts mentioned, to make recognition of and render valid the consolidation and merger of the two companies, which consolidation and merger might otherwise have been invalid by reason of the want of authority on the part of the Houston and Great Northern Railroad Company to unite and consolidate. Clearly, by the terms of the two acts the consolidation was agreed to by the state; and agreeing, as we must assume was contemplated, that the consolidation would have the force under the

compact of the companies "to unite, merge and consolidate their several properties and franchises," the rightfulness of its existence and user under such authority would be legally binding on the state. In Ry. & Banking Co. v. Georgia, 92 U. S. 665 (23 L. ed. 757), it was remarked: "It may be that the consolidation of two corporations—or amalgamation, as it is called in England—if full and complete may work a dissolution of them both, and its effect may be the creation of a new corporation. Whether such be the effect or not must depend upon the statute under which the consolidation takes place, and of the intention therein manifested." The stockholders of the old companies became stockholders, it appears from the record, in like proportion of interest in the new company, and directors and officers thereof were elected, and the new corporation has been managed and regarded as such ever since. This practical construction of the purpose and object of the consolidation as being to create a new corporation and the right of user as such should be persuasive, at least in some degree, upon the proper construction to be given to the fact and intention of consolidation. And there is the further fact that the state, through its proper officers, has recognized the application of the act of 1889 to the consolidated International and Great Northern Railroad Company. It is not perceived why, under the terms of the agreement of the two companies in connection with special acts of the legislature, the two original companies were not consolidated and merged "in property and franchises," one with the other, under the name of the International and Great Northern Railroad Company, which was to have continued existence as a new company with the enlarged powers, franchises and property
1012 rights common to the original companies. As the effect of the completed consolidation, operating through the agreement of the companies and by the legislative authority mentioned, is that of creating a new corporation and of transmuting the franchise of each original corporation, with all its terms, to the new corporation, the new corporation would be possessed of the charter privileges common to both of the original companies. In virtue of this consolidation and merger the charter of the new company would then be regarded as if reading "that the principal office shall be established at Houston, Texas, or at such point on the line of said railway as may be deemed most convenient for the transaction of its business, and may be moved from time to time to such places on said line as the progress of the work of construction may render expedient and necessary." Thus, as we believe would be the effect, the International and Great Northern Railroad Company, by the ambulatory terms of its charter, would have at the time of its existence no certain or fixed place designated for its principal office, and hence in that particular be within the terms of art. 6423. The ruling in the case of Morrill v. Smith Co., 89 Tex. 529, 36 S. W. 57, is not opposed to that construction. In that case the bonds were issued to the original company on October 2, 1873, and the legal question involved was whether at the date of issue the obligee in the bonds was an existing corporation. As the opinion states the record it did not appear at the date of issue of the bonds either that a lawful

consolidation was effected between the Houston and Great Northern Railroad Company and the International Railroad Company, or that the agreement to consolidate was then complete and had then taken effect between the two companies. At the date of the issue of the bonds to the original company the later two legislative acts of 1874 and 1875 and the completed consolidation had not, as here, happened

But if that construction be erroneous, the further terms of the same statute would afford another ground and would govern and control and, we think, be decisive. As a distinct and separate part of the act it is provided in these words: "And such railroads shall keep and maintain their machine shops and roundhouses, or either,
1013 at such place or places as they may have contracted to keep them for a valuable consideration received; and if said general offices and shops and roundhouses, or either, are located on the line of a railroad in a county which has aided said railroad by an issue of bonds in consideration of such location being made, then said location shall not be changed; and this shall apply as well to a railroad that may have been consolidated with another as to those which have maintained their original organization." Intending, as the legislature did, to establish a fixed locality for the general offices, shops and roundhouses of a railway company, and prevent their being moveable at the will of the company, the language of the act should be given that reasonable construction which would accomplish the purposes and intentions of the law. By expressly declaring, in the second paragraph of the article, that the principal offices shall not be changed from the locality where they "are located on the line of a railroad in a county which has aided said railroad by issuance of bonds in consideration of such location being made," it was evident that at the time the act went into effect the then place in which the offices were "located on the line" in consideration of a bond issue of such county, would be the only locality thereafter allowable to such railway company at which to fix and keep the same. This has the effect of qualifying and modifying the first paragraph of the article requiring the company to keep its offices at the place named in its charter. This construction makes consistent and gives force to all parts of the article in meaning to require railway companies to keep and maintain their offices at the place named in their charter; but if they "are located on the line" in consideration of county aid by bond issues such companies shall not change them elsewhere, even to the original charter place. In this view the article in hand would be applicable, notwithstanding the Houston and Great Northern Railroad Company's legislative charter designated Houston as the place of principal office. Besides it expressly applies to consolidated companies.

The further pertinent state of facts provided by the article
1014 in hand, in order to make the statute applicable, is, that the "railroad company" shall have "contracted or agreed" to locate its general offices, shops and roundhouses, "for a valuable consideration," or that such general offices, shops and roundhouses "are located on the line" in a county which has aided the railroad by "an issue of bonds in consideration of such location being made." Speak-

ing to the first state of facts mentioned, the terms of the act are to the extent only that there has been location made under "a contract or agreement for a valuable consideration." By requiring that the contract or agreement be that of the "railroad company," an unauthorized agreement or contract of officers of the company, unless adopted or ratified by the company, would not be sufficient. The case of Orient Ry Co. v. City of Sweetwater, 104 Tex. 329, 137 S. W. 1117, ruled that as the contract made by the vice-president was without authority or ratification, it could not be held that the "railroad company" made any contract. The case of Logue v. Ry. Co., (Sup. Co.) —— S. W. ——, was one for damages; and failing in proof of authority on the part of those making the contract to bind the company, the court held the company was not bound. Clearly, in the two cases the contract of the vice-president and contract with a single director of the company could not be regarded as the contract of the "railroad company" in the absence of authority or ratification. That is the extent of the ruling in the two cases. In the instant case, however, there are facts and circumstances sufficient to show authority on the part of the officers and that have the legal effect to make the contract or agreement of 1872 found by the jury the contract or agreement of the "company." The by-laws of the Houston and Great Northern Railroad Company throughout 1872 and 1873, according to sections 1 and 2 of article 1, and section 6 of article 2, vested the direction and management of the officers of the company in a board of nine directors of whom a majority could transact business, and from whom could be elected a president, a chief engineer and general agent, a general superintendent, and other officers. The charter of that company empowered it "to make by-laws for its gov-
1015 ernment," and vested the direction and control of its offices in a board of directors. The only stated meetings of the board of directors were annual meetings. Under sec. 10 of art. 2 the business of the company, during the intervals between the meetings of the board of directors, was to be transacted by the executive officers, with all contracts not of immediate necessity to be subject to the approval of the board or executive committee. The executive committee consisted of five directors, a majority of whom could do business and was vested with all the powers of the board of directors during the intervals between its meetings, subject to ratification by the board, and the president was ex officio a member of the executive committee. The president, the chief engineer, general agent, and the superintendent were among the executive officers who were each authorized by the by-laws to transact the business of the company during the intervals between the meetings of the board and to make and close contracts of immediate necessity. Section 1 of article 3 provides that the president shall be the chief executive officer of the company, and shall have the general management and supervision of the officers of the company. Section 5 of article 3 confers on the president the power to negotiate contracts during the intervals between the meetings of the board, subject to approval by the board at its next meeting, save and except in cases specially provided for, and he shall perform such duties not otherwise provided for as are usually

devolved upon the president of incorporated companies. By other sections the duty was devolved upon the president to execute all orders, as well as resolutions, of the board of directors in respect to the business of the company. Under art. 3 the chief engineer and general agent was specially charged with the location and work of construction of the road, and in the absence of the president was the general supervisor of the affairs, officers, agents and employes of the company. Under art. 3 the superintendent had charge of running and operating the road, and of all employes engaged thereon, and was required to perform any other duties exacted by the president or board of directors. He was required to report to the board the expediency of any measures, changes,
1016 alterations or improvements proposed to be adopted or made in the running or operation of the road, and to make monthly reports of his transactions to the board. The minutes of the Houston and Great Northern Railroad Company and the undisputed evidence show that for 1872 and 1873 Galusha A. Grow was president, and C. E. Noble was chief engineer and general agent, of the Houston and Great Northern Railroad Company, and that from December, 1871, to December, 1872, Grow was also superintendent of the company. On February 13, 1872, the board of directors of the Houston and Great Northern Railroad Company adopted an agreement between Grow for the Houston and Great Northern Railroad Company, and Dodge for the International Railroad Company, whereby the two companies were to be consolidated, all of which was approved by the stockholders of the companies on September 23, 1873. On February 14, 1872, which was the day following the decision to consolidate, the board of directors of the Houston and Great Northern Railroad Company adopted this resolution: "Resolved, that the President be instructed to proceed with the work of extending the road, provided counties make satisfactory subscriptions." On March 15, 1872, Grow, acting under the authority of the by-laws and acting with the assistance of Chief Engineer and General Agent Noble, made and entered into the contract with the citizens of Palestine whereby, in return for Judge Reagan's obligation to canvass Anderson County and a bond issue of $150,000.00, the Houston and Great Northern Railroad Company became obligated to connect its railroad with the International at Palestine, and as a part of said railroad to locate and keep general offices, machine shops and roundhouses at Palestine. On March 26, 1872, the orders were issued for the election to authorize Anderson County's bond subscription, and Judge Reagan advised the president of the International Railroad Company that the donation would most likely be voted. On March 28, 1872, which was probably the day following the receipt of the assurance of Judge Reagan, the contract was let for the extension of the Houston and Great Northern Railroad to intersect the International at Palestine. On April 28, 1872, Grow made a public speech to hundreds of people, openly publish-
1017 ing the locative contract made by the Houston and Great Northern Railroad Company with the citizens of Palestine. Early in 1872 the subscription in Anderson County bonds was voted

by the electors and the result was declared, and before the close of the month the International Railroad Company, then being operated as one in interest with the Houston and Great Northern Railroad Company, caused a survey and map of its lands in the City of Palestine to be made showing a reservation of 87.10 acres in the city, adjacent to the principal business street, for railroad purposes, on which machine shops, roundhouses and general offices were afterwards located and maintained, with the balance of the company's lands. The map is endorsed "Office of the Chief Engineer and Superintendent of Construction, International Railroad, Hearne, June 1872." On January 11, 1873, the Houston and Great Northern Railroad Company adopted the resolution, "Resolved, that President Galusha A. Grow is hereby authorized to receive from Anderson County, or any other county having donated bonds to this company, the bonds donated in aid of the building of the road, and to receipt for the same." On January 29, 1873, Grow presented to the County Court of Anderson County the Houston and Great Northern Railroad Company's written application for the bonds, and publicly declared in open court to the effect that the contract for the location at Palestine of the shops and officers was common knowledge. The bonds of Anderson County having been delivered on January 29, 1873, the executive committee of the Houston and Great Northern Railroad Company on February 4, 1873, adopted the resolution authorizing the payment of a draft "of Galusha A. Grow, President Houston and Great Northern Railroad Company and International and Great Northern Railroad Company," which was to be credited "for extra services and expenses in procuring donations of lands and county bonds to the International and the Houston and Great Northern Railroad Companies." On July 21, 1874, is an entry on the minutes of the board of directors of the Houston and Great Northern Railroad Company, "On motion resolved, that the President be granted $5000.00 in addition to the amounts authorized by resolution
of February 4 and December 3, 1873, and April 7, 1874,
1018 which amount is in full payment for extra services and expenses as provided in the original resolution of February 4, 1873." On February 13, 1873, within two weeks from the delivery of the bonds of Anderson County, Grow, as president of the International and Great Northern Railroad Company, approved the recommendation of the auditor to the secretary of the company for the immediate removal of consolidated general offices to Palestine. It is undisputed that the general offices at Houston were abandoned about July 1, 1875. On that date the board of directors adopted the following: "Resolved, that the general office of this company be moved to Palestine in Anderson County, Texas, as soon as practicable, and that it be the duty of the secretary to give timely notice of such removal in the Houston Daily Telegram and the Galveston Daily News." About four months before the removal General Superintendent Hoxie requested an interview with the citizens of Palestine, at which, in the presence of Vice-President Hayes, and with his assent, Hoxie offered on behalf of the International and Great Northern Railroad Company to completely perform the Reagan-Groy con-

tract or agreement by removing the general offices from Houston and by keeping the offices, shops and roundhouses at Palestine, provided houses were built at once by the citizens at their own expense for the general officers, their families and clerks, as directed by the company. The offer was accepted the day it was made, and the houses were built by about the middle of June, and as fast as they were completed the company put men into them. The by-laws of the International and Great Northern Railroad Company in force in 1875 conferred the same power and authority on the president and general superintendent of that company as conferred by the by-laws of the Houston and Great Northern Railroad Company. It was proven that throughout the year 1875 Hayes was vice-president and general manager of the International and Great Northern Railroad Company. Sloan, the president resided in New York, and did not perform any practical duties in Texas while he was president. The board of directors on July 21, 1874, expressly conferred the authority, which Hayes exercised, "Resolved, that the general manager be authorized to perform the duties of the president in Texas
1019 in his absence." It is quite unnecessary to further set out every detail, for we conclude there is in the record conclusive circumstantial evidence that the board of directors of the Houston and Great Northern Railroad Company and the International and Great Northern Railroad Company knew of and approved the locative contract.

By the act of December 19, 1857, there was conferred upon every railroad company the power "to make such by-laws as might be thought proper for the government of the company." Similar power was by its charter conferred upon the International Railroad Company. Treating the by-laws shown in the record as a valid source of the officers' authority to bind the company and as expressing a permanent and continuing rule for the government of the company, then both of the contracts alleged were duly authorized by undisputed evidence. "Intrusting the president with the management of the entire business is not the delegation of corporate powers and rights, but is a mere authorization of the president to perform for and in the name of the corporation the business it is authorized to transact." 1 Thompson on Corp., sec. 1200; 2 Thompson on Corp., secs. 1409, 1465. Added to this authority was the resolution of February 14, 1872, instructing the president to proceed with the work of extending the road and of securing donations of county bonds. The contract of March, 1872, with the citizens of Palestine, was a contract for the extension of the road, and was a contract to secure county bonds. The terms of the contract on both sides were left by the resolution to the discretion of President Grow. Hence there would appear not only the contract of 1872 authorized by the by-laws and directed by the board of directors of both the Houston and Great Northern Railroad Company and the International and Great Northern Railroad Company, but the express promise of the latter company to perform the contract. And even if it should be asserted that there is no direct evidence that the particular contracts were actually placed before the full board of directors, the presump-

tion would obtain that the officers of the company did as their duty required them to do. Olcot v. Gabert, 86 Tex. at p. 126, 23 S. W. 985. Hence the presumption would charge the board with
1020 full knowledge of the terms of the contract, as found by the jury they did have. In the case of City of Tyler v. Ry. Co., supra, the record showed no by-laws and showed no precedent resolution of the board of directors, but it did show, as does this record, an express offer to perform a prior contract, together with certain acts by the railroad company involving sanction by the board of directors, which at the time and in the manner carried out authorized the finding that the same were done in performance of the contract. Therefore in giving the proper legal effect to the state of facts found by the jury, which we must take as true, it would certainly appear that the terms of the article have application to appellant's predecessor. And it would further appear as a fact that at the time the act of 1889 took effect the offices, shops and roundhouses were located at Palestine as one of the considerations for a bond issue of Anderson County for $150.000.00. It is insisted, though, by appellant, that as the law required the records of the County Court of Anderson County to state a proposal or consideration for which the bonds of the county were to issue, such record would be conclusive of the consideration, and no parol, outside considerations, inducements or promises can be gone into. By the law authorizing a county to aid in the construction of a railroad or make internal improvements, the requisite of submission to a popular vote is that the order of the court for the election shall be entered on the minutes and "shall also state in clear and concise language whether the proposition be to take stock, to make a loan, or to make a donation, and the amount of aid to be given and the particular road or work for which it is to be used." And upon favorable result of the election the court must, according to the act, "make such orders and adopt such regulations as will give practical effect to the proposition so voted for." Acts 1871, p. 29; Paschal's Digest, art. 7329. Clearly, the extent of the language of the act, in requiring what the order shall state, is as to the character of the aid to be given and the amount thereof. The act does not require that the order of the court shall state all the terms and stipulations which the agents of the county and the railway company have seen fit to agree upon either as to the work or extent of construction to be done. And while the act pro-
1021 vides that the work for which the donation is made shall be completed at the time of issues, there are no express limitations or conditions upon making independent specific stipulations as the parties may deem proper to the extent of the work of construction that should be completed. The aid is clearly authorized for the benefit of public use, and particularly for the interests of the county. The "construction" of a railway might properly include the location of Offices, shops and roundhouses. In Ry. Co. v. Alleca, 56 Ind. 486, in passing upon a statute, like the one here, authorizing municipal corporations to extend aid in the construction of railroads in two ways—either by subscribing to the stock of the company or by making a donation thereto—it was decided that the term "donation"

meant an absolute gift without any condition or consideration. Fisk v. Flores, 43 Tex. at p. 344, though, determines that "it is also quite evident that it is entirely consistent with the nature of a title by 'donation' that the donor may be moved by reason of services rendered by the donee to make the donation, and that it is induced by such consideration does not take from the transaction the character of 'a donation.'" The parties having the right, as we think they did, to stipulate, by reason of the donation, as to the extent of the work or construction that the railway shall have completed at the time of the donation or issue, and the terms of such contract not being required by statute to be in writing or stated in the minutes of the court, the extent of the work as the "consideration" or agreed inducement for the donation may be truly shown, as permitted generally in ordinary cases. The case of Anderson County v. Ry. Co., 52 Tex. 228, does not hold that the order of the county court was required by law to state the terms of stipulation and the consideration for the issue of the bonds. In that case the plaintiff by its petition sought to have the bonds cancelled because, among other grounds, there was failure to build a depot; and the court held it must be conclusively presumed that feature of the agreement was performed because the authorized agent of the county had within his authority so declared, and further that "an allegation of a partial failure of a railroad in its contract shows no sufficient reason
1022 for annulling the entire issue of bonds or for the recovery of the value of the entire issue." Here the first contract or agreement alleged was formed about March 15, 1872. It arose from the verbal acceptance of a verbal offer. The offer was made by Mr. Grow, acting for the Houston and Great Northern Railroad Company, to the citizens of Palestine, represented by Judge Reagan, and the terms accepted by Judge Reagan for such citizens. When these terms submitted in parol were assented to in parol the contractual tie existed. It was not intended by either party that any memorial should be made in writing of the terms and considerations of the contract entered into by Grow and Reagan as the agents of their respective principals. The order of the court was only a requisite to the extent of part performance of the contract in order to carry out one of its terms. The parol evidence rule would therefore have no application to a contract or agreement entirely verbal, as here, even though it may be necessary to perform some obligation of the contract by means of a written memorial. 17 Cyc. 741; 1 Greenleaf on Ev., sec. 305-e; following this rule: Hanson v. Yturria, 48 S. W. 797; Pell v. Giesen, 51 S. W. 44; Landrum v. Stewart, 111 S. W. 770. The alleged second contract of 1875 rested entirely in parol.

It is further contended by appellant that the foreclosure sale in 1879 had the legal effect to wipe out the contractual obligation of the International and Great Northern Railroad Company in respect to location of its offices, shops and roundhouses. Appellant plead that on October 14, 1879, the properties and franchises of the International and Great Northern Railroad Company were discharged from contract obligations by virtue of judicial sale under decree of fore-

closure to John S. Kennedy and Samuel Sloan as trustees, who on November 1, 1879, conveyed the properties and franchises unto the International and Great Northern Railroad Company for $10,348,000.00 in purchase-money bonds. The appellees in replication to this defense plead that if John S. Kennedy and Samuel Sloan purchased said properties and franchises they did so as trustees for the International and Great Northern Railroad Company and for its
stockholders at the date of purchase, in consummation of an
1023 agreement between all parties at interest that such sale should
not affect the stock ownership in said company nor the company's title to said properties and franchises. Under these pleadings the question of a bona fide sale to any third person became issuable. The facts and circumstances warrant the inference of fact, which in support of the court's judgment we must assume that the court made, that there was not a bona fide judicial sale. Hence in such finding of fact the legal effect of the sale and deeds to the trustees would not discharge admitted corporate obligations. Northern Pac. RR. Co. v. Boyd, 228 U. S. 482, 57 L. ed. 941.

Concluding as we do that in point of fact that law article 6423 applied to the appellant's predecessor, and that such article would govern appellant, the question raised by venue in Anderson County must be overruled for the reasons given in Ry. Co. v. Anderson County, supra, that the question of venue was dependent upon the ultimate fact of the legal location of the principal office or domicile. This ruling disposes of as well the assignments raising the plea of res adjudicata, the validity of the alleged contracts, statutes of limitation and fraud, and admissibility of evidence.

It is further our opinion that the plea to the jurisdiction of the district court of the state, as made by appellant, was properly overruled by the court. Clearly, the Federal Court had the power to reserve jurisdiction to determine the validity and priorities of any liens and burdens against the sold-out properties of the International and Great Northern Railroad Company in the hands of the purchaser or his assign, and its jurisdiction in that respect would be certainly exclusive. But the appellees by their suit are not seeking, in the nature of a private or personal right, to subject the property to any burden, lien, claim or right growing out of or attached to the acts of the sold-out company. Nor is the effect of appellees' suit to hold or subject the purchaser of the sold-out company in liability in his property to a personal or private claim or encumbrance in favor of appellees, by reason of any contract or liability incurred by the sold-out company. Properly construing the appellees' petition in the
light of the facts given therein, and the prayer, the suit was
1024 in the nature of the prevention of the continuance of an
illegal act, violation of a statute of the state, upon appellant's part, working injury without remedy at law and seeking to interrupt the continuance of such wrong by equitable interference at the hands of the court. Upon the facts stated in the petition as offered therein, in showing a violation of statute law by the appellant the prayer was for a decree "for a mandatory injunction commanding

the defendant to at once desist and refrain from keeping or maintaining any other general offices in connection with the operation of said railroad at any other place than the City of Palestine, and commanding and requiring the defendant to keep and maintain all of the general offices for the operation of said railroad at the City of Palestine." If enforced according to the terms of the prayer, clearly the results of the suit belong to and inure to the public, as a duty owing to it. The defense of appellant and the right of appellees were entirely dependent upon whether a statutory provision of the state in respect to charter rights of appellant in location of its domicile was applicatory. The decree was entirely dependent upon the statute, and not the enforcement of a private contract as such, for its vitality. The contract was only evidence in the line of facts going to prove the application of the statute, and did not operate or have the legal effect to create a lien in rem, or any other legal liability or claim in favor of appellees. As the Federal Court had finally dismissed the proceedings from the docket, the jurisdiction existed in the state court to grant the equitable relief here sought against appellant, and such jurisdiction does not in the least interfere with or conflict with the decree of the Federal Court. This ruling in respect to the nature of the petition will serve also to overrule assignments presenting demurrers and exceptions to same.

Appellant assails the articles of the legislature being considered, originating as the act of 1889, as violative of the Constitution of the United States in the several articles mentioned in the ruling. It is believed that the act could not properly be construed as under-
1025 taking to add to preexisting contracts rights of a purely private character and to be enforcible as such. When a railway company bargains away for a valuble consideration the domicile of origin the effect is more than a mere personal contact. It is a modification of the corporate franchise, and to that extent relinquishes and limits the charter obligation or privilege. The avowed purpose of the act was to be applicable to such situations and companies. Prior to the constitution of Texas of 1876 all railway companies were chartered by special legislative acts. Before the passage of the act of 1889 such railway companies having legislative charters were required by general acts of 1853 amended by general act of 1857, to keep their principal offices at the place named in the charter, but were further expressly authorized thereby to change same at pleasure to some other point on the line of the railway. Manifestly the language of the act of 1889 expresses the purposes and intention of the legislature to have only certainty of the location of the principal offices, shops and roundhouses, and to insist upon the domicile chosen by any railway company as suitable to it being final and unchangeable. In this view, as an amendment of the acts of 1853 and 1857, the legislation of 1889 is not an onerous amendment, nor does it either essentially alter the plan of corporation or fundamentally change any privilege in holding, as it does, the governing offices at the chosen domicile of the company when there has been permanent relinquishment and abandonment in point of fact of the domicile of origin. Such being the principle involved in the law, and as it operates and

purports to operate no further than that principle, it is believed that under the facts clearly established by this record there does not arise nor is there presented any question of constitutional violation of appellant's rights in any respect, or impairment of obligation of charter contract. Under the findings of fact here the consolidated International & Great Northern Railroad Company, appellant's predecessor, changed the location of its governing offices, shops and roundhouses, to Palestine, under locative contracts, for a valuable consideration and aid by bonds. It is evident from the terms of
1026 the locative contract, and is adduced as a fact, that such company intended to permanently relinquish and abandon its domicile at Houston without intention of return. It is a general rule of evidence that the acts of a party are admissible evidence of such party's intention to establish a domicile. And a domicile, once existing, is presumed to be retained until shown otherwise. So contracted locations, as here, abided with intention of permanency as here, would be acts evidencing the purpose to permanently relinquish and abandon the place designated in the charter, and have only the chosen domicile. It was proven that the International and Great Northern Railroad Company has had its domicile at Palestine, asserting that point as its place of principal office, for about forty years and to its dissolution by foreclosure proceedings. And since the act of 1889 went into effect to the day of being sold out by judicial decree, being about twenty-three years, the International and Great Northern Railroad Company asserted and claimed its chosen domicile at Palestine as the place of its principal office and at which place its shops and roundhouses were located. Having permanently relinquished and abandoned in point of fact the domicile of origin at Houston for a chosen domicile at Palestine, and without intention of return to Houston, neither the International and Great Northern Railroad Company nor appellant for it could consistently insist that a state of facts exists showing injury or destruction of any original contract term of having domicile at Houston. And in view of the fact of permanent abandonment, as was the effect of the locative contract, the repeal of the act of 1857 by the act of 1889 would not so far bear upon appellant's predecessor as to operate to impair any of its existing rights claimed or asserted to the time it was sold out. And even if the act of 1889 operated to amend the term of privilege to go "elsewhere on the line of road at pleasure," it would appear as a fact warranted by the evidence that the company as such sanctioned and agreed to the modification thereof by the general act of 1889. Knowing of the modification of the right to railway companies to go elsewhere at pleasure, as was the effect of the act of 1889, the stock-
1027 holders of the International and Great Northern Railroad Company, after the passage of the act, met at Palestine annually for twenty-three years and to the judicial sale, claiming and asserting such chosen domicile as the "principal office." Upon the idea that the act of 1889 operated to change or restrict the obligation to go freely elsewhere at pleasure, it would appear as a fact, deducible from the evidence, that such stockholders acquiesced in

and consented to the change or restriction of the former privilege or term of contract. Knowing of the legislative provision and its application to the International and Great Northern Railroad Company, as it must be presumed that the stockholders did, it is apparent from their acts, claims and conduct in reference to the chosen domicile of Palestine that they as owners undertook to perform the requirement of the law and accept the chosen domicile of Palestine as final and unchangeable. It was thought in Com. v. Cullen, 53 Am. Dec. 450, where a new grant is beneficial in its aspects very little is required to found the presumption of acceptance. It is not doubted that corporations can, like individuals, agree to and accept modification of terms of obligation. In Williams v. Wingo, 177 U. S. 60, 44 L. Ed. 905, it was held, in effect, that a general statute may be repealed because it does not constitute a contract as such with any particular person or company. Therefore, in the facts of the case, it is believed a constitutional question does not arise having application to appellant or its predecessor. While adhering to the conclusion that the facts of the record afford no ground for holding that any existing rights of appellant or of its predecessor have been invaded or violated, it is nevertheless believed that the act of 1889 is in all respects valid and subject to no constitutional objections, as a police regulation within the power of the state to make. It is an established rule that a corporation is a resident citizen of the state in which it is created, and must dwell within the state of its creation. Bank v. Earle, 13 Peters (U. S.) 519, 10 L. Ed. 274. And the state, having the power to create the corporation, has the right, it is not doubted, to fix by initial legislation the precise locality within the state for the location
1028 of the governing offices of the corporation. If the state has the power, as it has, to fix the location of the governing offices in the first instance, it rests upon the ground of public interest in that respect. The location of governing offices of a corporation is a subject-matter of public interest and regulation for purposes of jurisdiction, litigation affecting the corporation as such, state visitation, and taxation of personal property. And in the absence of legislation conclusively fixing the principal office of the corporation, the place where it has such principal office would lie entirely in matter of proof. As well is the location of principal shops and roundhouses on the line of road a subject-matter of public interest, for they are but a part of the physical instrumentalities of necessary operation of the railway, and the public are affected in interest through proper operation of the road as a public carrier. Moreover, as the shops and roundhouses are a necessary part of the operation of the railway, the location of the same at the will of the company would not be an absolute right to it freed from legislative regulation in public interest and convenience. The company may not, as a right, establish its shops and roundhouses at a point either without the state or off of and distant from its line of railway, because, conferring, as the state does, the right to the company of operation of the road through a given territory, and only a given route within the state, the company in so doing would

be acting beyond a territorial privilege of operation. The power of the state to restrict the privilege of operation of the road to the particular territory or route authorized to be covered would necessarily include the right, exercised in public interest and convenience of operation, of enforcing location at a particular point on the line of road of the given instrumentalities of operation. If the power exists in the state, as it does, to regulate and reasonably govern operation of the road in public interest and convenience, the necessity or expediency and economic reasons for so doing are purely questions for the legislature, and not for the courts. The location of the principal office, shops and roundhouses being a subject-
1029 matter of public interest, legislation in respect thereto would be within the police power of the state to promote public convenience or good. The police power of the state extends, reasonably exercised, to promote the public convenience. Ry. Co. v. Ill., 200 U. S. 561, 50 L. Ed. 596; Ry. Co. v. Ohio, 123 U. S. 292, 43 L. Ed. 704; Ins. Co. v. Ohio, 153 U. S. 446, 38 L. Ed. 780. And location of the principal office being within the police power of the state, previous regulation would not prevent the operation of the police power further exercised to promote the public convenience or good. In application of that principle the state, in Ry. Co. v. Kentucky, 161 U. S. 677, 40 L. Ed. 849, was held to have the power to forbid the consolidation of competing corporations, though the right to consolidate should be held to be given by the charter, and though the charter contained no reservation of power so to do. To the same effect is Pearsall v. Ry. Co., 161 U. S. 646, 40 L. Ed. 838. It was held in State v. Ry. Co., 24 Tex. 122, that it was within the constitutional power of the state to impose the duty upon executive officers of the company to reside within the state, though the law was passed after the grant of the charter. The principle of law of this latter case has direct application to the instant legislative provision. A difference in principle is not perceived to be between requiring the president and a majority of the directors to have residence within the state, and requiring the governing officers of the corporation to have residence in a particular locality within the state on the line of railway. A legislative provision requiring location of general offices at a fixed locality, in its last analysis means only that the executive and governing officers of the corporation as such shall have residence at a particular locality within the state on its line of railway. The same principle would have application to shops and roundhouses, which are but a part of the instrumentalities of operation of the railway. Holding, as we do, that the act is a regulatory one in public interest and within the operation of the police powers of the state, it is not therefore assailable as violative of the federal constitution upon the
1030 ground of impairing the obligation of charter contract.

Appellant, though, further claims that the statute denies equal protection of the law because of classification, in that it does not include individuals and receivers operating a railroad as carriers. It applies to all railroad corporations alike. Ry. Co. v. Mackey, 127 U. S. 205, 32 L. Ed. 107; Tullis v. Ry. Co., 175 U. S. 348, 44

L. Ed. 192; Ry. Co. v. Matthews, 165 U. S. 1, 41 L. Ed. 611. And appellant further claims that the act is in denial of equal protection of the law because it imposes excessive penalties that preclude an appeal to the courts against its provisions. The penalty provision of this act being severable, and no penalties being here inflicted, that portion of the act is of immaterial consideration. Ry. Co. v. Michigan R. R. Com., 231 U. S. 457, 58 L. Ed. 310; Ry. Co. v. Garrett, 231 U. S. 298 58 L. Ed. 229.

The act is not retroactive, as insisted by appellant, against it, for its charter bears date since the act was passed.

It is further insisted that the act is void as direct regulation of interstate commerce. Undertaking, as the act does, only to make the subject of a local law the domicile of a corporation created by it, it could not reasonably be determined that the act attempts to regulate or is a per se regulation of interstate commerce. Consequently it is not an objection to the act that it may remotely affect, if it does, interstate commerce. Ry. Co. v. Hughes, 193 U. S. 488, 48 L. Ed. 272; Ry. Co. v. Mazursky, 216 U. S. 132, 54 L. Ed. 417; Smith v. Alabama, 124 U. S. 465, 31 L. Ed. 511.

We have carefully considered all the assignments made in the brief, and have concluded that they should be overruled.

The decision of the questions made on appeal has the result to affirm the decree of the trial court restraining appellant from changing the location of its general offices, shops and roundhouses from the City of Palestine, and from keeping and maintaining its general offices at any other place than Palestine, Texas, unless hereafter authorized by law so to do.

LEVY,
Associate Justice.

Jan. 7, 1915.

Filed Jan. 7, 1915.

1031 Writ App. No. 9285. No. 1351. International and Great Northern Railway Company v. Anderson County et al. Opinion of the Court. Filed Jan. 7, 1915, E. T. Rosborough, Clerk Court of Civil Appeals, Sixth Supreme Judicial Dist. of Texas. Recorded in Opinion Record No. 5, Page No. 1056, E. T. Rosborough, Clerk, By —— ——, Deputy. Filed in Supreme Court Mar. 15, 1915. F. T. Connerly, Clerk.

1032 STATE OF TEXAS,
County of Bowie:

I, E. T. Rosborough, Clerk of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, at Texarkana, Texas, do hereby certify that the above and foregoing 31 pages is a true and correct copy of the original opinion of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, filed in my office on the 7th day of January, 1915, in the case of International & Great

Northern Railway Company, Appellent vs. Anderson County et al, Appellees, No. 1351.

In testimony whereof I herenuto set my hand and seal of office at Texarkana, Texas, this the 26 day of July, 1916.

[Seal Court of Civil Appeals of the State of Texas.]

E. T. ROSBOROUGH,
Clerk of said Court.

1033 Be it remembered that on Thursday, the 7th day of January 1915, the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, met in the City of Texarkana, Texas. Present: Samuel P. Willson Chief Justice, Richard B. Levy Associate Justice, Wm. Hodges Associate Justice, and E. T. Rosborough Clerk. No. 1351. International & Great Northern Ry. Co., Appellant, v. Anderson County et al., Appellees, Appealed from District Court of Cherokee County.

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of the Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the Court below be in all things, affirmed; that the appellees Anderson County, the City of Palestine, George A. Wright, J. W. Ozment, A. L. Bowers, John R. Hearne, Z. L. Robinson, E. W. Link, R. C. Sewell, John M. Cooley and P. H. Hughes recover of and from the appellant International & Great Northern Railway Company and of J. E. McAshan and B. D. Harris sureties on said appellant's supersedeas bond all costs in this behalf expended, both in this court and the court below for all of which execution may issue, and this decision be certified below for observance.

THE STATE OF TEXAS,
County of Bowie:

I, E. T. Rosborough, Clerk of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, do hereby certify that the above is a true and correct copy of the judgment rendered by said Court in the above styled and numbered cause as the same appears of record in the minutes of said Court in Minute Book 2 Page 161.

In testimony whereof, I hereunto set my hand and seal of said Court at Texarkana, Texas, this the 26th day of July 1916.

[Seal Court of Civil Appeals of the State of Texas.]

E. T. ROSBOROUGH,
Clerk of said Court.

1034 In the Court of Civil Appeals of the State of Texas for the Sixth Supreme Judicial District.

No. 1351.

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY, Appellant,
vs.
ANDERSON COUNTY et al., Appellees.

Appellant's Suggestion and Motion to the Court of the Disqualification of Members of This Court, and, Subject to the Same, Its Motion for Rehearing.

I.

The appellant, the International & Great Northern Railway Company, moves the Court to set aside the judgment of affirmance herein for the reason that, as appellant has been informed since the submission and decision of this Court in this case, two of the members of this Court are related within the third degree to citizens and property owners of the City of Palestine and of Anderson County, all of whom were parties plaintiff in this case. On the same date as the filing of this Motion, but prior to the filing hereof, appellant has submitted to the Court, upon a showing accompanying the same, a suggestion and motion that the court declare the disqualification and declare the Decree and Opinion of this Court be set aside for such disqualification and to be vitiated thereby, all as appears in the separate suggestion and motion to that effect and the Exhibits attending the same now on file, and to which reference is made.

Should this suggestion and motion to the Court, to declare the Decree of Affirmance and Opinion herein rendered to be vitiated and to be set aside, because of the disqualification of two of its members, not be sustained by the Court, but be overruled, and, subject to the same being overruled, (but protesting that it should be sustained, and reserving all right to so protest and contend, and without waiving its right to contend that the disqualification does and has
1035 existed, and that such Decree and Opinion was and is vitiated by reason of the disqualification of two members of this Court,) appellant now moves for a re-hearing in this case, and specifies the following grounds relied upon for the rehearing as errors committed by this Court, to-wit:

II.

This Court erred in overruling appellant's first, second, third, fourth, fifth and sixth assignments of error grouped and presented on pages 3 to 6 of its Brief and the propositions thereunder on pages 6 and 7 of said Brief, and in thereby holding that the District Courts of Anderson County and of Cherokee County had jurisdiction to try and determine the matters alleged by plaintiffs for recovery and in not holding that the jurisdiction to hear and determine all said

matters was exclusively in the United States District Court for the Northern District of Texas.

III.

The Court erred in refusing to sustain the proposition of the appellant made under Assignments one to six, inclusive, and in overruling such proposition, which is as follows:

"The United States Court, in foreclosing the second mortgage of the I. & G. N. R. R. made in 1881, by its decree of May 14th, 1910, had the power to reserve (as it did) exclusive jurisdiction to determine the validity and priorities of any liens and burdens against the sold-out properties, in the hands of the purchaser or his assign; when claimed to originate under the sold-out railroad, or by its act or contract, or that of some one prior in title, whether prior or subsequent to the foreclosed mortgage.

Such reservation of jurisdiction is a condition and term of the sale, made in the decree of foreclosure; a warranty by the court, to its extent, that such burdens or liens shall be litigated in that court alone; and the rightful exercise of a power and jurisdiction inherent in any court of equity in making foreclosure and directing sales; and constantly exercised in complicated foreclosures in State and Federal Courts, and necessary to be exercised in order to not
1036 indefinitely defer sales until the court has settled all matters of right in rem, subject, or which can be subjected, to its exclusive jurisdiction.

In this decree the reservation is clear, but it need not be directly made; it rises by implication.

Whereby a Federal question is presented, on account of the violation of the exclusive jurisdiction of the United States Court."

IV.

The Court erred in its Opinion in holding that the decree of foreclosure of the United States Court of the mortgage of 1881 by its decree of May 4, 1910, did not operate to reserve the exclusive jurisdiction of this litigation to that Court, because the Statute of 1889, as held by this Court, commonly known as the "office-shops statute", did not, as this Court declares, purport to or create any lien, burden, or right in rem against any property which has come down to the International & Great Northern Railway Company, such holding being in contradiction to the opinion of the Supreme Court heretofore given in this case; obtained by the plaintiffs and offered by defendant.

V.

This Court erred in not sustaining this appellant's proposition on page 47 of its Brief to the effect that this litigation and decree herein are in conflict with and denial of the right, title, privileges and immunities of appellant as protected by the decree of the United States

Court forecl-sing the mortgage of 1881 upon the properties, in the exercise of the powers conferred on it as a court of equity by the Constitution of the United States and by section 237 of the Act of Congress March 3, 1911 (33rd L. Statutes 1156) and the Statutes of the United States, section 709.

VI.

This Court erred in overruling appellant's seventh assignment of error on pages 47-48 of its Brief and the proposition thereunder, and in not holding that the proceedings in the United States
1037 Court for the Northern District of Texas and foreclosure thereunder of the second mortgage of 1881 and the sale thereunder and the reservations of the decree constituted a complete bar to this suit, in that same show that the Courts of this State have no jurisdiction to proceed herein and that causes of recovery alleged by plaintiffs are barred by such proceedings.

VII.

The Court erred in not sustaining the proposition of the appellant under its seventh assignment that the decree of foreclosure of May 10, 1910, and proceedings thereunder, and denunciation of the alleged contracts sued on, disposed of them, unless the plaintiff may litigate them in the United States Court, it being shown and undisputed in the evidence that, in pursuance of the decree of foreclosure of May 10, 1910, the purchaser and the appellant did duly denounce the alleged contracts sued on as not to be assumed by it, whereby, under the terms of the decree of foreclosure of the United States Court, such matters were all disposed of and finally determinated unless litigated in the United States Court, and whereby it resulted that the decree of this Court and of the District Court is in flat contradiction to the provision referred to in the decree of foreclosure of the United States Court.

VIII.

This Court erred in failing to find and state that the International & Great Northern Railway Company did, in accordance with the decree of foreclosure of May 10, 1910, made by the United States Court, denounce and elect not to perform the alleged contracts sued on herein, if they ever existed, all as was completely proved in this case without dispute, and this Court is respectfully now requested to find that fact, all as completely shown in the Statement of Facts herein, pages 286-297-298.

IX.

This Court erred in overruling appellant's assignments numbers eight to twenty-six and twenty-eight to thirty, inclusive,
1038 grouped together in appellant's Brief at pages 48 to 53, inclusive, and the propositions thereunder in said Brief, and in

not holding that the contract alleged by plaintiffs between G. A. Grow, representing the Houston & Great Northern Railroad Company, and John H. Reagan, representing the citizens of Palestine, was contrary to law and to public policy and therefore unenforceable, for the reasons given in said assignments and propositions.

X.

This Court erred in refusing to find and sustain and in refusing to mention one of the leading propositions in this case, as set forth on page 53 of appellant's brief under the last above mentioned assignments, which propositions was as follows:

"No contract can be founded upon the employment of services to influence any public official to enter into any contract or engagement, or the body of the voters to adopt any contract submitted to their votes. It is immaterial whether or not there was bad intent or a corrupt motive. The allegations and claims of plaintiffs that the alleged contracts on which they sue were based upon a bargain for the use of Judge Reagan's influence and speeches and services to influence or "induce" the voters of Anderson County to vote a bond issue, come within this rule."

XI.

This Court erred in failing and refusing to pass upon, mention and support the second proposition under last above mentioned assignments set out on page 139 of appellant's Brief, which is as follows:

"An agreement to pass to a portion of the voters a value, contingent upon a certain election being carried, especially when that value is a large one, can not form a contract, but is illegal and void, as contrary to public policy, as well as to the statutes prohibiting the bribing of voters, but it is void independently of such statutes."

1039

XII.

This Court erred in failing to find in its Findings of Fact in this case the undisputed fact that the plaintiffs in evidence and in submission to the jury did contend and did induce the jury to find that the Houston & Great Northern Railroad Company, acting by its President, Grow, on or about the 15th day of March, 1872, contracted and agreed with the citizens of Palestine, acting by John Reagan, to estend its line of railroad to intersect the International Railroad at Palestine, and to establish a depot within a half mile of the depot at Palestine, and to commence running cars regularly thereto by July 1, 1873, and to thereupon locate and forever thereafter maintain the general offices, machine shops and roundhouses of the Houston & Great Northern Railroad at the City of Palestine, for and in consideration of an agreement by John H. Reagan to make a thorough canvass of Anderson County to induce the electors of the County to authorize the issuance of interest — that Anderson County should issue

and deliver said bonds; and this Court is now respectfully requested to find that the plaintiffs did contend upon this trial and did induce the jury to find, and that the jury did find, that the consideration and a consideration for the maintenance of the alleged rights claimed by the plaintiffs were alleged contracts involving as a basis the alleged consideration of Judge Reagan's inducing the electors of the County to pass a bond issue. This is a matter unmentioned by the Court in its Opinion except to overrule all unmentioned assignments, and the Court is now most insistently urged to state the undisputed fact that the Decree in this case is founded upon such alleged contract involving such alleged consideration, to-wit: Judge John H. Reagan's alleged efforts to induce the electors of the County to authorize the issuance of interest bearing bonds.

XIII.

This Court erred in maintaining, by overruling assignments in block without mentioning or designating them, that it is legal to hire a person to influence the electors to pass a bond issue, and that
1040 the terms, if any, or compensation for inducing the bond issue, or for influencing the electors, can be the basis of a legal contract, which position this appellant took as one of its main positions, and the court erred in its Opinion, in overruling such assignments, presenting the alleged contract, and presenting that no contract could be founded upon such consideration.

XIV.

The Court erred in overruling appellant's assignments eleven to thirty-five and thirty-one to thirty-three, inclusive, grouped together on pages 145-146 of appellant's Brief, and the propositions thereunder, and in not holding that the contract alleged by plaintiffs to have been made between Grow and Reagan and the County was not susceptible of proof by parol evidence, or by other evidence than the record of the election proceedings, whereby the County of Anderson voted for the issuance of bonds to the Houston & Great Northern Railroad Company, and in not holding that such record constituted the exclusive legal evidence of any contract to which it was essential that the County should be a party, and the Court erred in holding that the allegations, evidence and verdict of the jury were legally sufficient to establish any other contract than that shown by the written record of such election.

XV.

The Court erred in overruling and not sustaining the first proposition under assignments eleven to twenty-five, inclusive, and thirty-first to thirty-third, inclusive, on page 146 of appellant's brief, which is as follows:

"As the statute required the contract with the county for the bond issue to be in writing, and that there should be a written record

thereof made by the County Court, and that the County Court should determine and settle whether or not the terms of the contract had been complied with, the contract with the county, on the considerations to be rendered by the railroad, and the considerations to be ren-
1041 dered by the county, could be made in no other way; and therefore, the ascertainment and settlement of this written contract and the determination of performance by the County Court, by the very writings themselves, and that court's judgment thereon, was the only way in which the terms of this contract could be ascertained; from which it results that any representations by Grow and others in promotion of the canvass for the bond issue were inadmissible. The proposition now made being that when the law requires a contract with the voters or municipality to be in writing, and it is in writing, and the performance of the consideration thereof be ascertained and adjudged by a court or other body trusted with this duty, and when the whole matter is complete on its face, no parol or outside considerations or inducements or promises can be gone into. This is not a matter of procedure merely, but fundamental.

XVI.

This court erred in overruling and refusing to sustain and in not finding the second proposition under last above assignments on page 150 of appellant's brief, which is as follows:

"The written contract in this case was complete of every consideration both ways, and under the general rules in regard to written contract (complete and exclusive in all their terms, and not attempted to be set aside), parol modifications were not admissible."

XVII.

This Court erred in refusing to find and in overruling the third proposition under the last above assignments on page 151 of appellant's brief, which is as follows:

"Contracts made and adopted by the vote of the people are necessarily never subject to a modification by showing what promises or statements outside of the contract of record were submitted to the people, otherwise, after the lapse of time, every such contract could be overruled on the mere basis of campaign promises, stump
1042 speeches, or expectations held out."

XVIII.

This Court erred in sustaining that the contention of appellees that testimony might be given as was given in this case to speeches and contents thereof made in 1872 in promotion of the bond issue to be made by the County of Anderson and to alleged promises and representations testified to as contained in such speeches, in support of appellees' alleged parol contracts, upon which they sue herein, and in modification of and in contradiction to and in addition to the undoubted written contract with the County.

XIX.

This Court erred in overruling appellant's thirty-fourth assignment of error on page 163 of its Brief and the proposition thereunder, and in not holding that the promises made by Grow after the completion of the election proceedings and of the contract thereby created between the County and the Houston & Great Northern Railroad Company were of no effect to alter such contract or to make any other or different contract from that expressed in the record of such proceedings.

XX.

This Court erred in overruling and in refusing to sustain the proposition under the thirty-fourth assignment on page 164 of appellant's brief, which is as follows:

"The contract being fully formed, at the time Grow went to get the bonds and he then being entitled to them, or not being entitled to them, and the court adjudging that this railroad was entitled to them on performed considerations, no promises which he may have made could be based upon any valuable consideration, and, therefore, they were of no importance. The contract could only be formed by an election."

XXI.

This Court erred in not mentioning and in failing to find
1043 the undisputed fact contained in an undisputed document, being the record of the proceedings of the County Court of Anderson County, in 1872 and 1873, wherein it was indisputably sh-wn that the contention had been made before the County Court of Anderson County, the then executive of that County when the bonds were issued, as now made here, that as an inducement to the voters to vote the bond issue it had been promised on the side or in public speeches, that the machine shops and roundhouses should be located at Palestine, which contention was indisputably overruled by the County Court of Anderson County; (S. F. 142-146-189-192) and this Court is now respectfully requested to find, as it has not found, that the County Court of Anderson County in 1873 made an Order and adjudged that the Houston & Great Northern Railroad Company had complied with its proposition to the County, the general offices not then being at Palestine nor the shops there; and this omission from the essential Findings of Fact of the Court is now pointed out, and the Court is requested to find the same, there being no dispute as to the facts requested, or conflict in evidence.

XXII.

This Court erred in failing to find, as heretofore found by the Supreme Court of Texas, in the litigation of Anderson County, et al vs. the Houston & Great Northern Railroad, (52 Tex. 242) involving

the very written contracts between the County of Anderson and the Ho-ston & Great Northern Railroad now in question, that such writings could not be contradicted or gone beyond by showing things alleged to have been undertaken as an inducement, as contended, for the formation of such written contracts or as a part thereof, all as directly litigated, settled and declared in such case.

XXIII.

This Court erred in overruling appellant's thirty-fifth assignment of error on page 165 of its brief, and in not holding that Anderson County was estopped from litigating any claim asserted in this case by the previous litigation between the Houston & Great Northern Railroad Company and the County of Anderson, such litigation being set up in defendant's answer in section 11A, such facts having
1044 been conclusively proven a-d showing that the matters herein alleged have been adjudicated in that cause so as to preclude the claims of plaintiffs herein.

XXIV.

This Court erred in failing to state in its Findings of Facts that in 1874 or about that time there was a litigation between Anderson County and the Houston & Great Northern Railroad, all as shown in 52 Texas-242, involving the very writings and contract between the County of Anderson and the Houston & Great Northern Railroad drawn in question in this case, and this Court is now moved to find that such litigation existed wherein Anderson County endeavored to set aside and void the bonds issued on the ground, among others, that the representatives of the railroad had held out inducements to the voters of the Counties to issue such bonds, promising to perform a certain matter or matters not espressed in the writing, and wherein the whole record of the County Court and the whole written history of the bond issue was set up defensively by the railroad, and wherein it was shown, adjudged and declared that such matters could not be added to, and wherein it was adjudged that the County could not contradict the judgment of the County Court declaring that the conditions, terms and undertakings of the railroad for the issue of the bonds had already been complied with; all as completely shown in the Statement of Facts and the undisputed evidence; and this Court is now so requested to find, and to find that a true copy a-d record of all of the proceedings and pleadings in the case of Anderson County vs. Houston & Great Northern Railroad, in 52 Texas 242, were introduced in evidence in this case.

XXV.

This Court erred in overruling appellant's eleventh to thirtieth, twenty-fourth to twenty-fifth and thirty-sixth assignments of error on page 167 of its Brief, and in not holding that the District court erred in refusing to give appellant's requested peremptory Instruction No.

1; for the reason that so much of the Articles 6423, 6424 and 6425 as would apply to contracts, such as plaintiffs attempted to allege, made before the adoption of the General Office Statute of
1045 1889, and to give to such contracts the effect contended for by plaintiffs, would impair the obligation of the contract in the mortgage duly executed in 1881 between the I. & G. N. R. R. Co. and the mortgagees therein, which mortgage had been settled, as ascertained and declared by the decree of foreclosure of the United States Court above referred to, in that the Act of 1889, so construed, would add to and place burdens on the original contracts stated by plaintiffs and secure such contracts as contended by subsequent law as against the properties or property, or some of them, now held by defendant and owned by it under foreclosure sale, as above set out; and such Statute, if applicable to the contracts alleged to have been made before its adoption, converted what was before at most personal contracts of the railroad company making them into secured contracts and obligations and burdens upon the property and running with the same in violation of the obligation of the contract of the said mortgage executed in 1881 and in the accomplishment, as claimed, of a preference created by such Statute, to be prior in law, though junior in time, to the obligations of the contract secured by said mortgage and bonds, whereby, as so applied, such Statute is unconstitutional and void.

XXVI.

This court erred in refusing to maintain the following proposition made by appellant on page 168 of its brief under the last mentioned assignments, which is as follows:

"Because said act of the legislature of 1889 violates Sub-section One of Section X of Article One of the Constitution of the United States, and impairs the obligation of contracts when, and as construed by the plaintiffs and plead by them; without which construction and application they can not recover; in that it appears, from the decree of foreclosure and evidence introduced by them, that the I. & G. N. R. R. was sold out under a mortgage termed the second mortgage at a loss, issued in 1881; that the defendant is the assignee and holder as purchaser of all the rights whatsoever accruing to the mortgagees; and further, as to any obligations, claimed by the plaintiffs
1046 to have been imposed by the act of 1889 (all of which were additions to and burdens upon the alleged contract asserted by plaintiffs) they are, in violation of said mortgage, attempting to make prior in law rights which were junior in time, if any such rights existed, all of which is in violation of the Constitution of the United States, here and now invoked.

By this proposition a Federal question is presented."

XXVII.

This Court erred in overruling appellant's last mentioned assignments and thirty-seventh assignment of error on page 170 and the proposition thereunder, and in not holding that the District Court

erred in refusing to give appellant's peremptory Instruction No. 1 for the reason that the Act of 1889, now constituting Article 6423, 6424 and 6425 of the Revised Statutes, as relied upon and applied by plaintiffs in this case, is violative of Sub-section 1 of Section 10 of Article 1 of the Constitution of the United States prohibiting any State from passing a law impairing the obligation of contracts, in that said Statute as so construed and applied attempts to give a lien and fix a burden and servitude upon the properties, thereby adding to the obligations, if any, of the alleged contracts and attempting to attach and add to those alleged contracts duties and conditions as set out in the Statute, and said Statute is, therefore, null and void when so applied to prior contracts alleged in this case.

XXVIII.

This court erred in overruling and failing to sustain the following proposition set out on page 171 of appellant's Brief under the last above mentioned assignments, to-wit:

"The plaintiffs rely upon the act of the Legislature of Texas of 1889, carried into Articles 6423-4-5 of the present Revised Statutes of Texas, and are now claiming that by such act, long subsequent to the alleged contract which they plead in this case, a lien, burden, or servitude was fixed upon the property or properties, or some of them, of the sold-out I. & G. N. R. R., which have been acquired by
1047 this defendant; without which lien or burden they can not recover; and in that by this statute and its terms they are extending and attempting to burden and add to the alleged contracts whereby it appears, when applied to the facts of this case, that such act of 1889, as so construed, is unconstitutional, and void, and violates Sub-section One of Section X of Article One of the Constitution of the United States, prohibiting any State from passing a law impairing the obligation of contracts. The plaintiffs claiming that their alleged personal contract so became secured first in 1889, and that in 1189 the statute placed other obligations on the alleged contracts, and not included in the contracts.

By this proposition a Federal question is presented."

XXIX.

The attention of this Court is directed to the opinion of the Supreme Court in this case, wherein it is held that the General Office Statute did impose upon the franchises and properties and general offices, machine shops and roundhouses, a burden or servitude or lien and rights in rem, and it is now pointed out that the opinion of this Court conflicts with and overrules the same; wherefore, the Court is respectfully requested to now state that it refuses to follow the opinion of the Supreme Court in this regard, and to file an additional statement showing on what grounds of law or fact it holds differently from the Supreme Court, and on the identical pleadings in this regard as in this case, and on which the Supreme Court gave its opinion.

XXX.

This Court erred in overruling appellant's thirty-eighth assignment of error on page 172 of its brief, and in not holding that the trial court erred in refusing to give appellant's requested peremptory instruction, because the aforesaid Statute, as relied on by plaintiffs, is in violation of Sub-section 1 of Section 10 of Article 1 of the Constitution of the United States, in that such application gives to said Statute the operation of an ex post facto law, because such Statute denounces a forfeiture of the character and a penalty of $5,000.00 a day to be recovered by the State which penalty is made prior in law, though junior in fact, to the mortgage under
1048 which this appellant holds, since such penalties are to be collected out of the properties of this appellant if plaintiffs' construction of said Statute be correct.

XXXI.

This Court erred in refusing to sustain the thirty-eighth assignment on page 172 of appellant's brief, which is as follows:

"The court erred in refusing to give the peremptory charge No. 1, requested by the defendant, because this said Statute of 1889, and as carried into the Revised Statutes of Texas of 1911, is unconstitutional and void and in violation of Sub-section 1 of Section 10 of Art. 1 of the Constitution of the United States of America; in that, by such sub-section every ex post facto law of the State is prohibited; and in that, by said statute of the State of Texas for a violation thereof, forfeiture of charter and a penalty of $5,000.00 per day is denounced to be recovered by the State; whereby under, the construction of plaintiffs, ex post facto, there has been given a penalty to be made prior in law, though junior in fact, to the mortgage under which this defendant holds, so that such immense penalties shall be collected as contended by plaintiffs out of the properties of this defendant, whereby such act, so violating the Constitution of the United States, is unconstitutional and void. (R., 614, Sec. 137).

This assignment is adopted as a proposition. It also presents a Federal question."

XXXII.

This Court erred in overruling appellant's 39th assignment of error on page 172 of its brief and the proposition thereunder, and in not holding that the trial court erred in refusing to give appellant's requested peremptory Instruction No. 1 because said act of 1889, as attempted to be enforced by plaintiffs, is violative of Section 1 of Article 14 of the amendments to the Constitution of the United States because, by the denunciation of the penalties and the attempt to apply the provisions of that Statute to
1049 appellant its privileges and immunities would be abridged and it would be deprived of its property without due process

of law and denied the equal protection of the law should it resort to the Courts to resist this action and assert its rights in the premises, especially in view of the excessiveness of the penalties and the attempt to shut the doors of the Courts to the appellant in its efforts to test the legality of the claims of plaintiffs and the constitutionality of such Statute.

XXXIII.

This Court erred in overruling proposition under grouped assignments on page 173 of appellant's brief, which is as follows:

"It appears that the plaintiffs rely upon said State act of 1889, as construed by them, which act is in violation, when so construed, of Section One of Article XIV of the Amendments to the Constitution of the United States, commonly called the XIV Amendment; in that such statute imposes great penalties; and in that the insistence that the statute is applicable to the defendant, constitutes an attempt to abridge the privileges and immunities of the defendant, and to deprive it of its property without due process of law, and to deny it the equal protection of the law by penalizing or threatening to penalize it at the rate of $5,000.00 a day and further penalize it, if it should resort to the courts to resist this action and litigate its rights by refusing to obey such unconstitutional statute.

This proposition presents a Federal question."

XXXIV.

This Court erred in overruling appellant's 40th assignment of error on page 174 of its brief and proposition thereunder, and in not holding that the trial court erred in refusing to give appellant's requested peremptory Instruction No. 1, because the said act of 1889, is violative of Section 1, Article 14, of the Constitution of the United States as an undue interference with the business of the appellant and its obligations to the public, both in State and Inter-state commerce, in that it attempts to interfere with the discretion of appellant, a public carrier, to conduct its business within its
1050 own discretion in obedience to the laws of the State and the United States, and in that it denounces forfeitures and penalties as above stated and attempts to place burdens and liens asserted by plaintiffs, and in that it prescribes the places where a great number of persons in the service of defendant must conduct their business and have their offices and residences, thereby denying this appellant the equal protection of the law and depriving it of its property without due process of law and interfering with its just and legal discretion to perform its duties to the public, to its stockholders, and other persons.

XXXV.

This Court erred in refusing to maintain the proposition and in overruling the same, as set forth on pages 174 and 175 of appellant's brief, which is as follows:

"The plaintiffs can not recover, as admitted by them, without the aid of said State statute of 1889, which statute, as applied by them, is void and unconstitutional, and violates Section One of Article 14 of the Amendments to the Constitution of the United States; in that it is an undue interference with the business and obligations of the defendant, whic- it owes to the public in State and Inter-state commerce; whereby it attempts to interfere with the lawful discretion and power of the defendant to conduct its business within the limits of the law; and whereby its attempts, by subsequent statute, to place burdens and liens and additions on and securing personal contracts, as claimed by the plaintiff, thereby denying to this defendant the equal protection of the law, and taking its property without due process of law, by such illegal interference.

This proposition presents a Federal question."

XXXVI.

This Court erred in overruling appellant's 41st assignment of error on pages 175-176 of its brief and the proposition thereunder, and in not holding that the trial court erred in refusing appellant's peremptory Instruction No. 1, because said act of 1889 is violative of Section 1, of Article 14, of the Amendments to the Constitution of the United States, in that said Statute is applicable only to
1051 chartered railroad companies and not to individuals, associations, receivers or other persons operating railroads, or acting as common carriers, nor to any other persons or corporations than railroad companies, wherefore said Statute denies to appellant a chartered railroad company, the equal protection of the law.

XXXVII.

This Court erred in refusing to maintain and in overruling the proposition on page 176 of appellant's brief, under assignments grouped, which is as follows:

"That the said act of 1889 of Texas, as applied, is unconstitutional and void, and yet without it the plaintiffs can not recover; in that such act is applicable only to chartered railroads, and not applicable to individuals, receivers or other persons operating as railroad carriers, or to other persons or corporations whatsoever, and so violates Section One of Article XIV of the Amendments to the Constitution of the United States, being legislation against a species or class, not rightly classified on any legal ground; and in that it places a burden upon the species or class not placed upon other persons and corporations classifiable with it; thereby violating the prohibition of denying to any persons the equal protection of the laws, and abridging the privileges and immunities of the defendant, and depriving it of its property without due process of law.

This proposition presents a Federal question."

XXXVIII.

This Court erred in overruling appellant's 42nd assignment of error on page 177 of its brief and the proposition thereunder and in not holding that the trial court erred in entering judgment upon the answers to special issues found by the jury, because this action is wholly founded upon the operation of said act of 1889 upon alleged contracts and said act is unconstitutional for the following reasons: (*a*) Because it imposes penalties excessive in amounts and prohibited by the Constitution of Texas; (*b*) Because as construed and applied it is retroactive; (*c*) Because it impairs the
1052 obligations of contracts as hereinbefore stated; (*d*) Because it is ex post facto. Furthermore, by the foreclosure sale of 1879, alleged and conclusively proved by appellant, every right of plaintiffs under said contracts, if any ever existed, was eliminated long before the passage of the act of 1889.

XXXIX.

This Court erred in failing and refusing to maintain proposition under group of assignments on pages 177 and 178 of appellant's brief, which is as follows:

"The plaintiffs rely upon the said act of 1889, which is claimed by them to secure their alleged contracts in this case, which, as applied, is illegal and void and contrary to the Constitution of the State of Texas: (*a*) because the same assesses a penalty of an amount prohibited by the Constitution; (*b*) because the statute as construed and pleaded is retroactive; (*c*) because the plaintiffs seek to recover in violation of the obligations and terms of the alleged contracts on which thy sue, and in violation of the mortgage contract, of the sold-out railroad, made in 1881; (*d*) because such statute is ex post facto, and pronounces penalties, and therein is contrary to the Constitution of the United States, as well as that of the State; (*e*) because as construed by plaintiffs, the statute denies to the defendant the equal protection of the law, and is violative of the due process of law."

XL.

This Court erred in overruling appellant's assignment of error numbers 43 to 48 inclusive, grouped on pages 238 and 239 of appellant's brief, and the proposition thereunder on page 239, and in thereby holding that the trial court did not err in refusing appellant's peremptory Instruction No. 1 and overruling appellant's objection to the submission of any special issues contained in the Charge of the Court and in overruling appellant's objection No. 1 to question No. 3, submitted in the Charge to the Jury, and in overruling appellant's objection No. 1 to question No. 6 submitted in the Charge to the Jury and in overruling objection No. 2 to
1053 question No. 6 submitted in the Charge to the Jury, by all of which assignments requested instruction and objections to

instructions given, this appellant compalins that there was no evidence of any authority from the H. & G. N. R. R. Co. and the I. & G. N. R. R. Co. for the making of the alleged contracts between Reagan and Grow and between Hoxie and Wright and Ozment, and that there was no evidence of ratification by said companies or either of them of the acts of said Grow and Hoxie in attempting to make any such contracts; and herein this court erred in holding that there was any evidence of such authority or ratification and in overruling the 48th assignment complaining that the verdict of the jury was without evidence to support it in these particulars.

XLI.

This Court erred in not finding as stated in proposition under assignments on page 239 of appellant's brief, which proposition is as follows:

"No authorization or ratification was shown in the evidence (or even tended to be shown), of the alleged contracts sued on. The burden was upon the plaintiffs. On the contrary, the evidence upon these issues showed, and tended overwhelmingly to show, that there had been no ratification or authorization of such alleged contracts by the Board of Directors or any railroad involved, it being conceded that the ratification or authorization would have to be by the Board."

XLII.

This Court erred in finding that there was evidence of the authorization or ratification of the alleged contracts sued on, there being no evidence whatsoever thereof.

XLIII.

This Court erred in overruling appellant's 49th, 50th and 51st assignments of error on pages 244-245 of appellant's brief and proposition thereunder, and in not holding that authorization or ratification of the acts of Grow and Hoxie to make any such alleged contracts had to be by the Board of Directors acting as a body, and in not holding that the trial court erred in refusing special charge No. 1
requested by appellant in connection with question No. 3 sub-
1054 mitted by the Court to the Jury.

XLIV.

This Court erred in failing to maintain the proposition advanced by the appellant on page 245 of its brief, which proposition the court is now requested to find, to-wit:

"The authorization or ratification of the alleged Reagan-Grow and Hoxie rent house contracts, on which the plaintiffs depend, if ever made, had to be made by the Coard of Directors acting as a body, and it is not sufficient that a majority of all of the board not acting as a body may authorize or ratify, it being essential that the Board

should act as a body, with the opportunity of consultation. The defendant was entitled to have this charged to the Jury."

XLV.

This Court erred in overruling the contention of appellant that ratification or authorization of such alleged contracts as are herein sued on could only be made by the Board of Directors in consultation and could not be made by a majority of all of the Board separately.

XLVI.

This Court erred in overruling appellant's 52nd assignment of error and the 53rd assignment of error on page 247 of appellant's brief and propositions thereunder on pages 247 and 248 of its brief and in not holding that the trial court erred, in the concluding sentence of the special charge No. 3 given in response to and *and* in lieu of the special instruction requested by defendants, which sentence is as follows: "But if you find that such agreements had been made, then you may consider the establishment and maintenance of the shops and offices at Palestine along with all other evidence in the case in determining whether or not the Company knowingly acquiesced in or ratified such agreements, if any were made." And this Court erred in not holding that there was no other evidence of such ratification or of knowledge, and further erred in not holding that, if there was, the establishment and maintenance of the offices and shops at Palestine was no such evidence as the Charge complained of intimated to the Jury, whereby commenting upon the evidence.

1055

XLVII.

This Court erred in overruling the proposition under assignments on page 247 of appellant's brief, which is as follows:

"Since t-e H. & G. N. R. R. Co. and the I. & G. N. R. R. Co. had the legal right to establish and maintain their general offices, machine shops and roundhouses at Palestine without any contract, the fact that they did establish them there was no evidence that these companies, or either of them, had authorized or ratified any contract binding them to do so."

XLVIII.

This Court erred in overruling appellant's 54th and 55th assignments on page 262 of its brief and the proposition thereunder on pages 262-263, a-d in not holding that the trial court erred in not sustaining appellant's objection to the submission of any of the special issues contained in the charge and in refusing appellant's special charge instructing a verdict for defendant, and herein this court erred in not holding that by the foreclosure, sale and purchase of the properties under the proceedings had in 1879, referred to in the proposition under said assignments, had the effect to vest the

title of the properties of the sold-out railroad company in the International & Great Northern Railroad Company, freed from the contracts alleged to have been previously made between Reagan and Grow and between Hoxie and Wright and Ozment.

XLIX.

This court erred in not finding and maintaining the position that by the foreclosure sale of 1879, made before the passage of the act or 1889, known as the "office-shop act," upon which plaintiffs rely, (R. S. 6423-4-5), and under the laws existing in 1879, the International & Great Northern Railroad Company was not relieved of all obligation of the alleged contracts sued on, if any obligation they ever had; the effect of such sale and foreclosure of the properties being to relieve the purchasers of the necessity of taking out a new Charter, and to authorize them to proceed under and by their old Charter or Charters and the old Charter or Charters of the International & Great Northern Railroad Company, which that Company freed from the obligation of any such contracts, if they ever existed,
whereby the Act of 1889 could not retroactively and legally
1056 again make them binding.

L.

This Court erred in not sustaining the proposition on pages 262 and 263 of appellant's brief under the 54th and 55th assignments, which is as follows:

"The court should have given special charge No. 1, requesting the court to instruct a verdict for the defendant, for the reasons that under three several decrees of foreclosures rendered by the Circuit Court of the United States for the Western District of Texas, all of the properties of the International Railroad Company and of the H. & G. N. R. R. Co., and of the I. & G. N. R. R. Co., their successor, together with all corporate rights, privileges and franchises, were sold in 1879, more than ten years before the enacting of the general office statute of 1889, which is now Article 6423-4-5, Revised Statutes of 1911; that at the foreclosure sales under said decrees, John S. Kennedy and Samuel Sloan, Trustees, became the purchasers of said properties, corporate rights, privileges and franchises; that said sales to Kennedy and Sloan were duly confirmed by the court under whose decrees the sales were made; that upon compliance with the terms of said sales, deeds for all of said properties, corporate rights, privileges and franchises were executed by the Master designated by the Court to make said sales to said Kennedy and Sloan; that the effect of said sales was to vest in the purchasers at said sales the title to said properties, corporate rights, privileges and franchises of said International Railroad and of said H. & G. N. R. R. Co., and of said I. & G. N. R. R. Co., their successor, free from liability for the debts and other merely personal obligations of said International Railroad Company, said Houston & Great Northern Railroad Company and said International & Great Northern Railroad Company; that the fact that said Sloan and Kennedy, after acquiring said properties,

corporate rights, privileges and franchises, executed a conveyance thereof to the International & Great Northern Railroad Company, and that the stockholders, as shown by the records of said Company, remained the same after said sales, with the exceptions of the holders of a small minority of the shares of stock of said company, as they were prior to said sales, did not have the effect of reviving
1057 or restoring the liability of said companies, or any of them, for their debts and other purely personal obligations."

LI.

This Court erred in overruling appellant's 56th and 57th assignments of error on page 285 of its brief and the proposition thereunder on same page, and in not holding that, by the organization of appellant in 1911 as a corporation and the acquisition by it of the properties of the sold-out International & Great Northern Railroad Company under the foreclosure proceedings completed in that year, appellant took absolute title to such properties, freed from the operation of the contracts alleged to have been previously made, and that appellant was protected therein by the construction given by the Supreme Court of Texas to the General Office Statute in the case of K. C. M. & O. Ry. Co. vs. Sweetwater, 104 Texas 329, and that the effort in this case to so enforce said contracts and the General Office Statute of 1889 as subsequently construed by the Supreme Court in the case of I. & G. N. Ry. Co., vs. Anderson County, Texas, changing the previous construction of said Statute impairs the obligation of the contract between appellant and the State of Texas arising from its Charter of 1911, and takes appellant's property without due process of the law and deprives it of the equal protection of the law, in violation of the Constitution of the United States, Art. 1, Sec. 10 and 14th Amendment, Sec. 1.

LII.

This court erred in failing to maintain the first proposition under 56th and 57th assignments of error on pages 285 and 286 of appellant's brief, which is as follows:

"The applicable law in force at the time when a contract is made, forms a portion of that contract; and is the obligation thereof; and when a charter or other contract is made based upon the law in force at that time, and there is a construction, by the ultimate court of the State, of its own statute, constitution, or other law, and a charter is taken out in conformity with that construction, or other
1058 contract made involving that meaning, it violates the obligation of the contract, contrary to Sec. 10, Sub-sec. 1, of Art. 1, of the Constitution of the U. S thereafter, by a change of construction of the meaning of the statute, to thereby change or burden the contract.

Applying this principle to this case, the defendant herein, in August, 1911, took out a charter under the then existing laws of Texas, and as a condition of taking out the same, assumed and has

paid obligations of over one million dollars, in order to procure said charter or contract; the Supreme Court of Texas having finally decided, not later than June, 1911, in the case of K. C. M. & O. R'y. vs. Sweetwater, officially reported, 104 Tex. 329, that any contract, even written, with a sold-out railroad for the location of its shops and offices, did not follow the properties in the hands of the purchaser, and made this construction in connection with R. S., 6423-4-5, being the Office-Shops Act of 1889 (then R. S. 4367, etc., of R. S. of 1895), thereby declining to hold that this act created a burden or servitude for the security of the contract, whereas, the plaintiffs now insist, in contradiction to such decision of the Supreme Court (under which the present charter was taken out) that any such contract did follow and burden and constitute a servitude on the properties, or some of them: the decision of the Supreme Court being that such contracts remained purely personal to the sold-out railroad, as appears on the face of the decision. This proposition presents a Federal question."

LIII.

This Court erred in overruling appellant's second proposition under said 56th and 57th assignments, found on page 295 of its brief, and in hodling that the said General Office Statute of 1889 requires offices, shops and roundhouses falling within its terms to be perpetually or forever maintained at the place fixed by contract.

LIV.

This Court erred in overruling the second proposition under 56th and 57th assignments of error on page 295 of appellant's brief, which is as follows:

"The Statute of 1889, being the Office-Shops Statute (R. S.,
1059 6423-4-5), at most purports to require the general offices and shops to be maintained "permanently" at the place where they may have been contracted to be kept, and the word 'Permanently' does not mean 'forever', but means only for a less period, which would be completely complied with between 1875 and 1911."

LV.

This Court erred in not sustaining appellant's third proposition under its 56th and 57th assignments, said proposition being on page 296 of its brief, and in not holding that peremptory instruction should have been given for defendant, even if the alleged contracts were legal, because under the law, as it was when they were made, if at all, they were personal obligations only of the contracting corporations and unsecured in rem, and did not have the extent given to them by the General Office Statute of 1889; and to give another and more extensive obligation thereto is violative of Sec. 10 of Art. 1 of the Constitution of the United States, in that by such construction said act of 1889 would be made to impair the obligation of the

charter contract of the railroad companies, as well as that of the contract between said companies and the mortgagees under the mortgage of 1881, and of the alleged contracts sued on.

LVI.

This Court erred in overruling appellant's 58th assignment of error on page 297 of its brief and the propositions thereunder on pages 298 and 303 of its brief and in not holding that the judgment of the District Court is unsupported by and contrary to fundamental principles of law, in that the contracts alleged and sought to be proved are represented by plaintiffs to be binding forever, and in that if such contracts were indeterminate in time they rest in the discretion of either party and have been determined by defendant, and if they were ever binding upon it, or its property, or have been terminated by its predecessor, all of which conclusively appears in the evidence without controversy.

LVII.

This Court erred in overruling and refusing to sustain and refusing to find the first proposition under 56th, 57th and
1060 58th assignments on page 298 of appellant's brief, which is as follows:

"The alleged contracts herein are alleged to have been entered into, and to last forever, and to bind the I. & G. N. R. R. Co. forever, and that the act of 1889, being the Office Shops Act, secures such contracts against some of the property or properties of the sold-out railroad above.

These alleged contracts, as alleged, and the statute, as construed, violate the Constitution of the State of Texas, which prohibits perpetuities and monopolies, and thereby the indefinite restraint on alienation and the indefinite tying up of property, as 'forever.'"

LVIII.

This Court erred in overruling and refusing to maintain the second proposition on page 303 of Appellant's brief under said assignments, which is as follows:

"If the alleged contracts were contracts at all they were contracts indeterminate in time, and every contract, the duration of the performance of which is not specified, can be terminated at the option of either party."

LIX.

This Court erred in overruling appellant's 59th assignment of error and the proposition thereunder, on page 303 of its brief, and in not holding that the trial court erred in overruling appellant's objection No. 2 to question No. 4 submitted in charge to the jury, and in not holding that the alleged contract between Hoxie and Wright

and Ozment was within the statute of frauds, because not in writing and not performable on either side within the year.

LX.

This Court erred in overruling appellant's 60th, 61st and 62nd assignment of error on pages 307-308 and the proposition thereunder on page 308 of appellant's brief, and in not holding that the trial court erred in overruling appellant's demurrer No. 8 in Section 11 of the answer, and in overruling objection No. 1 to question No. 4 submitted in the charge to the jury, and in refusing special charge No. 4 requested by defendant, all relating to the alleged con-
1061 tract between Hoxie, for the railroad company and the citizens of Palestine, including Wright and Ozment, of date 1875, and herein this Court erred in not holding that there was no valid contract arising out of the alleged transaction between said parties, because, while the alleged contract purported to bind the railroad company forever, it fixed no time during which the other parties thereto were to be bound unless forever, in which case the said contract would fall within the statute of frauds, because not in writing. There was no obligation upon the part of Wright and Ozment or other citizens of Palestine to rent the houses for any time unless they were bound to rent them forever, and said agreement was, therefore, either optional with the said parties and not a contract, or within the statute of frauds.

LXI.

The Court erred in failing to sustain the proposition on page 308 of appellant's brief under above assignments, which is as follows:

"There is no consideration for a contract where performance is optional on one side, and, therefore, when the agreement does not bind to perform for any specific time, where continuous performance rests in option to be discontinued at any time by the obligor, and there being no consideration, there is no contract, but an agreement, which fails for lack of consideration.

Applying this principle to the Hoxie rent house agreement, as alleged, there is stated to be an agreement to perform by the railroad 'forever' in consideration of an agreement to perform by the citizens of Palestine, perhaps impliedly 'forever', that is, to rent houses 'forever', in which case the contract would be within the Statute of Frauds, as above, and unenforceable, or if this implication can not be placed upon the allegations of the pleading that the houses were to be rented 'forever', then there is no allegation that they were to be rented for any time, and they were, therefore, to be rented only for such time as the lessors might see fit, whereby there would be no contract for the lack of consideration."

1062

LXII.

This Court erred in overruling appellant's 63rd assignment of error and proposition thereunder found on pages 316-317 of ap-

pellant's brief, and in not holding that the trial court erred in entering judgment upon the special issues found by the jury, because the charter of the Houston & Great Northern R. R. Co., the obligations of which were assumed by the International & Great Northern Railroad Company required that the domicile and principal office of said railroad should be at Houston, at which place therefore such general offices were required to be kept by the General Office Statute of 1889, upon which plaintiffs rely.

LXIII.

The Court erred in refusing and failing to sustain proposition under 63rd assignment of —, page 317 of appellant's brief, which is as follows:

"The plaintiffs rely upon the Office-Shops Act of 1889 (R. S., 6423-4-5), without which they can not recover, on the ground that the H. & G. N. and I. & G. N. had contracted to keep the general offices at Palestine, Texas, whereas, the act provides that every railroad company shall keep its general offices at the place designated in its charter. It being now shown, without dispute, that the charter of the H. & G. N. R. R. located its general offices in the city of Houston, Texas, and that the charter of the International authorized it to consolidate with any other road, and did not locate its general offices, but authorized them to be changed; and that the International had consolidated with the H. & G. N. into the I. & G. N., and moved to Houston, Texas, where the general offices remained until the move to Palestine in 1875, the act of 1889 does not enforce any contract, if any there was, to locate the general offices at Palestine, but, on the contrary, prohibits the enforcement of any such contract; a place for the general offices being named in the charter, and at least under these circumstances the act does not award specific performance."

1063

LXIV.

This Court erred in overruling appellant's proposition under 24th and 25th assignments of error, which proposition is found on page 326 of its brief, and in not holding that the causes of action herein set up by plaintiffs were barred by the failure of the railroad companies to be affected thereby to remove their general offices, shops and roundhouses to Palestine within two years after making of the alleged Reagan-Grow contract.

LXV.

This Court erred in overruling appellant's 64th assignment of error and proposition thereunder on page 327 of its brief and in not holding that the trial court erred in refusing appellant's requested special instruction No. 2 instructing the jury to leave out of consideration the alleged agreement between Reagan and Grow for the reason that said agreement was broken by the keeping of the

general offices at Houston for more than two years after the making of said contract, whereby this action was barred both as to offices and shops, or either.

LXVI.

This Court erred in overruling appellant's 65th assignment of error and the propositions thereunder on pages 328 to 330 of its brief, and in not holding that the trial court erred in refusing to submit to the jury question No. 9 requested by defendant, submitting to the jury the question whether or not the defendant had broken the contract sued on in 1881 by moving its general offices from Palestine to St. Louis and keeping them there until 1888, whereby this action would be barred by limitation; and herein the Court especially erred in overruling the fourth proposition under *siad* assignment and in not holding that if the contracts had been so broken during said period the General Office Statute of 1889 would be retroactive in its operation against the International & Great Northern Railroad Company.

LXVII.

The Court erred in refusing to sustain the third proposition stated under 65th assignment of error on page 330 of appellant's
1064 brief, which is as follows:

"If the two years' statute of limitation were not applicable, then the omnibus four-year statute of limitation was applicable, and it was then at least raised in the evidence whether or not the four years' statute of limitation had run by reason of the removal to St. Louis.

LXVIII.

The Court erred in refusing to maintain the proposition stated under the 65th assignment of error on page 328 of appellant's brief, and in overruling the same, which is as follows:

"If the evidence did not absolutely show that limitation had run generally, it undoubtedly raised the issue of whether or not limitation had run as to the general offices under the testimony, to the effect that the general offices had been moved to St. Louis in 1881; and remained there until in 1888. This suit was brought in 1912, and the defendant was entitled to have it submitted to the jury whether or not such removal to St. Louis, and stay there, was a breach of the contract."

LXIX.

The Court erred in refusing to sustain*ed* the fourth proposition under assignment 65 on page 331 of appellant's brief, which is as follows:

"It being at least raised in the evidence whether or not any right of action as to the offices was barred, the act of 1889 passed after the accrual of a bar would be retroactive and unconstitutional when

construed to remove such bar. To refuse to submit to the jury whether or not the facts (well supported in evidence) existed which would constitute a bar, was to rule that the statute could constitutionally be retoractive, and remove the bar.

LXX.

The Court erred in no where considering and finding in its opinion the fact shown absolutely in the evidence that the offices were moved to St. Louis, Mo. in 1881 and remained there until in 1888—that is, the general offices of the International & Great Northern
1065 Railroad and all of its employees, with the exception of the Assistant Secretary, a Claim Agent, and, perhaps, a Superintendend, there being no dispute as to these matters, and the Court is now respectfully requested to find this fact, in accordance with the testimony of Maury and Howard, and the Findings of Fact in the suit of the State of Texas vs. the International & Great Northern Railroad, all as set out in the Statement of Facts, and as was apparent in the evidence in this case, without dispute.

LXXI.

This Court erred in overruling appellant's proposition on pages 338-9 of its brief, submitted under 24th and 25th assignments of error on page 52, and in not holding that the effect given to the contracts alleged by plaintiffs and by the General Office Statute of 1889 violates the Constitution of the United States, Art. 1, Section 8 vesting in Congress the exclusive power to regulate interstate commerce, in that such effect would be to bind this appellant forever to keep its offices, shops and round houses at Palestine, and deprive it of the power to so regulate its affairs as best to serve the interests involved in interstate commerce and regardless of the effect upon interstate commerce.

LXXII.

This Court erred in overruling appellant's 66th assignment of error on page 341 of its brief, and the proposition thereunder on page 342, and in not holding that the trial court erred in refusing to submit to the jury question No. 7 requested by defendant submitting to the jury the question as to the effect of fixing the general offices, shops and round houses at Palestine forever as a burden upon interstate commerce.

LXXIII.

This Court erred in overruling appellant's 67th assignment of error and proposition thereunder on pages 348 to 349 of its brief, and in not holding that the trial court erred in entering any judgment in favor of plaintiff in this case, because the foreclosure of the mortgage of 1881 upon the properties of the International & Great

Northern Railroad Company, under which foreclosure this
1066 appellant takes all its rights, was valid, and had the effect to vest complete title in this appellant; and that plaintiffs, at most, were left only with the right to redeem from such foreclosure, which they have not offered to do.

LXXIV.

The Court erred in failing to sustain proposition on page 349 of appellant's brief, and in overruling the same, it being as follows:

"Even if the plaintiffs have any right, their right is subordi*ante* to the foreclosed second mortgage of 1881, the redemption of which would involve the payment of over fourteen million dollars which the plaintiffs do not offer to redeem and pay, and which the obviously can not redeem, and will not redeem, as their right, if any is far less than the cost of redemption. Therefore, they are precluded, and it is immaterial that they were omitted from the foreclosure because it is unnecessary to make persons parties having a burden or lien junior to a foreclosed mortgage when, by no possibility, they could or would redeem, and it is a mere abstraction and moot question to permit litigation of such a theoretical right."

LXXV.

This Court erred in overruling appellant's 68th assignment of error on page 351 of its brief, submitted as a proposition, and in not holding that the trial court erred in not holding that the trial court erred in not entering a judgment foreclosing the mortgage of 1881 as against the plaintiffs, if the Court entered any judgment at all.

LXXVI.

This Court erred in overruling appellant's assignment numbered 68-*a* on page 352 of its brief and the propositions thereunder and in not holding that the trial court erred in admitting the testimony of the witness Wright to the statement as having been made by Hoxie about a letter from Crow and in not holding that Wright's testimony was hear-say; and that Grow's letter, if written, was inadmissible because the said Grow had severed his connection with the railroad before said letter purported to have been written and had no authority to act for or bind the railroad by any statement he might make.

1067

LXXVII.

This Court erred in overruling appellant's 69th assignment of error on page 353 of its brief and in not holding that the trial court erred in refusing to give appellant's peremptory Instruction No. 1 because the Trustee and bond holders under the mortgage of 1881 took their lien without notice of any of the contracts alleged by plaintiffs

and also at a time when such contracts could not have affected the lien of the mortgage upon the property or the title of a purchaser thereunder at foreclosure sale, but were purely personal obligations of the corporations which made them, if ever made, for which reason this appellant, purchasing under foreclosure of said mortgage of 1881 and succeeding to all the rights of the Trustee and bond holders therein, acquired title freed from the operation of such contracts and from the operation of the General Office Statute of 1889 passed subsequently to the attaching of the mortgage lien; therefore, the appellant is protected by the above principle, both of law and by the protection afforded by the Constitution of the United States and of the State of Texas.

LXXVIII.

This Court erred in overruling appellant's 70th assignment of error on page 354 of its brief and the propositions thereunder on pages 354-6, and in not holding that the trial court erred in admitting in evidence a certain newspaper article published in the "Dailey Visitor", a Palestine paper, of date May 16, 1899, and signed by Judge Reagan, because not under oath nor subject to cross-examination; second, it was confusing and prejudicial; third, it was hearsay; fourth, it related to matters with which Judge Reagan had been concerned and was a principal party, according to plaintiffs' allegation, and contained self-serving declarations written in 1889 and not in explanation of letters introduced by defendant, without objection written in 1872, and 1874; and, fourth, said letter was inadmissible because a mere political article stating conclusions prejudicial to appellants.

LXXIX.

This Court erred in refusing and failing to state in its
1068 Conclusions of Fact or anywhere in its Opinion the matter of the newspaper article introduced by Judge Reagan in evidence and objected to by the appellant, which article is set out in the Statement of Facts on pages 355 and 358 of appellant's brief and was dated May, 1899, whereas the alleged contracts sued on were of date 1872 and 1875, the newspaper article being 27 and 24 years therafter; and the Court is now requested to set out and state said newspaper article and to find that it was introduced in evidence, and to state its terms.

LXXX.

This Court erred in overruling appellant's 71st assignment and proposition thereunder on page 359 of its Brief and in not holding that the trial court erred in refusing peremptory instruction No. 1, for that the evidence did not show that Judge Reagan in the transaction with Grow was representing the citizens of Palestine as distinguished from the citizens of the County, which was a necessary

fact to sustain plaintiffs' action on the alleged contract between Reagan and Grow.

LXXXI.

The Court erred in not finding that Judge Reagan was not shown by the evidence to have been representing the citizens of Palestine as differentiated from the citizens of the County, and the Court is requested to find upon this issue, it being fundamental to this case on the theories of the plaintiffs to determine whether or not there was evidence to show that Judge Reagan was representing the citizens of Palestine as differentiated from the citizens of the County in the contract in which it was alleged he was involved, wherein it was stated that the consideration to the railroad was Judge Reagan making public speeches and inducing the citizens of the County to vote a bond issue, there being no evidence in this case to show that Judge Reagan so bargained his influence and so contracted for compensation for his public speeches to induce the County voters to vote for the bond issue, as alleged in this case; and this Court is now urgently moved to find upon this issue and to find that it was unsupported in the
1069 evidence, this Court not having found thereon.

LXXXII.

This Court erred in overruling appellant's 72nd assignment of error and the proposition thereunder on page 359 of its brief and in not holding that the trial court erred in refusing appellant's special charge No. 2 instructing the jury to leave out of consideration the alleged agreement between Grow and Reagan, since there was no evidence justifying the submission of the question to the jury whether or not Judge Reagan bargained for the location of the shops and offices for the people of Palestine in consideration of his political influence.

LXXXIII.

The Court erred in not specifically finding that there was no element whatsoever shown in the alleged contracts sued on, though alleged in both of them, to-wit: that of 1872 and that of 1875, that Judge Reagan and the citizens of Palestine, and others, as an element of the alleged contracts contracted that Judge Reagan should advocate a County bond issue to the railroad before the voters and should make speeches in consideration thereof, it being essential, upon plaintiffs' theory as to this case, that the Court should specifically find whether or not any such agreement was made, there being no evidence that Judge Reagan agreed for the people of the town that his efforts and public advocation of the bond issue should be a consideration, as alleged in this case, and the Court erred in not passing upon this issue and not finding that there was no evidence to sustain such an issue; and the Court is now respectfully requested to specifically find whether or not there was evidence to sustain any such issue, and specifically to state whether or not this alleged considera-

tion (elsewhere shown to be illegal) was ever stipulated to be rendered and was ever rendered on the terms and conditions as allegd.

LXXXIV.

This Court erred in overruling appellant's 73rd assignment of error on page 360 of its brief and the proposition thereunder on same page and in not holding that the trial court erred in re-
1070 fusing appellant's requested special charge No. 4 complaining of the alleged contract between Hoxie and the citizens of Palestine, including Wright and Ozment, since there was no evidence justifying the submission of that alleged contract.

LXXXV.

The Court erred in not finding that there was no evidence in support of the alleged contract of 1875 between Hoxie, representing the railroad, and the citizens of Palestine, including Wright and Ozment, and the Court is now requested to rule upon this issue and specifically find whether or not there was evidence to sustain the same.

LXXXVI.

This Court erred in overruling appellant's 74th assignment of error and the proposition thereunder on page 360 of its brief, and in not holding that the trial court erred in overruling appellant's objection No. 1 to question No. 1 submitted in the Charge to the jury, since there was no evidence sufficient to support the allegation of a contract between Reagan and Grow, but, at most, only testimony to show negotiations between them preliminary to the formation of a contract between the railroad company and the County, which was afterwards formed and was completely in writing and contained no such stipulations as those upon which plaintiffs rely.

LXXXVII.

This Court erred in overruling appellant's 75th assignment of error and proposition thereunder on page 361 of its brief, and in not holding that the trial court erred in refusing special charge No. 1 requested by appellant in connection with question 1 submitted by the Court to the jury, whereby the defendant sought to have submitted to the jury the question whether the conversations and transactions between Reagan and Grow were mere negotiations rather than a contract.

LXXXVIII.

This Court erred in overruling appellant's 76th assignment of error and the proposition thereunder on page 362 of its brief and in not holding that the trial court erred in refusing appellant's special
1071 charge No. 4 in connection with question No. 1 instructing that the burden of proof was upon the plaintiffs.

LXXXIX.

This Court erred in overruling appellant's 77th assignment of error and the proposition thereunder on page 362 of its brief and in not holding that the trial court erred in refusing to submit to the jury special issues No. 2 in connection with question No. 1 submitted by the Court, whereby it was sought to have the jury determine whether Judge Reagan was acting for Anderson County as a whole or as special representative of the citizens of Palestine in the transactions alleged as occurring in 1872.

XC.

This Court erred in overruling appellant's 78th assignment of error and the proposition thereunder on page 363 of its brief and in not holding that the trial court erred in refusing to submit to the jury question No. 6 requested by defendant, whereby it was sought to have the jury say whether or not Wright, Ozment and others bound themselves to rent the houses referred to to officers and employees of the I. & G. N. R. R. Co. and for how long.

XCI.

This Court erred in overruling appellant's 79th assignment of error on page 364 and the proposition thereunder on page 365 and in not holding that the trial court erred in not giving without qualication special charge 3 requested by defendant concerning the alleged contract between Anderson County and the Houston & Great Northern Railway Company.

XCII.

The Court erred in overruling and not sustaining proposition under 79th assignment of error on page 365 of appellant's brief, which is as follows:

"The law requiring the contract with the County to be in writing, and to be ascertained and settled by the order of the County Court and the election proceedings, the writings were conclusive, and could not be changed by election representations, or representations after the election."

1072 XCIII.

This Court erred in overruling appellant's 80th assignment of error on page 365 of its brief and in not holding that the verdict of the jury was without evidence to support it, in that the evidence failed to show that in the transactions between Reagan and Grow the former was acting for the citizens of Palestine, but, on the contrary, showed affirmatively that he was acting for the citizens of Anderson County at large, if there were any such transactions.

XCIV.

This Court erred in overruling appellant's 81st assignment of error on pages 365-6 of appellant's brief and in not holding that the verdict of the jury is without evidence to support it, and is against the weight and preponderance and all of the evidence so manifest as to show prejudice or bias, in that it was not shown that the transaction concerning the offices, shops and round houses was more than mere negotiations, but, on the contrary, it was shown that there was nothing more than negotiations and discussions concerning them.

XCV.

This Court erred in overruling appellant's 82nd assignment of error and in not holding that the verdict of the jury is without evidence to support it and is so manifestly against the great weight and preponderance and all the evidence as to show prejudice or bias, in that it was not shown that Judge Reagan agreed to make the canvass of Anderson County the consideration of an agreement by the railroad with the citizens of Palestine, but the contrary was shown.

XCVI.

This Court erred in overruling appellant's 83rd assignment of error on page 366 of its brief and in not holding that the verdict of the jury is without support in the evidence and is so manifestly against the great weight and preponderance and all of the evidence as to show prejudice or bias, in that the evidence did not show that Hoxie contracted and agreed with the citizens of Palestine, including Wright and Ozment, to perform a previous contract alleged to have
1073 been made between Grow and Reagan and County, but it was shown that he did not so contract.

XCVII.

This Court erred in overruling appellant's 84th assignment of error on page 367 of its brief, and in not holding that the verdict of the jury is without support of the evidence and is so manifestly against the great weight and preponderance of the evidence as to show prejudice or bias, in that the evidence does not show that Hoxie contracted and agreed with the citizens of Palestine, as submitted in question No. 4, since the only testimony was as to the dealing of a private corporation organized for profit for the purpose of owning and renting real estate and houses, which only represented itself and not the citizens of Palestine in the conversation with Hoxie, if any.

XCVIII.

This Court erred in overruling appellant's 85th assignment of error on page 367 of its brief and in not holding that the trial court erred in its judgment in failing to define and restrict the injunction

and command to the shops and roundhouses at Palestine and refusing and failing to state that the judgment did not apply to other shops and roundhouses not at Palestine, or require them to be closed or go out of operation, there being no ground in the pleading or evidence for the judgment so stated.

XCIX.

This Court erred in overruling appellant's 86th assignment of error on pages 368-9 of its brief and in not holding that the trial court should have granted a new trial because the contract with Anderson County, the only contract shown by the evidence, was evidenced by judgment of the County Court specifying the purposes and consideration for which the bond issue was made which were the railway company's agreement to build its railway from the boundaries of the County into Palestine and to establish and maintain a depot within a half mile of the court house at Palestine; and because the consideration for which said bonds were issued, being so evidenced by said judgments and orders of the County Court,
1074 and being required to be submitted to a vote of the people, and being so submitted, the contract between the railroad company and the County of Anderson could be neither added to nor subtracted from by any other evidence either oral or written, and could be nowise modified from the contract as contained in the orders of the Court and other documents which were the record of the bond issue, and further defendant excepts to said judgment because there is no foundation either in the issues found by the jury or in the facts for the recovery by Anderson County included in the judgment. (Section unnumbered, Motion for New Trial, being the last Section thereof, R. 618.)

C.

The Court erred in overruling appellant's 87th assignment of error, on page 374 of appellant's brief, and in not holding that the venue of this case was in Harris County and not in Anderson County, the domicile of the defendant being in Harris County.

CI.

The Court erred in its statement on page 1 of the Opinion in stating that the suit was brought by the County and City and certain citizens suing for themselves and in behalf of all like interested and situated members of the public in the City of Palestine, whereas the suit was brought by the City and County and nine citizens of Palestine "in behalf of themselves and all other citizens of said City of Palestine styled herein plaintiffs." (R. page 47.)

CII.

The Court erred on page 2 of its Opinion in finding that the verdict was supported in the evidence on the grounds as set out above,

and because there was no support in the evidence, as stated by the Court, that the alleged agreement was shown to be "for and in consideration of an agreement by John H. Reagan to make a thorough canvass of Anderson County to induce the electors of that County to authorize the issuance of interest bearing bonds of the County in the principal sum of $150,000.00, etc.", because the evidence did not show that any such agreement was made.

1075

CIII.

The Court erred on the 2nd and 3rd pages of the Opinion in finding that there was evidence to support the finding that the Houston & Great Northern Railroad Company and the International & Great Northern Railroad Company in point of fact authorized and ratified the action of Galusha A. Grow in making the alleged contract and agreement, because the evidence did not so show, there being no evidence that the Board of Directors of said road had so authorized or so ratified.

CIV.

The Court erred on the 3rd page of the Opinion in finding that the agreement thereon set out as made in 1875 was ever made, such agreement not being shown in the evidence.

CV.

The Court erred on the 3rd page of its Opinion in finding that there was evidence to support the verdict and the finding that the International & Great Northern Railroad Company ratified the alleged contract of 1875 and authorized the same, there being no evidence that the Board of Directors ever either authorized or ratified it.

CVI.

The Court erred in its Opinion in nowhere stating the undisputed facts fully proved that the general offices of the International & Great Northern Railroad Company, with the exception of the Assistant Secretary and Superintendent and Claim Agent, were moved away from Palestine to St. Louis, Mo., in 1881, with all of the general office employees, and remained in St. Louis until in 1888, and in failing and refusing to note these undisputed facts.

CVII.

The Court erred on page 5 of its Opinion in referring to the large record as containing the documents constituting a part of the case and in making such documents a part of its Opini-n by reference to such printed record, the Opinion and the appellant's defenses being incomprehensible without such documents; and the Court is now moved to correctly state all such relevant documents and

1076 make findings thereof.

CVIII.

The Court erred on pages 6 and 7 of its Opinion in finding that the appellant, when incorporated in 1911, did not have a right to select the domicile and place of business of its road, in accordance with the Statute providing that it should name the place when incorporated, and as provided by law.

CIX.

The Court erred on page 8 of its Opinion and elsewhere in the Opinion in maintaining that under the laws under which the Charter of appellant was taken out it could not name the place for its general offices and principal place of business, and that the Statute commonly known as the "Office-Shops Statute" applied to it, although it never entered into any contract therein referred to.

CX.

The Court erred on page 11 of its Opinion in holding that the effect of the consolidation of the Houston & Great Northern and the International Railroads into the International & Great Northern Railroad was to make the consolidation of their Charters effective, so as to make the consolidated companies in effect operated under a Charter which would read "that the principal office should be situated at Houston, Texas, or at such town on the line of said railway as may be deemed most convenient for the transaction of its business, and may be moved from time to time to such place on such line as the progress or work of construction may render expedient and necessary," because the consolidation was made under the obligations of the Charter of the two roads, the Charter of the International—prescribing no place, except on the line of its road—, and the Charter of the Houston & Great Northern—prescribing Houston, Texas,—whereby the Office-Shops Act of 1889, by its terms, would not be applicable as to the general offices.

CXI.

The Court erred on pages 11 and 12 of its opinion in holding that the provision of the "General Offices and Shops" Act that the general offices should be kept at the place named in the Charter,
1077 if any place was named, would not be applicable, as to restriction in the event that the offices were contracted to be located at some other place in consideration of County aid by bond issue: (*a*) Because this holding is directly in the teeth of the Statute. (*b*) Because the consideration herein alleged was not exclusively a bond issue, but also Judge Reagan's alleged political efforts and speeches in inducing the people of the County to vote a bond issue; whereby the whole agreement was illegal as alleged, because of the illegal element or consideration of inducing voters to enter into any contract.

CXII.

The Court erred on pages 12, etc. of its Opinion in refusing to follow the K. C. M. & O. vs. Sweetwater, 104 Tex. 329 case and Logue vs. Railway Company, cited by the Supreme Court, and in refusing to establish that there was no authorization or ratification of the alleged contracts sued on made by the Directors of the railroad company, and in supposing that the recitals in this Opinion in this case showed such authorization or ratification.

CXIII.

The Court erred on page 14 of the Opinion in finding that Grow entered into the contract with the citizens of Palestine whereby in return for Judge Reagan's obligation to canvass Anderson County for a bond issue of $150,000.00, the Houston & Great Northern Railroad Company became obligated to connect its railroad with the Internation of Palestine, and as a part of said railroad to put said railroad's machine shops and roundhouses and general offices at Palestine (*a*) Because no contract could exist or be a contract upon consideration involving in whole or part an obligation to canvass Anderson County to induce a bond issue, the law prohibiting any contract be formed upon such obligation. (*b*) Because the evidence did not show that the citizens of Palestine, as here stated, contracted with Grow for the benefit of themselves upon the bases of Judge Reagan's services to canvass Anderson County to induce a bond issue, such matter not being shown in the evidence; but the direct testimony of all the witnesses in this case shows that no such agreement was entered into, Mrs. Reagan, the relict of Judge Reagan,
1078 testifying and not testifying that Judge Reagan agreed to barter his influence and services for a consideration for the benefit of Palestine, and Jacobs testifying for the plaintiffs that Grow put the consideration upon the County bonds, and no witness in this case testifying that the people of Palestine had bartered Judge Reagan's influence for their own benefit.

CXIV.

The Court erred on page 15 of Opinion in stating that Grow made a public speech in 1872 publishing the locative contract made by the Houston & Great Northern Railroad with the citizens of Palestine, and as stated by the Court: (*a*) Because no evidence of such stump speeches is admissible to extend or qualify or make a contract in conflict with the writings, especially after such a lapse of time. (*b*) Because the evidence did not show that Grow made any such statement as attributed to him by the Court or in the testimony. (*c*) Because any such statement was in conflict with the express writings. (*d*) Because canvassing statements and political promises can not be introduced in evidence to determine the terms and extent of a contract voted on by the people. (*e*) For the other reasons hereinbefore assigned.

CXV.

The Court erred on page 15 of the Opinion, and elsewhere, in not setting out what were the terms of the written contract and propositions submitted to the vote of the people, exclusive of the matters herein sought by this litigation, and ascertained to have been adopted by the appellee County and to have been performed by the railroad, as appears from the records of the County Court of Anderson County, then in 1872 the executive body of that County, with the judicial power to ascertain and settle these matters; and the Court is now respectfully and insistently urged to embody these documents, or a complete statement thereof, in its Opinion, and to find them, and not to construe them in its Opinion without stating what they were.

1079

CXVI.

The Court erred on page 15 of the Opinion in finding upon mere parol testimony and against the contract and written record of the County Court of Anderson County that when Grow went to get the bonds of the County in 1873 he stated in open Court that the contract for the location at Palestine of the shops and offices were common knowledge: (*a*) Because such statement is not supported, as having been made, in the testimony. (*b*) Because the judgment of the County Court declared that the railroad had performed their obligation as to the shops, Shadduck having made the same contention as now made and it was overruled by the Court. (*c*) Because it was error in the trial court to receive any such testimony, and in this Court to affirm the same, in conflict with the writings and declarations and judgment and records of the County Court of Anderson County. And the Court is now requested to set out and state the judgment and record of 1872-3 of the County Court of Anderson County, all of which is in direct collision with the finding of the Court and with the force thereof.

CXVII.

The Court erred on page 16 of its Opinion in refusing and failing to set out and in not stating the material and absolute and uncontradicted evidence showing that there had been no authorization or ratification by the Board of Directors of the railroads of the alleged contracts sued on; and the Court is now requested to set out such evidence, among which are the following material matters: (*a*) The interior correspondence of principal executive officers and members of the Board of Directors of the Houston & Great Northern, the International and the International & Great Northern Railroads before and after the dates of the alleged contracts sued on, showing positively and uncontradictorily no knowledge whatever of the acceptance of such alleged contracts. (*b*) The positive testimony of the only two surviving members of the Board of Directors, Evans and Smith, who were members of the Board at the time the International & Great Northern general offices were moved to

Palestine in 1875, and the Secretaries and officers thereof.
1080 (*c*) The written contract entered into with the County in 1872 and voted on by the people, and the judgment and the proceedings of the County Court of Anderson County thereon. And it is now respectfully suggested to the Court that these documents are undisputed, and should be set out, together with all of the other documents and testimony on this point in the case.

CXVIII.

The Court erred on pages 16 and 17 of the Opinion and in finding that there were any By-laws which might authorize the officers of the company to make the alleged contracts: (*a*) Because there were no such By-laws. (*b*) Because such contracts could only be ratified or authorized by the Board of Directors.

CXIX.

The Court erred on page 17 of the Opinion in supposing that a resolution to authorize the President of the railroad to proceed with the work of extending the road and securing donations of County bonds had been passed, authorized the President of the road to bind the company to locate its shops and offices at some place forever, provided it was done in promotion of the securing of a bond issue.

CXX.

The Court erred on page 18 of the Opinion in discussing the contract voted upon by the people of Palestine without setting out what that contract was, it being in writing and signed by Judge Reagan, and accepted by the railroad, and afterwards, in 1873, before the shops or offices were moved to Palestine, declared by the County Court to have been completely performed by the railroad in a judgment for the issue of the bonds, which could only be issued when the work was ascertained to be performed.

CXXI.

The Court erred on page 18 of the Opinion in holding that the written contract upon which the bond issue was predicated could be explained, modified, added to or changed by parol testimony and testimony as to stump speeches and alleged canvassing promises, and in holding on page 19 of the Opinion that the terms of the contract were not required by the Statute to be in writing, and
1081 that the performance of the people in voting for the bond issue and the promises made to them to vote for the bond issue might, after a lapse of forty-two years, be proved by testimony of stump speeches, parol agreements and side statements.

CXXII.

The Court erred on page 19 of the Opinion in ruling that an alleged parol agreement between Judge Reagan, for the citizens of

Palestine, and Grow, for the railroad, could be shown as a part of the written contract of the County or an addition thereto upon which the people voted.

CXXIII.

The Court erred in its assumption and conclusion on page 20 of the opinion that the foreclosure sale of 1879 was not bona fide, and in assuming that any such issue or fact was found by the Court or Jury, there being no evidence whatever that that sale was not bona fide.

CXXIV.

The Court erred on page 20 of its Opinion in ruling, in direct collision with the ruling of the Supreme Court in this case, that the plaintiffs' alleged rights did not rest upon or involve any "burden, lien, claim or right" on the property or any property of the appellant.

CXXV.

The Court erred in holding that the Act of 1889, known as the Office-Shops Act, relied upon by the appellees, and its application to the facts in this case, was within the police power of the Legislature.

CXXVI.

The Court erred on page 23 of the Opinion in holding that there was any evidence that the stockholders or owners of the International & Great Northern Railroad acquiesced in and consented to the alleged contracts sued on in this case by the mere act of having the principal offices at Palestine, since they had a right to go to Palestine under the laws when they moved to Palestine by resolution of the Board of Directors, and the exercise of such right is no
1082 evidence of their knowledge or acquiescence in or adoption of the alleged contracts now sued on.

CXXVII.

The Court erred in stating that "we have carefully considered all the assignments made in the brief and concluded that they should be overruled:" (*a*) Because this Court has overruled numerous assignments and propositions advanced in the brief and unmentioned by the Court in the Opinion. (*b*) Because the Statute of the State requires this Court to announce in writing their decision of all issues presented to them by proper assignments, whether, of fact or law. (R. S. 1639-1636.) The Court is, therefore, respectfully requested to make its Conclusions of Fact and Law on all assignments.

Wherefore, this Court is requested, as above, to declare that the

Decree and Opinion herein entered by it is null and of no effect on account of the disqualification of Judges, as pointed out above, and to certify such disqualification; and, subject to the refusal of this Court to so declare and set aside said Opinion, and excepting to the refusal of the Court to so declare and set aside said Opinion and excepting to the refusal of the Court to so declare and set aside said Opinion on the ground of disqualification of Judges, this Court is respectfully moved to grant a re-hearing in this case and set aside the judgment herein rendered.

The Attorneys for the appellees in this case are:

Mr. A. G. Greenwood.

Campbell, Sewell & Strickland and Greenwood, of Palestine, Anderson County, Texas.

John C. Bos and Ira Watkind, of Jacksonville, Cherokee County, Texas.

Perkins & Perkins and John B. Guinn, of Ruske, Cherokee County, Texas.

Very respectfully,

INTERNATIONAL & GREAT NORTHERN RY. CO., *Appellant,*

By F. A. WILLIAMS AND
N. A. STEDMAN,
MORRIS & SIMS,
ANDREWS, BALL & STREETMAN,
WILSON, DABNEY & KING,
Its Attorneys.

1083 Endorsed:

Writ App. No. 9285.

1679.

In the Court of Civil Appeals of the State of Texas for the Sixth Supreme Judicial District.

No. 1351.

INTERNATIONAL & GREAT NORTHERN RAILWAY CO., Appellant,
vs.
ANDERSON COUNTY et al., Appellees.

Appellant's Suggestion and Motion to the Court of the Disqualification of Members of this Court, and, Subject to the Same, its Motion for Rehearing.

Filed Jan. 22, 1915, E. T. Rosborough, Clerk Court of Civil Appeals, Sixth Supreme Judicial Dist. of Texas.

Filed In Supreme Court Mar. 15, 1915, F. T. Connerly, Clerk.

1084 STATE OF TEXAS,
County of Bowie:

I, E. T. Rosborough, Clerk of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, do hereby certify that the above and foregoing 49 pages are a true and correct copy of Appellant's original suggestion and Motion to the Court of the Disqualification of Members of this Court and, subject to the same, its motion for rehearing, filed in my office on the 22nd day of January, 1915, in the case of International & Great Northern Railway Company, Appellant vs. Anderson County et al, Appellees, No. 1351.

In testimony whereof I hereunto set my hand and seal of office at Texarkana, Texas, this the 26th of July, 1916.

[Seal Court of Civil Appeals of the State of Texas.]

E. T. ROSBOROUGH,
Clerk of Said Court.

1085 No. 1351.

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY, Appellant,
vs.
ANDERSON COUNTY et al., Appellees.

Appeal from the District Court of Cherokee County.

Appellant prior to its motion for rehearing has filed a motion suggesting the disqualification of two members of this court and asking to have the judgment and opinion of this court vacated by reason of the suggested disqualification. It is suggested that the two members are related within the thrird degree to certain resident citizens and property owners of the City of Palestine. It is agreed as a fact by counsel that W. M. David and his wife are now and have been for about seven years resident citizens of the City of Palestine, owning a limited amount of personalty, and that W. M. David is a first cousin of Chief Justice Willson. It is agreed as a fact by counsel that A. G. Greenwood, T. B. Greenwood and Miss Mattie Greenwood are now and have been for more than ten years resid-nt citizens of the City of Palestine, owning a considerable amount of taxable personal and real property, and that they are related by consanguinity within the third degree to Associate Justice Hodges. There are two further exhibits attached to the motion pertaining to the occupation and financial worth of the relatives. This court accepts the agreement and exhibits as the facts, and further admits as a fact the relationship stated. These citizens of Palestine were not among the nine named citizens by whom the suit was brought, nor are they in point of fact parties to the record or the suit. The suit was brought by Anderson County, the City of Palestine, George A. Wright and eight other "citizens of the City of Palestine, Texas, who sue herein in behalf of themselves and of all other Citizens of said City of Palestine." The suit had for its purpose to compel the defendant as a duty owing

the public under the law, to keep and maintain its general offices, machine shops and roundhouses in the City of Palestine, and to desist and refrain from keeping and maintaining any other general offices in connection with the operation of the railroad than at Palestine, Texas. The appellees petition and the decree of the trial court are made a part of this statement and can be referred to.

(After Stating the Facts.)

The pertinent provision of the Constitution reads: "No judge shall sit in any case where he may be interested or where either of the parties may be connected with him, either by affinity or consanguinity, within such degree as may be prescribed by law, or when he shall have been counsel in the case." Art. 5, sec. 11. The disqualifying relationship is fixed by law to the third degree. Art. 1584 R. S. The constitutional provision very clearly expresses
1086 that such relative must be one of the parties to the cause to render the judge incompetent. And the rule laid down as a test of when a person is a party to the suit, within the meaning and spirit of this provision of disqualification to the judge, comprehends a person named in the pleading or a person so directly affected by the judgment in the particular case as in legal effect to be a party to the suit. This is the rule applied by the Supreme Court in the cases discussed. In Hudde v. Susan, 58 Tex. 392, a surety on a claimant's bond was held to be a party to the statutory proceeding to try the right of property, upon the ground that in legal effect the surety on the bond was an active party to the suit. "The sureties," it was observed, "have a right to protect their interests by interposing a defense to the suit, taking such control over its proceedings as will prevent loss to them by neglect or inattention, and finally of appealing to a higher court, if in their opinion an erroneous judgment has subjected them to loss or damage. Here then we have all the characteristics of a party to a suit combined in such surety." In Burch v. Watts, 37 Tex. 135, a surety on an attachment bond was in legal effect such a party to the record as entitled him to move to quash it. In Weir v. Brooks, 17 Tex. 638, a surety on the bond of a defendant in a distress warrant suit was in legal effect such a party to the suit as allowed him to take a writ of error to the Supreme Court. In Schultze v. McLeary, 73 Tex. 92, 11 S. W. 924, Orynski was a party defendant to the record, and his wife and the wife of the regular judge were sisters. The court held the judge disqualified upon the ground that the wife of Orynski was in legal effect an active party defendant to the suit and directly affected by the judgment. To the same effect is Jordan v. Moore, 65 Tex. 363. The court in Simpson v. Brotherton, 62 Tex. 170, clearly explains the legal reason for the holding, as in these two cases above, that the wife is in legal effect a party to the suit. It is stated, "our courts treat the relationship of husband and wife towards the community property as that of a partnership. The business of the firm is transacted in the name of the husband, and he prosecutes and defends its suits with the same effect as if his partner were named in the case. Judgments in such

suits bind both partners, or inure to their joint benefit if in their favor. In fact the wife is as much a party as if the record recited that the husband instituted or defended the suit for the use and benefit of himself and wife." In Jordan v. Moore, supra, it was stated, "his wife was not nominally a party to the action, but she was so in legal effect." All these cases apply and follow the
1087 definition of a party to an action as given in 1 Greenleaf on Evidence, sec. 535. In the case of Winston v. Marston, 87 Tex. 200, 27 S. W. 768, the Supreme Court again construed the word "parties," as used, as extending only to parties to the suit, named in the record or so in legal effect, and not including other persons "no account of some interest in the litigation." This decision is in harmony with the other cases and the general rule laid down by Greenleaf. If the word "parties" may extend to those named in the record or so in legal effect, the converse of the rule is that other persons are not parties merely "no account of some interest the litigation." In other words, it is meant to say, as applied to the facts of that case, that "parties," as used, extends to the actual parties to the cause, named in the record or so in legal effect, but not to those who in the law of estoppel become privies to another and merely are affected by the judgment as regards the subject adjudicated. In the case of Duncan v. Herder, 122 S. W. 904, the daughter-in-law of the judge was the daughter of a defendant who was made a party to the record in her capacity as survivor of her deceased husband and administrator of community estate of herself and her deceased husband. The suit was to cancel a judgment in favor of such survivor and administrator for debt and foreclosure of a lien on real estate. The court held that the daughter-in-law, "Mrs. Moore, was a party to the suit within the meaning of that term as used in the constitution," and that the judge was disqualified. Clearly in the facts of that case, Mrs. Moore had a joint interest in the land and was actually represented in the suit by the administrator or legal trustee. The daughter-in-law, through the representation of the administrator or legal trustee, was directly affected by the judgment in regard to her property, and she and the administrator had in a sense a legal identity concerning the same community land in suit. The ruling in the facts of the case can not reasonably be disapproved. It is not thought that this ruling overturns the rule applied in the Marston case, supra, or conflicts with the rule applied in the other cases, when the facts are considered. And it is not thought that this case can be said to have construed the provision of law in hand as extending generally to all persons who may, in the law of estoppel, become privy to another and become affected by the judgment. In the instant proceedings the relatives of the judges are not named in the record, and in the facts would not be parties in legal effect unless the allegations of the named citizens in the petition who "sue in behalf of themselves and of all other citizens of said City of Palestine" make
1088 the unnamed persons parties to the suit within the meaning of the constitutional provision. In the case of Cemetery v. Drew, 36 S. W. 802, the court stated, "A petition or bill filed in the interest of a party and all persons similarly situated does not make

the persons similarly situated parties to the suit." When the question is one of common or general interest it is a rule of equity procedure, in the interest of convenience, that one or more persons might sue for all having a possible interest. The unnamed persons, though, are merely inchoate, and not active parties to the suit. Until the inchoate parties come into the record they have no control of the action, can not appeal, and are not personally liable for costs, and therefore have none of the characteristics of a party to a suit. The judge may ascertain from the pleadings in the cause who are the parties to it or in legal effect active parties to it, but he may not know what unnamed and merely inchoate parties may be interested or possibly interested, or whether any such class of persons be related to him. And yet the validity of the judge's action must depend upon such a question if unnamed and merely inchoate parties are to be deemed parties to the suit within the letter and spirit of the constitutional article. It is thought that unless the unnamed parties come into the record, which they did not here, the allegations "in behalf of all other citizens" could be disregarded. The rule applied in Winston v. Marston is sound in interpretation and is applicable to the instant suit. The application of a different interpretation to the character of suit here would, it is believed, extend the disqualifying provision beyond its letter and spirit so as to cast uncertainty upon all rights acquired under judicial proceedings and make it almost impossible to carry on the administration of justice. In Hovey v. Shepherd, 105 Tex. 237, 147 S. W. 224, the suit reviewed directly interfered with the execution of a final judgment in another suit, and the parties were prohibited from so doing upon the ground that the matters adjudicated in the original suit were purely in the interest of the public, and the unnamed persons or class were bound by such adjudication. The court stated, "if the intervenors could litigate the issue, then, if defeated, any other citizen of the city could secure an injunction with as much justice and right as the injunction now threatened could be issued, and this might be followed up by each citizen, for intervenors had no right superior to any other." And this decision is clearly in line with principle and precedent. It is firmly predicated upon the principle that in the subject-matter litigated affecting the interest of the public alike the judgment thereon declared the rights and liabilities of
1089 the railway company to the various members of the public interested, and the members of the public were concluded thereby, though not parties to the record. In the law of estoppel they were privies as regards the subject-matter litigated. The distinction between being a party to a suit, named in the record or so in legal effect as directly affected by the judgment, and not a nominal party though being bound by the judgment, is of marked and material importance in a case of this character and purpose. A suit of this character and purpose is treated as one of general interest to the various members of the public interested, involving the same questions of law and fact; and as a means of convenient judicial test of this general interest it is permitted to some, but not

required of all the public similarly interested, to join as plaintiffs. The judgment declares the rights and liabilities of the defendant in respect to that general interest of the public in the matter litigated, and the defendant is entitled to have the judgment enforced finally and without interruption against the public interested. It is just to preclude or estop the unnamed public from interference with the final enforcement of the judgment in the cause instituted for the benefit of the public interested. They are in a sense privies, so that whatever binds one in relation to the subject of their general interest binds the others also. The ground of privity is not personal relation to the suit, but mutual relationship as regards the subject litigated, operating as estoppel. It is not doubted that a person, though not named as a party to the suit, may in a particular case by estoppel be concluded in his claim to property by a final judgment. The same reason and principle concluding a person by a judgment because of privity does not obtain to persuade the holding that unnamed or inchoate parties merely to a suit who have not come into the record as active parties would be such parties to the suit as to disqualify a judge from acting in the cause in a case of the instant character. It is thought that it is not enough in the instant suit to render a judge incompetent under terms of the law that he is related to some unnamed or inchoate party merely who may be affected by the judgment. As before said, a different construction would extend the provision of law beyond its letter and spirit so as to cast uncertainty upon all rights acquired under judicial proceedings. The question is approached with some delicacy by the court, but here determined as we believe the law requires. It is decided that the two judges referred to are not legally disqualified.

LEVY,
Associate Justice.

Filed Feb. 11, 1915.

1090 Endorsed: Writ App. No. 9285. No. 1351. I. & G. N. Railway Co., v. Anderson County et al. Opinion of the Court on Disqualification. Filed Feb. 11, 1915. E. T. Rosborough, Clerk Court of Civil Appeals, Sixth Supreme Judicial — of Texas. Recorded in Opinion Record No. 5 Page No. 948. E. T. Rosborough, Clerk. By —— ——, Deputy. Filed in Supreme Court, Mar. 15, 1915, F. T. Connerly, Clerk.

1091 STATE OF TEXAS,
County of Bowie:

I, E. T. Rosborough, Clerk of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, at Texarkana, Texas, do hereby certify that the above and foregoing 5 pages is a true and correct copy of the original opinion of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, filed in my office on the 11th day of February, 1915, in the case of International &

Great Northern Railway Company, Appellant vs. Anderson County et al, Appellees, No. 1351.

In testimony whereof I hereunto set my hand and seal of office at Texarkana, Texas, this the 26 day of July, 1916.

[Seal Court of Civil Appeals of the State of Texas.]

E. T. ROSBOROUGH,
Clerk of said Court.

1092 Be it remembered that on Thursday, the 11th day of February 1915, the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, met in the City of Texarkana, Texas. Present: Samuel P. Willson Chief Justice, Richard B. Levy Associate Justice, Wm. Hodges Associate Justice, and E. T. Rosborough Clerk. No. 1679-1351. International & Great Northern Ry. Co., Appellant, v. Anderson County et al., Appellees. Appealed from District Court of Cherokee County.

This cause came on to be heard on the transcript of the record and appellant's motion for rehearing and the Court having inspected said record and duly considered said motion is of the opinion that the said motion should be and the same is hereby denied.

THE STATE OF TEXAS,
County of Bowie:

I, E. T. Rosborough, Clerk of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, do hereby certify that the above is a true and correct copy of the judgment rendered by said Court on motion for rehearing in the above styled and numbered cause as the same appears of record in the minutes of said Court in Minute Book 2 Page 237.

In testimony whereof, I hereunto set my hand and seal of said Court at Texarkana, Texas, this, the 26th day of July, 1916.

[Seal Court of Civil Appeals of the State of Texas.]

E. T. ROSBOROUGH,
Clerk of said Court.

1093 In the Supreme Court of Texas, From Cherokee County, Sixth District.

I. & G. N. RY. CO.
vs.
ANDERSON COUNTY.

April 5th, 1916.

This day came on to be heard the application of I. & G. N. R. R. Co. for a writ of error to the Court of Civil Appeals for the Sixth District and the same having been duly considered, it — ordered that said application be refused. That the applicant I. & G. N. R. R. Co.

and its sureties, J. E. McAshan and B. D. Harris pay all costs incurred on this application.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by the Supreme Court on the application for writ of error in the above styled cause.

Witness my hand and the seal of said Court, this the 26th day of June, A. D. 1916.

[L. S.]

F. T. CONNERLY, *Clerk.*
By H. L. CLAMP, *Deputy.*

Motion for rehearing overruled June 24th, 1916.

STATE OF TEXAS,
County of Bowie:

I, E. T. Rosborough, Clerk of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, hereby certify that the above is a true and correct copy of a certified copy of a judgment of the Supreme Court of Texas filed in my office on the 29th day of June, 1916, in the case of International & Great Northern Railroad Company, Appellant vs. Anderson County et al, Appellees, No. 1351.

In testimony whereof I hereunto set my hand and seal of office at Texarkana, Texas, this the 26th day of July, 1916.

[Seal Court of Civil Appeals of the State of Texas.]

E. T. ROSBOROUGH,
Clerk of said Court.

[Endorsed:] 1351. Application No. 9285. I. & G. N. R. R. Co. vs. Anderson County. Copy of Judgment in Supreme Court. Application for Writ of Error. Filed June 29th, 1916. E. T. Rosborough, Clerk Court of Civil Appeals for Sixth Supreme Judicial District of Texas.

1094 Court of Civil Appeals, at Texarkana, Clerk's Office.

No. 1351.

INTERNATIONAL & GREAT NORTHERN RY. Co., Appellant,
vs.
ANDERSON COUNTY et al., Appellees.

Certified Copy.

Bill of Costs in the Court of Civil Appeals, Sixth District.

Filing Record	.50
Docketing Cause	.50
Appearances	1.00
Filing Briefs	.80
Filing and Entering Motion	1.40
Orders	5.00
Certiorari	.....
Scire Facias	.....
Filing Extra Papers	9.70
Copy of Judgment, etc	.....
Oath	.....
Continuance	.....
Judgment	$1.00
Taxing Cost and Copy	.50
Certificate with Seals	.....
Mandate	$1.50
Recording Opinion (2)	24.85
Certified Copy of Opinion	.....
Certified Copy of Bill of Cost	$1.00
Execution for Cost and Return	.....
Alias Execution and Return	.....
Pluries Execution and Return	.....
Notices	49.50
Certified Copy of Motion	72.00
Precepts	11.00
Cost of Transcript to Supreme Court	5.50
Express Charges to and from Supreme Court	1.70
Total	$187.45

Cost of Transcript	.....
Cost of Stenographer's Report	.....
Sheriff's Fees	14.35
Clerk's Fees, Sixth District	187.45

Clerk's Fees, — District	.....
Costs in Supreme Court	10.00
	$211.80
By Deposit on Express	1.00
	$210.80
Cost of Transcript, Statement of Facts, two certified copies of opinions, three orders and motion for rehearing to the Supreme Court of the United States	$483.60
Total	$694.40

I, E. T. Rosborough, Clerk of the Court of Civil Appeals, Sixth Supreme Judicial District of Texas, at Texarkana, Texas, do hereby certify that the above is a true and correct copy of the Original Bill of Cost.

Witness my hand and seal of said Court, at Texarkana, Texas, this 2nd day of August 1916.

[Seal Court of Civil Appeals of the State of Texas.]

E. T. ROSBOROUGH, *Clerk,*
—— ——, *Deputy Clerk.*

THE STATE OF TEXAS,
County of Bowie:

I, E. T. Rosborough, Clerk of the Court of Civil Appeals for the Sixth Supreme Judicial District of the State of Texas, do hereby certify that the foregoin- pages 1 to 92 inclusive contain a true, complete and correct copy of all the proceedings in this Court on the appeal of the International & Great Northern Railway Company vs. Anderson County et al., No. 1351 on the Docket of this Court.

Witness my hand and seal of said Court this the 2nd day of August A. D. 1916.

[Seal Court of Civil Appeals of the State of Texas.]

E. T. ROSBOROUGH,
Clerk Court Civil Appeals for the Sixth Supreme Judicial District of the State of Texas.

[Endorsed:] No. 1351. Certified Copy Bill of Costs in the Court of Civil Appeals, Texarkana, Texas. International & Great Northern Ry. Co., Appellant, vs. Anderson County et al., Appellees. Issued 2nd day of August 1916. E. T. Rosborough, Clerk, by —— ——, Deputy. Dear Sir: Please have your client remit and save cost of execution. —— ——, Clerk.

An argument, separately printed, will be filed, and which, we request, be read with the application.

It is suggested that with the aid of this argument the application will be readily understood.

No.....

IN THE

SUPREME COURT

OF TEXAS

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY,
Plaintiff in Error,

VS.

ANDERSON COUNTY, ET AL.,
Defendants in Error.

In Error to the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas

APPLICATION FOR WRIT OF ERROR

—By—

F. A. WILLIAMS,
N. A. STEDMAN,
ANDREWS, BALL & STREETMAN,
MORRIS & SIMS,
WILSON, BARNEY & KING,
Its Attorneys.

GRAY, DILLARD & YOUNG, HOUSTON, TEXAS

1972

IN THE

SUPREME COURT

OF TEXAS

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY,
Plaintiff in Error,
vs.
ANDERSON COUNTY, ET AL.,
Defendants in Error.

No.....

In Error to the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas

---

APPLICATION FOR WRIT OF ERROR

To the Supreme Court of Texas:

The International & Great Northern Railway Company respectfully makes this application for a writ of error. It was the appellant in cause 1351, upon the docket of the Court of Civil Appeals of the Sixth Supreme Judicial District, having appealed this case from the District Court of Cherokee County, Texas, to which court the venue was changed from that of Anderson County. On January 11, 1915, the Court of Civil Appeals rendered its decree and opinion of affirmance, and thereafter, within due time, the plaintiff in error filed its suggestion of the disqualification of members of that

court and motion that the court certify such disqualification, and subject to the same, its motion for rehearing, both of which were overruled on February 11, 1915, the court writing an opinion upon the suggestion and motion for disqualification of its members, but writing no additional opinion upon the principal case; whereupon the plaintiff in error filed a motion for rehearing upon the opinion then first given as to the disqualification of the judges, which was overruled on February 25th; and now, within thirty days after February 11th, the plaintiff in error files this its application for a writ of error.

The defendants in error are Anderson County, the City of Palestine, a municipality in Anderson County, Texas, Geo. A. Wright, J. W. Ozment, John R. Hearne, Z. L. Robinson, E. W. Link, R. C. Sewell, Jno. M. Colley and P. H. Hughes, citizens of the City of Palestine, Texas, "who sue in behalf of themselves and all citizens of said city"; and their attorneys of record are A. G. Greenwood, Campbell, Sewell & Strickland, Thos. B. Greenwood (of Palestine, Anderson County, Texas), Jno. C. Box, R. O. Watkins (of Jacksonville, Cherokee County, Texas), Perkins & Perkins, and Jno. B. Guinn (of Rusk, Cherokee County, Texas).

BRIEF STATEMENT OF THE CASE.

(R., Record; St., Statement of Facts.)

The defendants in error were the plaintiffs below, and filed this suit in the District Court of Anderson County, Texas, against the plaintiff in error, seeking a restraining injunction to prevent it from moving its shops and roundhouses away from Palestine, and a mandatory injunction to compel it to move its general offices from Houston, Texas, to Palestine.

The suit was filed to the April term 1912. (R., 1.) In the original petition it was stated that Judge Gardner of Palestine was the owner of property in that city and the father-in-law of the representative plaintiff Sewell, and disqualified. (R., 23.) The application was granted by Judge Perkins at Rusk restraining the defendant from moving its shops and directing it within 60 days to move its general offices to Palestine from Houston, Texas. The ~~trial~~ original petition in this case is identical with the petition upon which the trial was held, except that the contention, in the original petition, that the defendant was the sold-out I. & G. N. R. R. Co., fraudulently assuming a new name, but preserving its identity, was abandoned in the new petition, and except that in compliance with the new statute the amended petition was stated in numbered paragraphs. With these exceptions the present litigation is upon the same petition as that heretofore before this court, on a previous writ of error. (R., 46-68.)

A mandatory and restraining injunction being obtained without a hearing, the plaintiff in error here took an interlocutory appeal to the Court of Civil Appeals of the First District, being the court to which appeals from Anderson County lay, and, having had no opportunity to demur or plead, appeared in the Court of Civil Appeals orally protesting against the granting of such writ. The case was there heard and the fiat of Judge Perkins affirmed as to the restraining injunction pending trial, but reversed and set aside as to the mandatory injunction commanding the immediate removal of the general offices from Houston to Palestine. (150 S. W., 239.)

A writ of error was granted by this court. The plain-

tiff in error then ~~and now~~ presented but two points to this court; and only these two points were ruled:

(1) That the venue of the suit was in Harris County, where the defendant had its domicile.

(2) That the right, if any, of the plaintiffs was a personal one, merely against the sold-out International & Great Northern Railroad Company or one of its predecessors, the Houston & Great Northern Railroad, and not against this defendant; and that the right of plaintiffs, if any, was not secured by the statute of 1889, commonly known as the Office-Shops Act, against the property of this defendant, and constituted no burden, lien or servitude upon its property or instrumentalities necessary to the use thereof.

Both of the positions were overruled by this court. (I. & G. N. R'y Co. v. Anderson County et al., 156 S. W., 499.)

The plaintiffs in their original petition, which is inserted in this record (R., 1, etc.), and in their amended petition, identical therewith (R., 46, etc.), presented, as bases of recovery, two alleged contracts:

(1) That in March, 1872, the H. & G. N. R. R. had constructed its road to the north line of Houston County, which is the southeast line of Anderson County, and that then Grow, its duly authorized president, "*Contracted and agreed in Anderson County, Texas, with the citizens of the City of Palestine, Texas, acting by and through Judge Jno. H. Reagan, to extend its said line of railroad from the north boundary line of Houston County to intersect the line of the International Railroad in Palestine, and to establish a depot within one-half mile of the courthouse at Palestine, and to commence running cars regularly thereto by the first day of July, 1873, and*

to thereupon locate and establish and forever thereafter keep and maintain the general offices, machine shops and roundhouses of the H. & G. N. R. R. in the City of Palestine, for and in consideration of the promise and agreement then made, upon the part of the said Judge Jno. H. Reagan, to make a thorough canvass of Anderson County, to induce the electors thereof to authorize, by their votes, the issuance of interest bearing bonds of said county in the principal sum of $150,000.00, and for and upon the further consideration that Anderson County, on authorization of its electors, in the manner prescribed by law, should issue and deliver to the H. & G. N. R. R. Co. its interest bearing bonds in said principal sum of $150,000.00, upon the completion of said railroad to its intersection with the International Railroad at Palestine, and upon the establishment of a depot within one-half mile of the courthouse, and upon the commencement of the running of cars regularly to such depot." (Sec. 9, Trial Petition, R., 49-50, and Original Petition, R., 3-4.) It was then alleged that the above claimed three-party contract formulated as between the Railroad, the citizens of Palestine and Anderson County was submitted to the voters of Anderson County and ratified by them, upon full exposition to them of its terms, and that Judge Reagan rendered the consideration stipulated on behalf of the ctiizens of Palestine, which was to canvass the county *"to induce the county voters to vote the bonds by a thorough canvass of Anderson County."* (Trial Petition, Secs. 10-11 and 14, R., 50-52; Original Petition formerly before this court, R., 45-46.) It was also alleged that Grow, the President of the Railroad, was authorized, and that the H. & G. N. confirmed the alleged contract.

It was nowhere alleged that the asserted agreement was in writing. Upon the trial it was shown *that there was a contract in writing between the County of Anderson and the railroad, still extant, and adopted by the voters in accordance with the statute of April 12, 1871.* (6 Gam., p. 931, and p. 29 of Acts.) The contract recited that the consideration to be rendered by the Railroad was to build into Palestine by a certain date, and to commence to operate a railroad of a certain standard, and to maintain a depot within half a mile of the courthouse in Palestine. Also the record of the County Court of Anderson County was shown and included in decree that these considerations had been complied with, and overruled the contention directly made that a part of the consideration undertaken was to locate the shops and roundhouses at Palestine.

On the trial, therefore, the defendants in error maintained, as they did in the Court of Civil Appeals, that *they were not limited to such written contract, but that they could base a recovery in this case upon Judge Reagain's influence and political services, and in making public speeches to "induce" the voters to vote the bond issue.* On the previous writ of error, this court stated that there was a three-party contract alleged between the citizens of Palestine, acting through Judge Reagan, and Anderson County and the H. & G. N. R. R., *"in consideration of the issuance and delivery to it by Anderson County of its interest-bearing bonds in the sum of $150,000.00."* (156 S. W., 499, Sec. 2.) *On the trial, the alleged consideration of Judge Reagan's making speeches inducing the voters to vote the bond issue was the basis of the submission of this alleged contract to the jury, and a great deal of evidence was introduced to*

show the contents of speeches, that he made an agreement to make the speeches and that he did make the speeches. The defendant objected to the admission of all of this testimony as varying the contract, and made the contention that it was contrary to public policy to found a consideration upon "inducing" the voters to vote a contract, and that such political services could not be a consideration. This was overruled. It was submitted to the jury and affirmatively determined by them that such alleged three-party contract existed, to-wit, question No. 1 in the terms of the pleading as set out above, "*for and in consideration of an agreement (if any) by Judge Jno. H. Reagan to make a thorough canvass of Anderson County, to induce the electors thereof to authorize, by their votes, the issuance of interest-bearing bonds of said county in the principal sum of $150,000.00, and upon the further consideration that Anderson County, on authorization of its electors, should issue and deliver its bonds in the principal sum aforesaid.*" (R., 553-554.) And also by question 2, it was submitted to the jury to determine whether or not the bonds were delivered and whether or not they found "*that Judge Jno. H. Reagan made a thorough canvass of Anderson County to induce the voters to vote said bonds.*" (R., 554, Q. 2.)

(2) The plaintiffs also allege that the H. & G. N. and International Railroad before 1875 consolidated into the I. &. & G. N. R. R. Co., and that about the beginning of 1875 the I. & G. N. R. R. Co., through Hoxie, agreed with the citizens of Palestine, represented by Wright and Ozment, that the I. & G. N. R. R. Co. would carry out the above mentioned alleged contract on the promises and undertakings thereof, "*and for the further additional consideration that said citizens should at once construct*

and complete, or cause to be constructed and completed, at their own cost and expense, any and all houses at Palestine, Texas, which might be demanded by the I. & G. N. R. R. Co., in accordance with such plans and specifications or directions as might be furnished by the company, through its officers, for occupancy at reasonable rentals, by employes of said company and their families, especially by general officers of said Company, their families and clerks." It was then alleged that the citizens of Palestine put up these rent houses such as were required. *It was nowhere alleged how long the rent houses were to be rented,* but that in consideration of the first understanding and agreement, and of this additional understanding, termed the Rent House Agreement, the general offices, shops and roundhouses were to be brought to Palestine and kept there forever.

The plaintiff in error contended that this agreement stated no consideration because no obligation to rent them for a fixed time was pledged, and therefore there could be no consideration, or that if for a fixed time, then forever, when the alleged contract would be within the statute a fraud. The Court of Civil Appeals overrules these contentions. Others are made. (R., Secs. 21, 22, Trial Petition, pp. 55-56.)

On trial there was much testimony upon these issues, it being claimed that such agreement was entirely in parole, and that such houses as were required were built within twelve months. It was contended by the defendant below that building the houses was of no importance to it, unless there was an obligation to rent them for a fixed time. It was submitted to the jury to determine whether or not such alleged contract was made and

whether or not the houses were built. (R., 555-556, Questions 4-5.)

It was plead that Grow had been authorized by the H. & G. N. R. R. and that his action was ratified, and that Hoxie had been authorized by the I. & G. N. R. R., and that his action had been ratified, and whether or not these allegations were true was submitted to the jury in questions 3 (R., 554) and 6 (R., 556). Upon the affirmative answer of these questions the judgment was rendered for the plaintiffs that the general offices, shops and roundhouses of the defendant should be maintained in the City of Palestine forever and that the defendant "be perpetually enjoined and restrained from changing the location thereof." (R., 559.)

A large part of the statement of facts is taken up with the plaintiffs' testimony introduced to support the issue submitted that Judge Reagan did contract to furnish his influence and to make speeches to induce the voters and that he made the speeches, and in regard to the contents of speeches made by Judge Reagan and Grow, and other matters outside of the writings, and also in regard to the alleged rent-house agreement of 1875.

The defendant plead in abatement and bar the foreclosure suit of the mortgage of 1881 in the United States Circuit Court and also specially the history of the I. & G. N. R. R. Co. and of the defendant, the latter being chartered in 1911, and based on this pleading. In this special pleading the history of the railroad and of the railroad properties was given and the various foreclosures through which they passed, and on them certain defenses were based on constitutional law and on limitation and other matters, which cannot be concisely stated

within the limits of this brief statement, but which will be fully developed below.

II.

Grounds of Jurisdiction of the Supreme Court.

(1) The Court of Civil Appeals has erroneously declared the substantive law of this case, upon a question of law which substantially affected the right of the plaintiff in error to maintain its defense, in that it held, as a matter of law, that there was no disqualification of Chief Justice Wilson and Associate Justice Hodges, who are related, as admitted in the opinion given by the court, within the third degree of consanguinity to citizens of Palestine, all of whom are plaintiffs in this case, and who have property and other rights in Palestine alleged to be directly involved in this case and affected in value by the result of this litigation, as appears in the petition and in the agreements and affidavits presented in the Court of Civil Appeals.

The Court of Civil Appeals maintains that the disqualification does not result because the representative plaintiffs, eight citizens of Palestine, are not related within the third degree of consanguinity to the members of the court, and thereby maintaining that it is in the power of the plaintiffs to qualify members of the court by naming representative plaintiffs suing for themselves and "all citizens of Palestine," not within the third degree of consanguinity or affinity, or to disqualify members of the court, at their will, by naming representative plaintiffs who were within the third degree of consanguinity or affinity; the Court of Civil Appeals thereby holding that it rested within the option of the

plaintiffs and their lawyers (two of whom were within the third degree of consanguinity to Judge Hodges, and large property holders in Palestine) to qualify or disqualify the two members of this court by inserting their own names, or those of others, as representative plaintiffs.

(2) The Court of Civil Appeals erroneously declared the substantive law in this case, upon a question of law which substantially affected the plaintiff in error to maintain its defense, in refusing to maintain that:

The United States Court in foreclosing the second mortgage of the I. & G. N. R. R. of 1881 by its decree of May 14, 1910, had power to reserve, as it did, the exclusive jurisdiction to determine the validity and priorities of any such burdens, liens, or conditions, or servitudes, or duties impressed upon any of the property of the I. & G. N. R. R. Co., or upon "the general offices, machine shops and roundhouses," whereby the same should be impressed "as property or instrumentalities necessary to the use of property, with the character of servitude for the benefit of the particular community," or otherwise, as are herein asserted;

A court making a foreclosure, especially of complicated properties, has by reservation a right to deal with such matters after the decree of foreclosure as well as to bring the parties into the decree of foreclosure; and in order to sell complicated properties such reservations are constantly made, and when a reservation is made it is a condition and term of the sale and warranty by the court that such matters shall be litigated in that court alone, and the rightful exercise of a power and jurisdiction inherent in any court of equity in directing foreclosure and making sales, and necessary to be exercised

in order to not indefinitely defer sales until the court has settled all claims, subject or which can be subjected to its exclusive jurisdiction. Under the decree of foreclosure directing the sale of the properties of the I. & G. N. R. R. Co., including all of its franchises, the reservation was expressed, but it need not be expressly made, it arises by implication; whereby a federal question is presented on account of the violation of the exclusive jurisdiction reserved to the United States Circuit Court, where alone this litigation can be conducted.

This position was taken in the beginning by the plaintiff in error and has been insisted on throughout the case.

(3) The Court of Civil Appeals has erroneously declared the substantive law in this case, upon a question of law which substantially affected the plaintiff in error to maintain its defense, in that:

The court refused and failed to hold, and overruled the defendant's contention in that regard, to-wit, that this litigation and the decree herein are in conflict with a denial of the right, title, privileges and immunities of the defendant, as protected by the decree of the United States Circuit Court in exercise of the powers conferred on it as a court of equity by the Constitution of the United States, by which decree it foreclosed the properties of the sold-out I. & G. N. R. R., and as protected by Section 237 of the Act of Congress of March 3rd, 1911 (33 L. Stats., 1156), and the Statutes of the United States, Sec. 709, in that the plaintiff in error acquired the properties of the sold-out I. & G. N. R. R. in 1911 under the decree of foreclosure of the United States Circuit Court for the Northern District of Texas of May, 1910, wherein it was provided that any such contracts

1083

as the alleged contracts could be denounced by the purchaser or its assigns, if they existed, and whereunder the plaintiff in error denounced these alleged contracts, if any, in accordance with the terms of the decree; and which provided directly and by implication that litigation such as this if it arose should be reserved for the foreclosing court in accordance with the established practice and powers of a court of equity.

(4) The Court of Civil Appeals has erroneously declared the substantive law in this case, upon a question of law, which substantially affected the plaintiff in error to maintain its defense, in that:

The court overruled and refused to maintain the plaintiff's contention, reasonably made, that no contract can be founded upon the employment of services to influence or induce "voters to vote a bond issue, or to induce or influence any public official to enter into any contract or engagement, or the body of the voters to adopt any contract submitted to their votes; it being immaterial whether or not there was a bad intent or a corrupt motive"; plaintiffs alleging and contending and introducing a great mass of evidence, over the objections of the defendant, in support of the alleged contracts on which they sue, and their contention as therein alleged that such contract could be supported upon a consideration of the bargain for the use of Judge Reagan's influence and speeches and services to influence or induce the voters of Anderson County to vote a bond issue, to-wit, the bond issue of 1872; and it being submitted to the jury to determine whether or not an agreement was made based on such services of Judge Reagan, and whether or not Judge Reagan rendered such services as a consideration for the alleged contract sued on, the jury answering such

questions affirmatively; it being the contention of the plaintiffs and defendants in error that such services and making the speeches to induce "the voters to vote the bond issue" could be a basis of a legally enforceable contract; and it being the contention of the defendant and plaintiff in error here that the law does not permit "the inducing" of the voters by speeches and otherwise to be a consideration of a contract, but prohibits and denounces the same as contrary to public policy and as void.

(5) The Court of Civil Appeals has erroneously declared the substantive law of this case, upon a question of law that substantially affected the plaintiff in error to maintain its defense, in that:

The Court of Civil Appeals overruled the plaintiff in error's contention, seasonably presented, that an agreement to pass to a portion of the voters a value contingent upon a certain election being carried, especially when that value is a large one, cannot be a consideration for a contract, but is illegal and void, as contrary to public policy as well as the statutes prohibiting the bribing of voters, but it is also void independently of such statutes; it being plead by the plaintiffs in this case that the citizens of Palestine, through Judge Reagan, and the H. & G. N. R. R. Co., through Grow, agreed that the shops, roundhouses and general offices should be established in Palestine forever, and that the railroad should be built into Palestine and a depot maintained therein within one-half mile of the courthouse, in consideration of the promise and agreement and performance by Judge Reagan thereof to make a thorough canvass of Anderson County to induce the voters to vote a bond issue, and in consideration of such bond issue, and that the

county voters upon this matter being explained to them did confirm the same; and a great portion of the evidence in this case being admitted in support of this point and this point being submitted to the jury by submitting to them to determine whether or not said alleged contract was made and whether or not Judge Reagan did canvass the county to induce the voters, and whether or not he made a thorough canvass of the county for that purpose.

(6) The Court of Civil Appeals has erroneously declared the substantive law in this case, upon a question of law that substantially affected the right of plaintiff in error to maintain its defense in this case, in that:

The court overruled the defendant's contention, seasonably made, and refused to sustain the same; which was that the act of April 12, 1871 (page 29 of Acts, Vol. 6, Gam., p. 931), required the contract for the bond issue to be in writing, and that there should be a written record thereof made by the County Court, and that the County Court should determine and settle whether or not the terms of the contract had been complied with, to-wit, whether or not the considerations to be rendered by the Railroad had been rendered, and whether or not the considerations to be rendered by the county had been rendered, and that the ascertainment and settlement of this written contract (which was extant and shown without controversy in this case, and was exclusive and complete in all its terms although not plead as being in writing by the plaintiffs), was to be determined by the writing itself and its performance or non-performance by the decree of the County Court, from which it results that any representations or statements by the advocates of the bond issues in speeches or otherwise, or prior nego-

tiations or testimony on that point could not be admitted. Notwithstanding which, the trial court admitted over these objections a great mass of testimony and evidence in contradiction to and extension of such written contract, required by the statute to be in writing, and in contradiction to the decree of the County Court, required by statute to determine whether or not the performance had been completed and whether or not the considerations had been rendered; upon which extraneously admitted testimony the verdict in this case for the plaintiff rests, such written contracts and such decree of the County Court negativing and denying all of the contentions of the plaintiffs as to the matters herein sued; for the verdict rests exclusively upon the contention that it is supported by such extraneous matters.

The proposition now made and denied by the Court of Civil Appeals being, that, when the law requires a contract with the voters or municipality to be in writing, and that the performance of the consideration thereof be ascertained and decreed by a court, and when the written contract and the decree are extant, no parole or outstanding considerations or inducements, or speeches, or negotiations, or promises can be gone into in contradiction to or extension thereof.

(7) The Court of Civil Appeals has erroneously declared the substantive law of this case, upon a question of law that substantially affected the right of plaintiff in error to maintain its defense, in that:

The court refused to hold and overruled defendant's contention, seasonably made, that the written contract being indisputably proved in this case, and being complete and of stated considerations, both ways, then that, under the general rules in regard to written contracts

(complete and exclusive in all their terms and not attempted to be set aside), parole modifications cannot be shown; the written contract being so complete and express and having been adopted by the voters as submitted to them in writing, and a great mass of testimony having been admitted in order to show that the shops and offices and Judge Reagan's services as alleged in inducing the voters were considerations on the respective sides as well as those stated in the writing, and the verdict and judgment in this case being claimed to rest exclusively on such testimony and these extraneous matters, speeches, negotiations, etc., of over forty years ago.

(8) The Court of Civil Appeals has erroneously declared the substantive law in this case, upon a question of law that substantially affected the right of plaintiff in error to maintain its defense, in that:

The court refused to hold, as seasonably contended by the defendant, and overruled its contention, to-wit: that contracts made and adopted by the vote of the people are necessarily not subject to a modification by showing what terms and statements, outside of the contract and writing submitted to the people, were made; because that after the lapse of time the writings could be overruled on the basis of testimony to campaign promises, stump speeches or expectations held out. This position was overruled by the trial court and the Court of Civil Appeals and over these objections a great mass of testimony and other matters were admitted in evidence to support the contention that the written contract submitted to the people was incomplete, and that the shops and offices were a part of the consideration to the voters and Judge Reagan's political services a part of the consideration to the railroad, although no such matters were expressed in the

contract submitted to the voters; and testimony being admitted at great length to campaign speeches, negotiations and alleged promises in support of the plaintiff's contentions, upon which testimony the verdict of the jury is claimed to exclusively rest, all lying outside of the writings; it being the contention of the plaintiff in error that such contracts cannot be so modified and changed by testimony to such speeches, etc., especially after the lapse of over forty-two years.

(9) The Court of Civil Appeals has erroneously declared the substantive law in this case, upon a question of law which substantially affected the right of plaintiff in error to maintain its defense, in that:

The court refused to hold, as seasonably contended by the plaintiff in error, but held to the contrary, to-wit: that the contract being fully formed at the time Grow went to get the bonds from the County Court and he then being either entitled to them or not being entitled to them, and that court adjudging by its decree that his railroad was entitled to them on performed considerations, no promises, if any, which he may have then orally made could have been based upon any valuable consideration, and, therefore, they were of no importance, and because the contract could only be formed by the vote of the people; which contention was overruled and testimony was admitted in contradiction to the decree of the County Court and the written contracts, to statements as testified to have been made by Grow that he persuaded the County Court to leave the matters of the shops, general offices and roundhouses out of its decree and out of its bonds, and that he persuaded them to trust to his personal representations that these things should be carried out.

1091

(10) The Court of Civil Appeals has erroneously declared the substantive law in this case, upon a question of law which substantially affected the right of plaintiff in error to maintain its defense, in connection with and as a necessary deduction from its actions as follows:

The court failed and refused to find, and refused to insert the finding as requested, in the statement of facts by the 21st section of the plaintiff in error's motion for rehearing, to-wit: the undisputed fact contained in an undisputed document, namely, the record of the proceedings of the County Court of Anderson County in 1872-1873, that the contention had been made before the County Court of Anderson County when the bonds of Anderson County were issued to the Houston & Great Northern Railroad Company to the effect that, as an inducement to the voters to vote the bond issue, it had been promised on the side or in public speeches that the machine shops and roundhouses of the railroad should be located in Palestine, and in that it was shown in the evidence that this contention was indisputably overruled by the County Court and that the court decreed, that the considerations for the bond issue were only to build in and to secure the maintenance of a depot within one-half mile of the courthouse in Palestine, and to operate the road, and that the court decreed that these considerations were the sole considerations and had been rendered; and furthermore, that the court decreed that the H. & G. N. R. R. had complied with its undertaking with the county, neither the general offices nor machine shops nor roundhouses then being in Palestine; all of which matters were indisputably shown in the evidence by the decrees and proceedings of the court, including the formal protest setting forth that a part of the undertaking

of the railroad had been the agreement to place the shops and offices at Palestine, which was directly overruled by the court, whereby the Court of Civil Appeals ruled as a matter of law that the decree of the County Court could be negatived though made in 1873, and then settling and ~~denoting~~ directing the issue of the bonds.

(11) The Court of Civil Appeals has erroneously declared the substantive law in this case, upon a question of law that substantially affected the right of plaintiff in error to maintain its defense, in that:

The court failed and refused to hold, as contended by plaintiff in error, which contention was seasonably made, that Anderson County was estopped from litigating any claim in this case by the previous litigation between the Houston & Great Northern Railroad Company and the County of Anderson, and by reason of facts indisputably proved showing that matter herein involved had been adjudicated in that cause so as to preclude its reassertion, the plaintiff in error having introduced on the trial of this case the whole record of the suit of Anderson County v. Houston & Great Northern Railroad Company, instituted in 1874, and litigated through the Supreme Court, wherein Anderson County attempted to show that there were certain inducements and agreements outside of the writings and wherein it was adjudged that the writings could not be so violated, and that the decree of the County Court of 1873 was final, the whole record of that case as it now exists in the Supreme Court being introduced in evidence in this case, that case being affirmed in 52 Texas, 242.

(12) The Court of Civil Appeals has erroneously declared the substantive law of this case, upon a question

of law that substantially affected the right of plaintiff in error to maintain its defense, in that:

The court held, against the contention of plaintiff in error, seasonably urged, that so much of the General Office Statute of 1889 as would apply to the contracts involved in this case, the same being Articles 6423-6424 and 6425 of the Revised Statutes of 1911, would not and does not impair the obligation of the contract when such statute is applied to the facts of this case and given the construction claimed for it by the plaintiffs, and without which construction they cannot recover herein, it being the contention of the plaintiff in error that said act in such applications as so now made violates Subsection 1 of Section 10 of Article I of the Constitution of the United States, and impairs the obligation of the contract mortgage of 1881. The contention of the plaintiff in error is that such statute upon the construction given is unconstitutional and invalid in the applications now disclosed for the first time, to-wit: that it appears for the first time from the decree of foreclosure and evidence that the I. & G. N. R. R. Co. was sold out at a loss under a mortgage termed the second mortgage issued in 1881; that the plaintiff in error is the assignee and holder as purchaser of all rights and interest whatsoever accruing to the mortgagees; and that further, as to any obligations claimed by the plaintiffs to be imposed by the act of 1889 (all of which were additions to and burdens upon the alleged contract asserted by plaintiff), they are in violation of the contract evidenced by the mortgage in attempting to make prior in law rights, if any, which were junior in time, all of which is in violation of the Constitution of the United States here and now and below throughout this case on trial invoked.

(13) The Court of Civil Appeals has erroneously declared the substantive law in this case, upon a question of law that substantially affected the right of plaintiff to maintain its defense, in that:

The court failed and refused to hold and overruled the contention of the plaintiff in error, seasonably made, as follows:

The plaintiffs rely upon the act of the legislature of Texas of 1889, carried into Articles 6423, 6424 and 6425 of the Revised Statutes of 1911, and are now claiming that by such act long subsequent to the alleged contracts, which they plead in this case as made in 1872 and 1875, a duty or lien, burden, or servitude was fixed upon the property or properties, or some of them, of the sold-out I. & G. N. R. R. Co., sold out under the decree of foreclosure of May, 1910, or the mortgage of 1881, which properties have been acquired by this defendant under such foreclosure sale, in that by this statute and its terms they are attempting to burden and add to the alleged contracts by the statutory extensions of obligations, by going beyond the alleged contracts, whereby it appears, when applied to the facts of this case, that such act of 1889 as so construed is unconstitutional and void and violates Sub-section 1 of Section 10 of Article I of the Constitution of the United States prohibiting any State from passing a law impairing the obligation of contracts; the plaintiffs claiming that their alleged personal contracts so became secured first in 1889 by the force of the statute and that in 1889 the statute placed other obligations on the alleged contracts not included in the contracts, to-wit, that the Act of 1889 gave a security and generally against the properties of the sold-out I. & G. N. R. R. Co. to the alleged personal contracts

of 1872 and 1875, and in that as claimed, it is contended that the Act of 1889 defined and extended these personal contracts so as to add to them the obligation to maintain, at Palestine, various persons not involved in the alleged personal contracts as testified to, whereby the statute, in its application to this case on such constructions is invalid, it being impossible for plaintiffs to recover without such construction of the statute and the applications of the statute as now made being first disclosed at the trial hereof. By this proposition a Federal question is presented.

(14) The Court of Civil Appeals has erroneously declared the substantive law in this case, upon a question of law which substantially affected the right of plaintiff in error to maintain its defense, in that:

The court failed and refused to hold, as contended by plaintiff in error, seasonably made, which contention was as follows:

It appears that it is now indisputably shown upon the trial of this case that the plaintiffs rely upon the statute of 1889, known as the Office-Shops Statute, the same being Articles 6423, 6424 and 6425 of the Revised Statutes of 1911 of Texas, which act as construed by them in the applications disclosed first on this trial and without which construction they cannot recover, is violative of Section 1 of Article 14 of the Amendments to the Constitution of the United States, commonly called the Fourteenth Amendment, in that such statute imposes great penalties, and in that the insistence that the statute is applicable to the defendant on the applications of this case constitutes an attempt to abridge the privileges and immunities of the defendant and to deprive it of its property without due process of law and to deny it the

equal protection of the law by penalizing or threatening to penalize it at the rate of $5,000 per day, and further penalize it if it should resort to the courts to resist this action and litigate its rights by refusing to obey such unconstitutional statute, whereby there is piled up against this defendant, on the constructions maintained by the plaintiffs at this time, penalties of over $5,475,000.00; whereby such statute is unconstitutional and void in its applications to this case.

This proposition presents a Federal question.

(15) The Court of Civil Appeals has erroneously declared the substantive law of this case, upon a question of law which substantially affected the right of plaintiff in error to maintain its defense, in that:

The court failed and refused to hold, as contended by the plaintiff in error, which contention was seasonably presented, that the General Office-Shops Statute of 1889 is invalid and unconstitutional, and invalid in its applications to this case, the same now being Articles 6423, 6424 and 6425 of the Revised Statutes of Texas of 1911, because the same is violative of that part of Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the law; because in its applications to this case, it creates an undue interference with the business of the plaintiff in error and its duties to the public, to its stockholders and other persons, both in State and interstate commerce, wherein it attempts to interfere with the lawful discretion and power of the plaintiff in error (as construed and applied in this case, without which construction there can be no recovery),

to conduct its business in its own discretion within the limits of law, and wherein it attempts to place burdens and liens and additions onto and securing the alleged personal contracts of 1872 and 1875 as claimed by plaintiffs, thereby denying to defendant the equal protection of the law and taking its property without due process of law by such illegal interference; and whereby the statute on the applications of this case is invalid.

By this ground a Federal question is presented.

(16) The Court of Civil Appeals has erroneously declared the substantive law of this case, upon a question of law which substantially affected the right of plaintiff in error to maintain its defense, in that:

The court failed and refused to hold, as seasonably contended by the plaintiff in error, that the Office-Shops Act of 1889, now carried into Revised Statutes of Texas of 1911, Articles 6423, 6424 and 6425, on its applications to this case and as applied for the behoof of the defendants in error is unconstitutional and invalid, because this act is by its terms applicable only to chartered railroads and by its terms not applicable to individual receivers or other persons operating as railroad carriers, or to other persons or corporations whatsoever in whatever business engaged, and so violates Section 1 of Article 14 of the Amendments to the Constitution of the United States, being in its applications hereto and as disclosed on the trial of this case legislation against a species or class, not rightfully classified on any legal ground, and in that it places a burden on a species or class not placed on other persons or corporations not classified with it, thereby violating the provision in denying to any person "the equal protection of the law," and abridging the privileges and immunities of the de-

fendant and depriving it of its property without due process of law.

This ground presents a Federal question, whereby on the applications of this case such statute is invalid.

(17) The Court of Civil Appeals has erroneously declared the substantive law of this case, upon a question of law which substantially affected the right of plaintiff in error to maintain its defense, in that:

Said court failed and refused to hold as seasonably contended by plaintiff in error:

That, as the plaintiffs rely upon the Act of 1889, being Articles 6423, 6424 and 6425 of the Revised Statutes of Texas of 1911, which is claimed by them to secure the alleged personal contracts of 1872 and 1875 on which they sue, ~~which~~ the act is invalid and unconstitutional and invalid in its application to this case, and contrary to the Constitution of the State of Texas:

(a) Because the same assesses a penalty of an amount prohibited by the Constitution, being excessive, and in contravention to Section 13 of Article I of the Constitution of Texas.

(b) Because the statute as construed and pleaded is retroactive on its applications to this case, it being claimed and asserted and maintained that without the statute the plaintiffs cannot recover, and that by it their purely personal alleged contracts of 1872-1875 were first secured, the statute in its applications and as applied being retroactive and contrary to Section 16 of the Bill of Rights of the Texas Constitution.

(c) Because the plaintiffs seek a recovery in violation of the obligations and terms of the alleged contracts on which they sue, and in violation of the mortgage contract of the sold-out railroad made in 1881, before the Act of

1099

1889 was passed, all in violation of Section 16 of Bill of Rights of the Constitution of Texas.

(d) Because, as construed by plaintiffs and applied by them, without which application they cannot recover, the plaintiffs deny to defendant the equal protection of the law, and violate due process of the law in interfering with the just discretion of the plaintiff in error in the management of its properties, contrary to Section 19 of the Bill of Rights of the Constitution of Texas.

Whereby such statute is invalid on its applications to this case.

(18) The Court of Civil Appeals has erroneously declared the substantive law of this case, upon a question of law which substantially affected the right of plaintiff in error to maintain its defense, in that:

The court held, against the contention of plaintiff in error to the contrary, seasonably made, that the trial court did not err in holding that there was ground to submit to the jury whether or not Grow and Hoxie were authorized to make the alleged contracts sued on, Grow representing, as alleged, the H. & G. N. R. R., and Hoxie the I. & G. N. R. R., and in refusing to sustain the contention of the plaintiff in error that not only was there no evidence whatever to show such authorization or ratification, but that on the contrary, the evidence upon these issues showed and tended overwhelmingly to show that there had been no ratification or authorization of such contracts by the board of directors of any railroad involved, it being conceded that the ratification or authorization would have to be made by the board. The trial court overruled these contentions, which ruling was sustained by the Court of Civil Appeals, and it was submitted to the jury to determine whether or not the board

of directors and the railroads had ratified or authorized the alleged contracts. Upon the trial of this case there was no evidence showing any such ratification or authorization, it being shown in evidence that all of the minutes of the railroads had been submitted to the plaintiffs and examined by them, and no minute or authorization being shown and no testimony of any of these directors or officers being brought, except of two members, who denied ever having heard of the alleged contracts sued on; and also there being introduced in evidence numerous letters and correspondence passing between the officers of the road, at the time of the transactions dealt with, directly showing that no such agreement was known to them, these officers being also in part members of the board of directors.

(19) The Court of Civil Appeals has erroneously declared the substantive law of this case upon a question of law that substantially affected the right of plaintiff in error to maintain its defense, in that:

The court failed and refused to hold, as contended by the plaintiff in error, seasonably presented, that the authorization or ratification of the alleged contract sued on had to be by the board of directors of the railroad or railroads acting as a body, and that it was not sufficient that a majority of the board not acting as a body may attempt to authorize or ratify, it being essential that the board should act as a body with the opportunity of consultation.

The plaintiff in error requested that this should be charged to the jury subject to its other contentions, and the court refused the charge. All of the minutes of the railroads were turned over to the plaintiffs, and they found no minute of ratification and depended for their

ratification upon the theory that a member or members of the board had heard of the alleged contract and had acted thereon.

(20) The Court of Civil Appeals has erroneously declared the substantive law of this case and has erred in regard to the substantive law upon a question of law that substantially affected the right of plaintiff in error to maintain its defense, in that:

The court failed and refused to hold, as contended by the plaintiff in error, by a contention seasonably made, that the trial court erred in the concluding sentence of special charge 3, given by him, as follows:

> "But if you find that such agreements had been made (then) you may consider the establishment and maintenance of the shops and offices at Palestine along with all other evidence in the case in determining whether or not the company knowingly acquiesced in or ratified such agreements, if any were made."

Because there was no evidence of such ratification or knowledge, and because, as a legal proposition, the establishment and maintenance of the shops at Palestine were not such evidence as intimated by the court in the charge complained of.

(21) The Court of Civil Appeals has erroneously declared the substantive law of this case and has refused to maintain the proposition of the plaintiff thereon, involving a question of law that substantially affected the right of plaintiff in error to maintain its defense, in that:

The court failed and refused to hold, as seasonably presented by plaintiff in error, that the fact that the International & Great Northern Railroad did establish the general offices and shops at Palestine was no evidence

of authorization or ratification of the alleged agreement sued on by the board of directors or boards of directors of the railroads. The railroads having a legal right to make such establishments at Palestine and the fact that they did so, not proving that the board or boards of directors had authorized or ratified the alleged contracts sued on.

(22) The Court of Civil Appeals has erroneously declared the substantive law of this case upon a question of law that substantially affected the right of plaintiff in error to maintain its defense, in that:

The court erred, against the contention of the plaintiff in error to the contrary, seasonably presented, in connection with the foreclosure sales of 1879, whereby all property, corporate rights, privileges and franchises of the International Railroad, of the Houston & Great Northern Railroad and of the International & Great Northern Railroad Company, their successor, were sold under decrees of foreclosure of the United States Court for the Western District of Texas to John S. Kennedy and Samuel Sloan, the sales having been confirmed by that court, and deed for all of said property, corporate rights, privileges and franchises having been executed by the Master, designated by the court, to Kennedy and Sloan as the purchasers, in accordance with the mortgages and decree of foreclosure thereof; that is, the court held that these sales did not have the effect to vest in the purchasers their right to the title to the properties, corporate rights, privileges and franchises of said International Railroad Company, of the Houston & Great Northern Railroad, and of the International & Great Northern Railroad, their successor, free from liability for the debts and other merely personal obligations of

the International Railroad, the Houston & Great Northern Railroad and the International & Great Northern Railroad Company; the court failing and refusing to hold that the fact that Kennedy and Sloan, after acquiring these properties, corporate rights, franchises and privileges, executed a conveyance thereof to the International & Great Northern Railroad Company, did not have the effect of ratifying or restoring the liability of said companies or any of them for their debts and other purely personal obligations, such as the agreements sued on were, if obligations at all, although the stockholders may have remained the same, with the exception of a minority, as they were prior to said sales.

(23) The Court of Civil Appeals has erroneously declared the substantive law of this case upon a question of law that substantially affected the right of plaintiff in error to maintain its defense, in that:

The court erred, in holding against the contention of the plaintiff in error, seasonably made, that the foreclosure sales of 1879 and the proceedings thereon, described in the last ground, did not vest in the purchasers at such foreclosures of all franchises and rights both to do and to be of the sold-out railroads as well as their other properties, and the franchise of the sold-out International & Great Northern Railroad Company to be a corporation without the necessity of taking out a new charter, free of all purely personal obligations; the effect of Article 4912, Paschal's Digest, being (Art. 4260 of the R. S. of 1879) that by such foreclosure and sale, in pursuance of the mortgages made covering all of the franchises of the railroads, the purchasers and their assigns were relieved of any obligation to incorporate the railroads, but might attach the

charter of the old sold-out railroad and operate under it free of all such alleged personal contracts as are claimed in this case, if any there were, there being at that time no provision for chartering a railroad to own and operate the sold-out properties of another railroad as is now the case, and the object and effect of the statute being to eliminate all unsecured obligations and personal contracts such as those claimed to be involved in this case, claimed afterwards to be secured by the act of 1889, which act, under such applications, could not constitutionally and retroactively validly apply to such a situation as this, thereby to revive and secure the claimed personal contracts of 1872 and 1875 as against the properties or franchises or in connection therewith of the sold-out railroad, it being contended, first, that the office-shops act of 1889 (R. S. of 1911, 6423-4-5), was not intended to and did not apply to situations such as this; and secondly, if so intended, the act is invalid in such applications and violative of section 16 of Article I of the Constitution of the State of Texas, being retroactive.

(24) The Court of Civil Appeals has erroneously declared the substantive law of this case upon a question of law that substantially affected the right of plaintiff in error to maintain its defense, in that:

The court stated in its opinion, with reference to the foreclosure sales of 1879 and the proceedings thereunder and the defense thereunder made by the plaintiff in error, that by such foreclosure sales all of these alleged personal contracts, if of any force, being then personal and the act of 1889 not being then adopted, were eliminated, the court stating in its opinion: "Under these pleadings the question of a bona fide sale to any third person became issuable. The facts and circumstances warrant the inference

1105

of fact, which in support of the court's judgment we must assume that the court found that there was not a bona fide judicial sale, hence in such finding of fact the legal effect of the ... d deeds to the trustee would not discharge admitted corporate obligations." (p. 20, opinion.)

Because this theory is first advanced in the opinion of the Court of Civil Appeals, duly objected to in a motion for rehearing, and because no such issue was submitted to the jury and it was not for the trial judge to find any such issue of fact, and because this conclusion of fact is now found by the Court of Civil Appeals as a predicate for the position of the trial court in refusing to sustain the proposition of the plaintiff in error in connection with such foreclosure sales and proceedings thereunder in 1879, and because there was no evidence whatever to show that such sales were void or fraudulent, being the sales made under the directions of a court of competent jurisdiction in 1879 and never impeached.

(25) The Court of Civil Appeals has erroneously declared the substantive law of this case upon a question of law that substantially affected the right of plaintiff in error to maintain its defense, in that:

The court ruled against the contention of plaintiff in error, seasonably presented, that the Office-Shops Statute of 1889 (R. S. of 1911, Arts. 6423-4-5), at most purports to require the general offices and shops and roundhouses of a chartered railroad coming within its provisions to be maintained permanently at the place where they have been contracted to be kept, and the word "permanently" not meaning forever, but means only for a less period, completely complied with (if there ever was any obligation), by keeping these institutions in Palestine as to the shops from in or about 1875 to the present time,

and as to the offices from in 1875 to in 1881, and from in 1888 to in 1911; the court, to the contrary, maintaining that "permanently" means "perpetually," or "forever," and maintaining the decree of the trial court perpetually enjoining their removal from Palestine, whereby the very words of the statute are edited and changed.

(26) The Court of Civil Appeals has erroneously declared the substantive law of this case upon a question of law that substantially affected the right of plaintiff in error to maintain its defense, in that:

The court overruled the following contention of the plaintiff in error, seasonably presented, and stating a correct proposition of law, to-wit: The obligations of the alleged contracts, if any, are to be determined by the statutes and laws existing at the time of their creation, and giving another and more extensive obligation thereto is violative of sub-section 1 of section 10 of Art. I of the Constitution of the United States prohibiting any State from passing any law impairing the obligations of contracts, whereby Articles 6423-4-5 of the present Revised Statutes of Texas, commonly known as the Office-Shops Act of 1889, are invalid in its applications hereto, because by such acts as construed, which construction has been enforced by the Court of Civil Appeals, these alleged personal contracts of 1872 and 1875 were claimed to be secured *in rem,* or made to inhere in, to be a duty on, or be a servitude upon, the properties outstanding to the defendant, thereby adding to the obligations of such alleged contracts and violating the obligations, and because, as contended herein, said acts extended and redefined the term "General Offices" as understood under the laws existing in 1872 and 1875, whereby numerous obligations were added thereto and numerous persons included there-

in, and also the obligation of their residence in Palestine and impliedly the residence there of their families; and whereby such act as now construed and applied on applications necessary for the recovery of the plaintiffs violate not only the Constitution of the United States, as pointed out, but the same provision in the Constitution of Texas.

This is a Federal question, as well as one arising upon the State law.

(27) The Court of Civil Appeals has erroneously declared the substantive law of this case upon a question of law that substantially affected the right of plaintiff in error to maintain its defense, in that:

The court refused to hold, as seasonably contended by the plaintiff in error, that the alleged contracts sued on, alleged to be forever, and to create an obligation for performance forever, and the Office-Shops Act of 1889 (R. S. of 1911, Arts. 6423-4-5), are invalid and void in their applications hereto (if it bears the construction that the word "permanently" therein means "forever"), because they then violate the Constitution of Texas, which prohibits perpetuities and monopolies and thereby the indefinite restraint on alienation and the indefinite tying up of property or the securing of any obligation as against property by a servitude or duty forever, to-wit: of section 26, Article I of the Constitution of the State of Texas.

(28) The Court of Civil Appeals has erroneously declared the substantive law of this case upon a question of law that substantially affected the right of plaintiff in error to maintain its defense, in that:

The court failed and refused to hold, as seasonably contended by plaintiff in error, to wit: The plaintiffs contended for the alleged rent-house contract of 1875,

not alleging how long the rent houses were to be rented, unless by inference "forever," when if not "forever" the performance on the one side would be stipulated for no definite time, and being indeterminate, it would be within the power of the persons claimed to be obligated to rent to cease renting at any time, whereby the consideration would fail, and there would be no contract alleged; the theory of the evidence and pleading of the plaintiff in this case being that the consideration of the alleged agreement made in 1875 was, as against the railroad, the obligation to perform the alleged three-party agreement of 1872 between the town, the county and the railroad, and the further consideration that the people of Palestine should rent houses, it not being plead or proved how long the houses were to be rented, whereby there was no consideration of renting houses; and no contract alleged.

(29) The Court of Civil Appeals has erroneously declared the substantive law of this case upon a question of law that substantially affected the right of plaintiff in error to maintain its defense, in that:

The court failed and refused to hold, as seasonably contended by the plaintiff in error, that the alleged rent-house contract of 1875 between Hoxie, representing the International & Great Northern Railroad, and the citizens of Palestine, was not a valid contract, because the consideration of renting the houses, as alleged, was no consideration, it not being plead or proved that the houses were to be rented for any specific time, whereby the consideration of renting the houses did not exist; but if there be an implication from the pleading that the houses were to be rented for any definite time, they were to be rented forever, and it being plead that the offices and shops were

to be maintained forever at Palestine, and all of this alleged agreement being contended to be in parol on the trial, it appears on this alternative theory that such alleged agreement was within the statute of frauds, performance on either side being impossible within a year; "forever," on every hypothesis, exceeding one year.

(30) The Court of Civil Appeals has erroneously declared the substantive law of this case upon a question of law that substantially affected the right of plaintiff in error to maintain its defense, in that:

The court failed and refused to hold, as seasonably contended by plaintiff in error, as follows: The plaintiffs relied upon the Office-Shops Act of 1889 (R. S. of 1911, 6423-4-5), without which they cannot recover, on the ground that Hoxie and Grow and the International & Great Northern Railroad Company had contracted to keep the general offices at Palestine, Texas; whereas, the act provides that the railroad company shall keep its general offices at the place designated in its charter and prohibits the formation or enforcement of any contract in contradiction to the place for the general offices designated in its charter; it being shown without dispute that the charter of the H. & G. N. Railroad located its general offices in the City of Houston, and the charter of the International authorized it to consolidate with any other road, and did not locate its general offices, except on the line, and that the International Railroad has consolidated with the Houston & Great Northern Railroad to form the International & Great Northern Railroad Company, assuming the duties of the Houston & Great Northern, and moving to Houston, Texas, whereby the act of 1889 does not enforce any contract, if any there was, to locate the general offices at Palestine, but, on the con-

trary, prohibits the enforcement of any such contract, if it be applicable, the place of the general offices being named in the charter of the Houston & Great Northern and the consolidation of those two roads being under the application and terms thereof.

(31) The Court of Civil Appeals has erroneously declared the substantive law of this case upon a question of law that substantially affected the right of plaintiff in error to maintain its defense, in that:

The court failed and refused to hold, as seasonably contended by the plaintiff in error, that all right of action, if any, was barred by the statute of two years limitation on account of the general offices and shops, or either, not being moved to Palestine within two years after the making of the alleged Reagan-Grow contract, and after the railroad became obligated to perform, if ever so obligated, it being shown in the evidence as to the offices, without dispute, that they remained in Houston until in 1875, for more than two years after the alleged three-party contract of 1872 was represented to have been made and alleged to have been completely performed on the part of Palestine and the county by the furnishing of Judge Reagan's political services and speeches to induce the voters of the county to vote the bond issue, and by voting the bonds and the delivery of the same, whereby the statute of two years' limitation (R. S., 5687, Section 4) applied.

(32) The Court of Civil Appeals has erroneously declared the substantive law of this case upon a question of law that substantially affected the right of plaintiff in error to maintain its defense, in that:

The court refused to hold, as seasonably contended by plaintiff in error, upon undisputed facts, that the statute

of limitation of two years (R. S., 5687, Section 4) had barred plaintiff's right of action, if any they ever had, as to the general offices, in that: It was shown without contradiction that the general offices were moved in 1881 from Palestine, Texas, to St. Louis, Missouri, and kept there until in 1888, with all of their equipment, clerks, employes and records and their various heads.

(33) The Court of Civil Appeals has erroneously declared the substantive law of this case upon a question of law that substantially affected the right of plaintiff in error to maintain its defense, in that plaintiff's cause of action, as to the general offices, was barred, because:

It was indisputably shown that the general offices were moved from Palestine to St. Louis in 1881 with all of their clerks, heads of departments and records and kept there in 1888 for more than four years, this suit being instituted in 1911; whereby, if the two years' statute of limitation does not apply, nevertheless the omnibus statute of four years applies (R. S., 5690), whereby plaintiffs' cause of action, if any, as to the general offices, was barred.

(34) The Court of Civil Appeals has erroneously declared the substantive law of this case upon a question of law that substantially affected the right of plaintiff in error to maintain its defense, in that:

The court failed and refused to hold, as seasonably contended by the plaintiff in error, that the alleged contracts sued on by the plaintiffs, if not absolutely barred as to the general offices, by the removal of the general offices to St. Louis in 1881, and maintaining them there until in 1888, yet that, subject to the above contention, that they were so absolutely barred, it was at least raised in the evidence that such contracts were barred as to the gen-

eral offices by the statute of two years limitation (R. S., 5687, Section 4) or if not by the statute of two years limitation, then by the statute of four years limitation (R. S., 5690) this being at least an issue for the jury, the general offices, clerks, heads of departments being kept at St. Louis during such period of over four years, adversely to and in contravention of the claims of the plaintiffs, as contended by the defendant, the plaintiff in error now contending that to refuse to submit this matter to the jury, after the court had failed to charge peremptorily therein for the defendant, was to hold that the act of 1889 being the Office-Shops Act (R. S. of 1911, 6423-4-5), operated retroactively to remove such bar, such not being the purpose of the act; but if the purpose, then the act being unconstitutional in that particular in its applications hereto, because the retroactive removal of the bar violates section 16 of Art. I of the Constitution of Texas.

(35) The Court of Civil Appeals has erroneously declared the substantive law of this case upon a question of law that substantially affected the right of plaintiff in error to maintain its defense, in that:

The court held, against the contention of plaintiff in error to the contrary, seasonably presented, that by giving effect to the contracts alleged by defendants in error and deciding that by the operation of the general office statute of 1889, upon said contracts, the plaintiff in error is "forever" bound to keep and maintain its general offices, machine shops and roundhouses at Palestine, there is no violation of Subsection 3, Section 8, Article 1, of the Constitution of the United States, conferring upon Congress the power to regulate commerce among several States, the consequence of the ruling of the court upon this subject being to deprive plaintiff in error of the power to so reg-

ulate its affairs as best to serve the interest involved in interstate commerce, and to place a perpetual burden upon such interstate commerce.

(36) The Court of Civil Appeals has erroneously declared the substantive law of this case upon a question of law that substantially affected the right of plaintiff in error to maintain its defense, in that:

The court failed and refused to hold, as contended by plaintiff in error, which contention was seasonably presented, that the trial court erred in entering any judgment in favor of defendants in error, for the reason that the foreclosure of the mortgage of 1881 upon the properties of the International & Great Northern Railroad Co., under which foreclosure plaintiff in error takes all its rights, was valid and had the effect to vest the complete title in plaintiff in error, and that at most defendants in error were left only with the right to redeem from such foreclosure, which they have not offered to do.

(37) The Court of Civil Appeals has erroneously declared the substantive law of this case upon a question of law that substantially affected the right of plaintiff in error to maintain its defense, in that:

The court failed and refused to hold, as contended by plaintiff in error, which contention was seasonably presented, that the trial court erred in refusing to give plaintiff in error's peremptory instruction, because the trustee and bondholders under the mortgage of 1881 took their lien without any notice of any of the contracts alleged by defendants in error, and also at a time when such contracts could not have affected the lien of the mortgage upon the property or the title of the purchaser thereunder at foreclosure sale, but were purely personal obligations of the corporations which made them, if ever made, for

which reason plaintiff in error, purchasing under the foreclosure of said mortgage of 1881, and succeeding to all the rights of trustee and bondholders therein, acquired title freed from the operation of such contracts, and from the operation of the general office statute of 1889, passed subsequently to the attaching of the mortgage lien, thereby entitling the plaintiff in error to be protected under the provision of the Constitution of the State of Texas prohibiting the passage of any retroactive law or any law impairing the obligation of contracts, and under Sub-section 1, of Section 10, of Article 1 of the Constitution of the United States prohibiting any State from passing any law impairing the obligations of contracts, and under that part of Section 1 of the 14th Amendment of the Constitution of the United States providing that no State shall pass any law depriving any person of life, liberty or property without due process of law.

By this ground a Federal question is presented.

(38) The Court of Civil Appeals has erroneously declared the substantive law of this case upon a question of law that substantially affected the right of plaintiff in error to maintain its defense, and seasonably presented by it, in that:

The court upheld the ruling of the trial court, and failed to hold that such ruling was error, to wit, the admission in evidence over the objections of defendant of a certain newspaper article, published in the Palestine newspaper or newspapers in May, 1899, and written by Judge Reagan, such admission of this document in evidence being erroneous, because, first, in writing the same Judge Reagan was not under oath or subject to cross-examination; second, because the article was prejudicially confusing; third, because it was hearsay; fourth,

because it related to matters with which Judge Reagan had been concerned and was a principal party, according to the allegations of defendants in error, and was presented by them as containing self-serving declarations, written in 1899, not in contemplation of letters introduced by plaintiff in error without objection, written in 1872 and 1874; and because, fifth, the newspaper article was inadmissible as being a mere political and controversial article stating conclusions of a character prejudicial to plaintiff in error. This newspaper article was a long document written 27 years after the matters to which it referred, and purporting to give an account of the understandings in regard to the railroad arrangements for entering Palestine.

(39) The Court of Civil Appeals has erroneously declared the substantive law of this case upon a question of law that substantially affected the right of plaintiff in error to maintain its defense, in that:

The court failed and refused to hold, as contended by plaintiff in error, which contention was seasonably presented, that the trial court erred in refusing peremptory instruction requested by the plaintiff in error, for the reason that the evidence did not show (there being no evidence) that Judge Reagan, in the transaction with Grow, was representing the citizens of Palestine, as distinguished from the citizens of Anderson County, which was a necessary fact to sustain the action of the defendants in error on the alleged contract between Reagan and Grow.

(40) The Court of Civil Appeals has erroneously declared the substantive law of this case upon a question of law that substantially affected the right of plaintiff in error to maintain its defense, in that:

The court failed and refused to hold, as contended by the plaintiff in error, which contention was seasonably presented, that the trial court, in refusing plaintiff in error's special charge No. 2, instructing the jury to leave out of consideration the alleged agreement alleged to be first formed by Grow and Reagan, since there was no evidence justifying the submission of the question to the jury whether or not Judge Reagan bargained for the location of the offices and shops for the people of Palestine in consideration of his political influence or advocacy of the bond issue.

(41) The Court of Civil Appeals has erroneously declared the substantive law of this case upon a question of law that substantially affected the right of plaintiff in error to maintain its defense, and seasonably presented, in that:

The court failed and refused, as specified and requested by the plaintiff in error, in the 83rd ground of plaintiff in error's motion for a rehearing, to make a finding of fact to the effect that there was no element in either the alleged contract of 1872 alleged to have been formulated by Reagan and Grow, or the alleged contract of 1875 between Hoxie and Wright and Ozment and other citizens of Palestine, to the effect that Judge Reagan should advocate a county bond issue to the railroad company before the voters, and should make specches in consideration thereof, it being essential, upon the theory of the defendants in error, that the alleged contracts should contain that feature as an element, and there being no evidence that Judge Reagan agreed for the people of the City of Palestine that his efforts and public advocacy of the bond issue should be a consideration for the contract of the railroad company.

(42) The Court of Civil Appeals has erroneously declared the substantive law of this case upon a question of law that substantially affected the right of plaintiff in error to maintain its defense, in that:

The court failed and refused to hold, as contended by plaintiff in error, which contention was seasonably presented, that the trial court erred in refusing plaintiff in error's requested special charge No. 4, asking the withdrawal from the jury of the alleged contract between Hoxie and the citizens of Palestine, including Wright and Ozment, since there was no evidence justifying the submission of that contract.

(43) The Court of Civil Appeals has erroneously declared the substantive law of this case upon a question of law that substantially affected the right of plaintiff in error to maintain its defense, in that:

The court failed and refused to hold, as contended by plaintiff in error, which contention was properly and seasonably presented and urged, that the trial court erred in overruling plaintiff in error's objection No. 1 to question No. 1 submitted in the charge to the jury, since there was no evidence sufficient to support the allegation of the alleged contract formulated by Reagan and Grow, but at most only testimony to show negotiations between them preliminary to the formation of a contract between the railroad company and the county, which was afterwards formed, and was completely in writing, and contained no such stipulations as those upon which defendants in error rely.

(44) The Court of Civil Appeals has erroneously declared the substantive law of this case upon a question of law that substantially affected the right of plaintiff in error to maintain its defense, in that:

The court failed and refused to hold, as contended by plaintiff in error, which contention was seasonably presented, that the trial court erred in refusing special charge No. 1, requested by plaintiff in error in connection with question 1 submitted by the court to the jury, whereby plaintiff in error sought to have submitted to the jury the question whether the conversations and transactions between Reagan and Grow were mere negotiations rather than a contract.

(45) The Court of Civil Appeals has erroneously declared the substantive law of this case upon a question of law that substantially affected the right of plaintiff in error to maintain its defense, in that:

The court failed and refused to hold, in accordance with the contention of plaintiff in error, seasonably made, that the trial court erred in refusing to give special charge No. 4, requested by defendant, in connection with question 1 submitted by the court to the jury, charging the jury that the burden of proof was upon the plaintiffs to show on the preponderance of evidence each fact made essential to enable the jury to answer yes to question 1 submitted to them to determine whether or not the alleged contract between Judge Reagan, representing the people of the town, and the county, and Grow, representing the railroad, was made, this request being made subject to the defendant's contention that the court should charge for the defendant.

(46) The Court of Civil Appeals has erroneously declared the substantive law of this case upon a question of law that substantially affected the right of plaintiff in error to maintain its defense, in that:

The court failed and refused to hold, as contended by plaintiff in error, which contention was seasonably pre-

sented, that the trial court erred in refusing to submit to the jury question No. 6 requested by plaintiff in error, whereby it sought to have the jury say whether or not Wright, Ozment and others, bound themselves to rent the houses referred to, to officers and employes of the International & Great Northern Railroad Company, and for how long.

(47) The Court of Civil Appeals has erroneously declared the substantive law of this case upon a question of law that substantially affected the right of plaintiff in error to maintain its defense, in that:

The court failed and refused to hold, as contended by plaintiff in error, which contention was seasonably presented, that the trial court erred in not giving without qualification special charge No. 3 requested by defendant, instructing that the record of the alleged proceedings in which the voters of Anderson County voted the issuance of bonds and of the action of the Commissioners Court thereon, was the exclusive evidence of the contract between the County of Anderson and the railroad company, and furnished no basis for a recovery by defendants in error, and further instructing that promises made by Grow and others during the canvass preceding the election or afterwards, when the bonds were issued and delivered to Grow, concerning the location of general offices, roundhouses and machine shops, constituted no contract with the County of Anderson or with anyone else, and that the jury could not base a verdict upon any contract claimed to have thus been made between the railroad company and the county.

(48) The Court of Civil Appeals has erroneously declared the substantive law of this case upon a question of

law that substantially affected the right of plaintiff in error to maintain its defense, in that:

The court failed and refused to hold, as contended by plaintiff in error, which contention was seasonably presented, that the verdict of the jury was without evidence to support it, since the evidence failed to show that in the transactions between Reagan and Grow, the former was acting for citizens of Palestine, but, on the contrary, showed affirmatively that he was acting for the citizens of Anderson County at large, if there were any such transactions.

(49) The Court of Civil Appeals has erroneously declared the substantive law of this case upon a question of law that substantially affected the right of plaintiff in error to maintain its defense, in that:

The court failed and refused to hold, as contended by plaintiff in error, which contention was seasonably presented, that the trial court erred in its judgment in failing to define and restrict the injunction and command to the shops and roundhouses at Palestine, and in refusing and failing to state that the judgment did not apply to other shops and round-houses not at Palestine, and did not require them to be closed or go out of operation, there being no ground in the pleading or evidence for the judgment so stated.

(50) The Court of Civil Appeals has erroneously declared the substantive law of this case upon a question of law that substantially affected the right of plaintiff in error to maintain its defense, in that:

The court failed and refused to hold, as contended by plaintiff in error, which contention was seasonably presented, that there was no foundation either in the issues found by the jury or in the evidence for the recovery by

Anderson County in favor of which, as well as of the other defendants in error, judgment was rendered, and because the consideration for which the bonds were issued was evidenced by writings and the decree of the County Court, and could be neither added to nor changed, and were exclusive of the general offices, shops and round-houses.

(51) The Court of Civil Appeals has erroneously declared the substantive law of this case upon a question of law that substantially affected the right of plaintiff in error to maintain its defense, in that:

The court, on page 8 of its opinion, and elsewhere in its opinion, held against the contention of plaintiff in error, seasonably presented, that under the laws under which the charter of plaintiff in error was taken out, it could not name the place for its general offices and principal place of business, and that the statute commonly known as the office-shops statute applied, although it (the plaintiff in error) never entered into any contract therein mentioned.

(52) The Court of Civil Appeals has erroneously declared the substantive law of this case upon a question of law that substantially affected the right of plaintiff in error to maintain its defense, in that:

The court held, on page 11 of its opinion, against the contention of plaintiff in error, seasonably presented, that the effect of the consolidation of the Houston & Great Northern and International Railroad Companies into the International and Great Northern Railroad Company was to cause the consolidated companies to be operated under a charter which would read "that the principal office should be situated at Houston, Texas, or at such town on the line of said railway as may be deemed most

convenient for the transaction of its business, and may be moved from time to time to such place on such line as the progress of work of construction may render expedient and necessary," because the consolidation was made under the application of the charters of the two companies, that the International describing no place except one to be on the line of its road, and that of the Houston & Great Northern prescribing Houston, Texas, whereby the provisions of the office-shops act of 1889 requiring the general offices to be at the place named in the charter would be applicable to the general offices of the consolidated company, or of plaintiff in error.

(53) The Court of Civil Appeals has erroneously declared the substantive law of this case upon a question of law that substantially affected the right of plaintiff in error to maintain its defense, in that:

The court held against the contention of plaintiff in error to the contrary, seasonably presented, that the provision of the general office-shops act of 1889, that the general offices should be kept at the place named in the charter, was not applicable to this case, in view of the alleged contract that the offices were contracted to be located at some other place in consideration of county aid by bond issue, because the holding is directly in the teeth of the statute, and because according to the theory of defendants, sustained by this statute, the consideration in this case was not exclusively a bond issue, but also Judge Reagan's alleged political efforts and speeches in inducing the people of the county to vote a bond issue rendering the whole agreement illegal by reason of the illegal element or consideration of inducing voters to enter into any contract.

(54) The Court of Civil Appeals, in its decision of this

case, held differently from the prior decision of the Supreme Court in this case upon the question of law as to the operation of the general office statute of 1889, the same being Articles 6423, 6424 and 6425, Revised Civil Statutes of 1911, upon the property and franchises of the International & Great Northern Railroad Company, acquired by plaintiff in error under the foreclosure sale of such property and franchises, made in pursuance of a decree foreclosing the lien of the mortgage of said International & Great Northern Railroad Company of June 15, 1881, the Supreme Court having held in the case of International & Great Northern Railway Company v. Anderson County et al., 156 S. W., 499, reviewing the judgment of the Court of Civil Appeals, rendered in an appeal from the interlocutory order of the District Court granting both a restraining and a mandatory injunction in this case, that the effect of said statute was to create a burden or servitude upon said property and franchises, operating as a qualification of such franchises and an incumbrance on said property, or a part thereof, and on said franchises, and the Court of Civil Appeals having held upon this appeal to that court that said statute did not operate as a burden, lien, claim or right or lien *in rem* upon said property and franchises. Said different holding by the Court of Civil Appeals is plainly upon a question of law, and arises upon exactly the same issue as was passed upon by the Supreme Court in its decision; and the condition as to the identity of the issue is not altered by the fact that it is, in the present state of the record, a part of a constitutional question which was not, and could not be, pleaded by plaintiff in error in the former appeal.

III.

ASSIGNMENTS OF ERROR, PROPOSITIONS, STATEMENTS FROM THE RECORD, AND CITATION OF AUTHORITIES IN SUPPORT OF THIS APPLICATION.

First Assignment, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law of this case by holding that two judges of the court, to wit, Chief Justice Wilson and Associate Justice Hodges, were not disqualified by reason of the fact that they were related within the third degree of consanguinity and affinity to citizens of Palestine, who, though not formal parties to the suit, were within legal contemplation parties to the suit. This error injuriously affected the right of plaintiff in error to maintain its defense, for the reason that it was denied the right of the decision of this case by a tribunal qualified under the Constitution and laws of this State, whereby the error did cause and was calculated to cause the rendition of an improper judgment.

By the opinion of the Court of Civil Appeals Messrs. Greenwood, the cousins of Judge Hodges, and counsel herein, and whose property interests were directly affected, as plead, could qualify or disqualify Justice Hodges and Wilson by putting in or not putting in such representative plaintiffs as they saw fit, the contention of the plaintiff in error being that it did not rest with them, at their option, to so qualify or disqualify the judges, and that the qualification or disqualification of the judges rests not upon a question of nominal parties, but upon the question of parties with real interests.

Statement.

The opinion of the Court of Civil Appeals, upon the motion suggesting the disqualifications, states that the relationship is agreed upon; the opinion does not state what appears by attached agreement to the motion; that Messrs. Greenwood, plaintiffs by representation, and counsel in the case, with their sister and mother, own over $25,000.00 of property in Palestine, and were citizens thereof before the institution of this suit, nor that David, the first cousin of Judge Wilson, has certain seniority rights in the shops at Palestine, all as set forth in the affidavit of David attached. The disqualification was discovered after the principal opinion was given in the case, and motion filed that the judges should certify their disqualifications, and set aside the decree of affirmance and opinion given, and subject to this motion a motion for rehearing. This suit was brought by Anderson County, the City of Palestine, Wright, and eight other citizens, stating "who sue herein in behalf of themselves and all other citizens of the City of Palestine, styled herein plaintiffs." (R., 47.) The suit was brought on the basis of two alleged contracts, one plead to have been made by the Houston & Great Northern Railroad with the county and with "the citizens of the City of Palestine, acting by and through Judge John H. Reagan, in 1872" (R., 49 and 50); and secondly, on an alleged contract of 1875 of the International & Great Northern Railroad Company, whereby it "contracted and agreed with the citizens of Palestine," etc. (R., 56.) It was alleged that the plaintiffs had acquired property rights in the City of Palestine worth many hundreds of thousands of dollars; that very large interests were involved; that moving the general offices from Palestine had damaged all property in the city to

over $100,000.00, which would continue and grow, and that moving the shops would damage the property in the city over one-half million dollars; and that the business interests would be severely damaged. (R., 64.) The decree of the District Court affirmed was "that the plaintiffs, Anderson County, City of Palestine, George A. Wright, and eight others, for and in behalf of all the citizens of Palestine, do recover judgment," etc. (R., 559.) The motion was overruled by the Court of Civil Appeals on February 11th, and in due time the plaintiff in error filed a motion for a re-hearing upon the opinion and decree of February 11th, overruling such motion, wherein it was set out that the court had erred in holding that the disqualification did not exist, because it was admitted and agreed that the two judges were related within the third degree to citizens of Palestine; and secondly, because the court had erred in not finding that the Greenwoods and David were within the referred to meaning of the statute of disqualification parties to this suit. On February 25th, this motion for re-hearing was overruled. In the original motion and suggestion of disqualification it was set out, together with agreements and affidavits, that the relationships existed, and had been discovered after the decree of affirmance was made, and the court's attention was directed to the terms of the pleading mentioned above, and that the relationship constituted a disqualification of the two judges, and voided the opinion.

Authorities.

Section 11, Art. 5, Constitution of Texas.
R. S. of 1911, Art. 1584.
Duncan v. Herder, 122 S. W., 904; 57 T. C. A., 542;

affirmed by Supreme Court on single point by refusing writ of error, 104 Tex., 686, and overruling Winston v. Masterson, 87 Tex., 200.
Jirou v. Jirou, 136 S. W., 493.
Hodde v. Susan, 58 Tex., 593.
K. C. M. & O. R'y v. Cole, 145 S. W., 1098, in connection with City of Sweetwater v. K. C. M. & O., 104 Tex., 329.
Hovey v. Shepherd, 105 Tex., 237.
Dennard v. Jordan, 37 S. W., 876.
Wetsel v. State, 23 S. W., 825.
State v. City of Cisco, 33 S. W., 244.
Casey v. Kinsie, 23 S. W., 818.
Schulte v. McLeary, 73 Tex., 92.
Jordan v. Moore, 65 Tex., 363.
Gaines v. Barr, 60 Tex., 676.
Simpson v. Brotherton, 62 Tex., 170.
Crook v. Newborg, 124 Ala., 479, and 27 So., 432, and 82 Am. St. Rep., 190.
Zaratee v. Villarael, 150 S. W., 334.
Cooley's Constitutional Limitations, 5th Ed., 403-410.
Freeman on Judgments, Vol. 1, Sec. 147.
Oakley v. Aspinwall, 3 N. Y., 547 (3 Comst.).
Seward v. Tasher, 143 N. Y. (Sup.), 257.
Queen v. Justices, 6 Queen's Bench, Jan., 1845, p. 753, Vol. 115, English Reports, Reprint, and same case, 44 King's Bench, p. 284.

In accordance with Subdivision (i) of Rule One of the Rules of the Supreme Court of June 25, 1913, the court is now referred to the separate printed argument upon this sole point, filed in the Court of Civil Appeals in support of the suggestion and motion to that court, and for the setting aside of the decree of affirmance on that ground.

Second Assignment of Error, Which is Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law of this case, by holding that the State

District Court has jurisdiction to try this case, and that such jurisdiction was not exclusively in the United States District Court for the Northern District of Texas, successor to the United States Circuit Court for that District, because that court, in foreclosing the second mortgage of the International & Great Northern Railroad of 1881, by its decree of May, 1910, had the power to reserve, as it did, the exclusive jurisdiction to determine the validity and priorities of any such burdens, liens, conditions, duties or servitudes impressed on any of the franchises or other property of the sold-out railroad, since a court making a foreclosure, especially of complicated properties, has the power to reserve to itself in the decree the exclusive power over litigation of such matters asserted under or in connection with the acts of the foreclosed debtor or its predecessors in title, and to dispose of them by a supplemental bill instead, of delaying the case to bring them in before the decree of foreclosure and sale. Such reservation of jurisdiction being, as it were, a contract and warranty of the court foreclosing that the litigation of such matters shall be exclusively in the court of foreclosure, which reservation, when so made, is for the benefit of the purchaser, as is the International & Great Northern Railway Company of 1911, under the decree of foreclosure.

The erroneous ruling of the Court of Civil Appeals in this regard, and in refusing to maintain the contention that the State court had no jurisdiction, injuriously affected the right of the plaintiff in error to maintain its defense for the reason that the plaintiff was denied the right of the hearing in the determination of such matters by the United States District Court for the Northern District of Texas, where it had a right under the terms of the decree of foreclosure (under which it bought) to have

the issues of this case exclusively ruled and determined. This assignment presents a Federal question.

Statement.

This point was presented in the motion for new trial as to the plea of abatement, described below, Section 2, R., 562, and Section 3, R., 562-4, setting out all of the facts in the plea of abatement had been proved, stated below, and that the plea had been erroneously overruled, and also the refusal to sustain the plea in bar on the same facts (R., 590, Sec. 96 of motion for new trial), all of the motion for new trial wherein the assignment now made was preserved with regard to the plea in abatement, and the same plea made in bar, and which set up all the proceedings, as now stated. In the motion for re-hearing in the Court of Civil Appeals, the same position was taken and assigned as error in Sections 2 and 3 thereof, in the terms of this assignment, and all preserved in brief, pp. 3-6.

The plaintiffs claim that they have a burden or lien *in rem*, created by the act of 1889, to secure their alleged contracts of 1872 and 1875. The defendant presented this proposition by plea to the jurisdiction, and also plea in bar, both pleas being upon substantially the same facts. The plea to the jurisdiction is presented under Section 1 of the answer (R., 69 to 82), and the several exhibits thereto. This plea is sufficiently stated as follows: It was set out that on the 25th of February, 1908, the Mercantile Trust Company filed its bill against the I. & G. N. R. R., in the United States Circuit court for the Northern District of Texas, for the foreclosure of its mortgage of March 1st, 1892, for the aggregate principal amount of $3000.00, and for a receivership, which

receivership was granted, and Thos. J. Freeman appointed receiver. (R., 69-72, & D; R., 145-225.)

This was not the foreclosed mortgage of 1881, but what is known as the third mortgage, junior to what is known as the second mortgage, the foreclosed mortgage of 1881, hereinafter stated.

It is next plead that George J. Gould and others filed a bill in the same court, and that on this bill (their claims being unsecured) Thomas J. Freeman was also appointed receiver June 2nd, 1908. (R., 72-73, and Exhibit E, R., 226-230.)

That, on April 20th, 1908, before the bill was filed by George J. Gould and others, the Farmers Loan & Trust Company filed its bill to foreclose the mortgage of June, 1881, for $10,391,000.00 principal and interest, and for the appointment of a receiver. Whereupon, upon this bill, on the 20th of April, 1908, Thos. J. Freeman was appointed receiver. (R., 71-72, and Exhibits C and D, R., 191-223.)

It was plead that thereafter, in June, 1908, Thomas J. Freeman, receiver, applied for the consolidation of all of these cases, and that they were consolidated into Cause 2501. (R., 73-74, and Exhibit "F," R., 230-232.)

It was next plead that these three bills being consolidated, the cause proceeded; and various administrative orders entered; but that on May 10th, 1910, the court decreed foreclosure of the second mortgage of 1881, foreclosing that mortgage upon all of the properties, tangible and intangible, corporate rights and franchises, covered by the mortgage, and directing sale thereof. This decree is stated below.

It was plead that the sale was adjourned from time to time, and was finally made on June 13th, 1911, confirmed

by the court, and that on Aug. 8th, 1911, the defendant was chartered, as appears by its charter exhibited, which authorized it to purchase the properties of the sold-out railway bought by Nicodemus, and that Nicodemus, the purchaser, and the receiver, under orders of the court, conveyed the properties to the plaintiff, as appears by the deed exhibited. (R., Secs. 11-16, incl., pp. 77-78, and Exhibits I-L, incl., R., 260-294.)

That the properties were bought in by Nicodemus, representing the second mortgage bondholders, with the decree, except to the extent of $244,253.45, paid in cash, the second mortgage bondholders being the owners of the decree, and applying the same on their bid, but that they failed to realize the amount due them under their decree. (R., 78-79, Sec. 17.)

It was next plead that all of the notices provided for by the decree had been given; that the I. & G. N. Railway, eexrcising its option under the decree to denounce the alleged contract sued on, had, under proper order of its Board of Directors, within the six months provided by the decree, denounced the same, and stated that it would not perform the same (not acknowledging, but denying, that any such contracts as alleged existed); which denunciation it made by filing with the clerk of the United States Court, and by promptly serving notice thereof on the Commissioners' Court of Anderson County and the City Council of Palestine by having such notices read to these bodies. (R., 79-80, Sec. 21, and Exhibits M. N. O. and P, R., 294-308.)

The defendant also plead that it purchased the properties upon the faith, guarantees and statements of the decree, and the reservations therein. (R., Sec. 19, p. 79.)

Upon these pleadings the defendant deduced that the

1130

United States Circuit Court, now succeeded by the United States District Court of the Northern District of Texas, had reserved jurisdiction over all the questions herein involved, and that it appeared upon the face of these proceedings that the District Court of Cherokee County had no jurisdiction, and that the cause should abate. (R., Sec. 22, pp. 80-82.) This plea was sworn. (R., 82.)

The plaintiffs filed a supplemental petition, wherein it admitted the allegations in the plea of abatement, as follows: That the Mercantile Trust Company had filed bill of complaint instituting the receivership proceedings on the third mortgage; that the receiver was appointed; that George J. Gould and others had filed a bill; that upon the bill of George J. Gould and others Thomas J. Freeman had also been appointed receiver; that the Farmers Loan & Trust Company, Trustee of the second mortgage of 1881, had filed their bill as alleged; that the decree of foreclosure had been entered, as set out and exhibited as Exhibit "H"; that the sale had been deferred from time to time, and made final, as alleged by defendant, and the properties conveyed to defendant. But they did not admit that the case was still pending as alleged. It was admitted that the defendant's Board of Directors had directed a denunciation of the alleged contracts sued on, and that this denunciation had been served upon the Town Council of Palestine and the Commissioners' Court of Anderson County, and filed in U. S. Court. (R., 368-370.) The deductions as to jurisdiction of the Federal Court were not admitted. In replication to the plea in abatement and to the jurisdiction, the plaintiffs set up that they were never parties to the proceedings in the Federal Court (R., 370, Sec. 23); that the receiver had been discharged, and that it had been decreed by the United

States Court that all the properties sold out, and the receiver's and court's possession thereof, or control of the same as receiver, were discontinued. (R., 371-372, Sec. 24.)

Before the jury trial, it was agreed that plea to the jurisdiction should be tried by the court without a jury, whereupon he proceeded to the trial thereof, as appears by bill of exception 2-a. (R., 383-384.) Having heard the facts and the proof, the court overruled the plea in abatement, and as also appears by his judgment in this case. (R., 552.) The defendant made the assignments in its motion for a new trial presented above, which was overruled with its other grounds. (R., 619-620.)

The defendant also presented the same matter in a plea in bar. Having made its plea to the jurisdiction, it presented certain demurrers (R., 82-87), and then traversed the allegations of the plaintiff's amended petition, admitting or denying the same, as might be (R., 88-94, Sec. 3); made certain special pleas of limitation, etc. (R., 94-97), and then, under Section 8, commencing on R., 97, repeated as a plea in bar its above plea in abatement, including all of the allegations therein. (See down to Section 22, p. 108.) On this plea in bar the defendants deduced that the proceedings in the District Court of Cherokee County were in definance of and in contradiction to the decree of foreclosure of the United States Court; that all of the matters herein were reserved and only subject to be litigated in that court; that such decree had so assured the purchaser and his assigns; and that the defendant had relied thereon in purchasing; and also, the defendant presented that the United States Court had first acquired jurisdiction and invoked the Constitution and statutes of the United States, and the jurisdiction

and decision of such United States Court, and not limiting the above, insisted on Section 709 of the R. S. of the United States, carried into Section 237 of the Act of Congress of March 3rd, 1911 (36 Stat., 1087), in protection of the title, right, privileges and immunities established by and acquired by the authority of the decree and proceedings of said Federal Court. (R., Secs. 22-23, pp. 108-110.)

As appears above, the essentials were admitted by the plaintiffs, but they were also all proved by the defendant: (1st) Under its plea of abatement; and (2nd) under its plea in bar before the jury. The bill of the Mercantile Trust Company, the various appointments of the receiver, the bill of George J. Gould, the decree of foreclosure, and the orders of sale, and the deed, were all proved and set out; and that the denunciation of the alleged contracts had been made and served: and also that the bonds authorized by the mortgage of 1881 had all been sued on or bought as the debt of the mortgage, and that the mortgage was authorized. (St., I-VI, trial before the judge of the plea of abatement; and St., 241-274, 274-275, 275-276, 276-282; 8-28, 35-45, 52-67, 39-40, 285-286, 287-297, 48-52.)

It is unnecessary to more fully state, except to recapitulate the decree of foreclosure of May 10th, 1910, and to state the plaintiffs' pleading and certain developments on trial that their evidence was entirely of claimed parol agreements, and separately made from the undoubted written contract with the county.

This decree foreclosed the second mortgage of 1881, and declared all of the allegations of the bill therein to be true, and established the amount of the principal of the mortgage, being the first mortgage of 1879 not foreclosed; and also the amount of the third mortgage of 1892, the

third mortgagees having first sued for foreclosure and receivership, but being subjected to the foreclosed second mortgage of 1881. (St., 9-11.) The court then proceeded to the foreclosure of the mortgage of June 15th, 1881, and to the order of sale thereunder. This foreclosure included, generally speaking, the properties of the I. & G. N. "together with all its corporate rights, privileges, immunities and franchises * * * and all the tolls, fares, freights, rents, income and profits thereof, and all the reservation and reservations, remainder and remainders thereof" (St., 12-13); and including balance of incomes of the receiver subject to application thereof as the court might direct to the payment of receivership obligations, and the payment of claims which might be allowed by the court with priority over the foreclosed mortgages. (St., 13.) The court further declared that the lien of the second mortgage *was prior to all other liens, except as the court should state.* (St., 19.)

By Section XII (St., pp. 18 & 19) foreclosure was decreed of all properties and assets in hands of the receiver, subject to the court's making orders diverting the same to priorities; and that all of the title and right, and right of redemption, in the properties and franchises, tangibles and intangibles of the defendant, and of all parties; and of all *"persons claiming or to claim under them or either of them, of, in and to said premises, property and franchises, and every part and parcel thereof, shall be forever barred and foreclosed."*

The terms of the sale were then set out. It was directed that the sale should be subject to the first mortgage of 1879, and also *"to any unpaid indebtedness or liability, contracted or incurred by said defendant railroad, in the operation of its railroad, which the court may hereafter*

order or decree herein to be prior or superior to the lien of the said mortgage dated June 15th, 1881, * * * and subject also to the debts, claims, liens and demands of whatsoever *nature heretofore incurred or created,* or which may hereafter be incurred or created by the receiver herein, under orders of the court heretofore entered herein * * *'' and also subject to certain other specified liens on particular properties. (St., pp. 21-22-24.)

The commissioner appointed to make the sale was to give notice, when directed by the court, requiring all claimants, for debts and *''liabilities,''* to bring the same forward, with provision that if they do not do so, they should not enforce them against the receiver *''or against the property sold, or against the purchaser, or his successors or assigns,''* and that if such claims were permitted against the property *the purchaser should have the right to contest them in the court making the decree.* (St., bottom p. 22, to p. 23.) On page 24 it was set out again, as above, exactly what the purchaser should take subject to, and that he should not take subject to matters not then provided for. At the end of the decree (St., p. 27), it was provided that the purchaser, on the terms *stated could denounce any contract of the* sold-out railroad, as not to be assumed by it; and that: *''All questions not hereby disposed of,* * * * *including the disposition of all claims heretofore filed herein, or hereafter to be so filed, in accordance with the provisions of this decree, are hereby reserved for future adjudication; and the court reserves jurisdiction of this cause, and of the property affected by this decree, for the purpose of final disposition of all such questions and matters, and any party to this proceeding, and any claimant whose*

claims have been, or shall be, so filed herein may apply to the court for further orders and directions at the foot of this decree." (St., 27-28.)

Denunciation was made as set out above. (St., 286-298.)

The plaintiffs are Anderson County, the Town of Palestine, and nine citizens of Palestine, suing for themselves and all other citizens of Palestine. In their origianl petition, carried before the Court of Civil Appeals and the Supreme Court, it was contended at great length that the sale made in 1911 of the properties of the sold-out I. & G. N. R. R. was fraudulent, and that the defendant was but the I. & G. N. R. R. in a new skin. The terms of the decree of foreclosure, the style of the case, and the history of the foreclosure, were all left out of the original petition, and suppressed. (R., 11-24.) This charge of a fraudulent sale, and that the I. & G. N. R'y was the old corporation made up into a new package, has been abandoned, and was left out of the amended petition, on which the trial was had. (R., 46-68.)

The plaintiffs, on trial, stood their case exclusively on two general asserted causes of action, the second, however, growing out of the first, and dependent thereon, as it included the first; and the first involved certain iterations and reaffirmances to be separately analyzed.

(1) It was alleged that in March, 1872, the H. & G. N. R. R. had its road under construction, but had not reached Anderson County, and that Grow, its President, contracted and agreed with Judge John H. Reagan, representing the citizens of Palestine, to build into Palestine to an intersection with the I. R. R., and to establish a depot there within one-half mile of the courthouse by Jan. 1st, 1873, and there to locate and forever keep and

maintain the general offices, machine shops and roundhouses of the H. & G. N. R. R. *"for and in consideration of the promise and agreement then made, upon the part of the said Judge John H. Reagan, to make a thorough canvass of Anderson County to induce the electors thereof to authorize by their votes the issuance of the interest bearing bonds of said county in the principal sum of $150,000.00, and for and upon the further consideration that Anderson County, on authorization of its electors, in the manner prescribed by law, should issue to the H. & G. N. R. R. its interest bearing bonds in said principal sum of $150,000.00 upon the completion of said railroad to its intersection with the I. R. R. at Palestine, and upon the establishment of a depot within a half-mile of the courthouse, and upon the commencement of running cars regularly to such depot."*

It was alleged that Judge Reagan, in the performance of this agreement, canvassed the county and induced the electors to vote the bond issue; that the railroad was built in and received the bonds, and also that Grow was authorized by the H. & G. N. R. R., and his action in making this agreement ratified, and that Grow himself made speeches telling the voters that he had made this agreement, and that the voters acted upon Grow's speeches and statements, and voted the bonds, and that Grow afterwards got the bonds from the County Court by representing that he would carry out this agreement. (R., 49-54, Sections 9-17, inclusive.)

Under the Constitution of 1869 the issue of these bonds by the county was not prohibited, as by the present Constitution of 1876, but their issue was regulated by a statute requiring a *proposition for a contract, stating in writing what the railroad was to do* to get the bonds, to be

submitted to a vote of the people of the county or town. If this written proposition was adopted by vote, it then became the exclusive contract. The allegation is that the county was to issue these bonds on the consideration to it of the completion of the road into Palestine, and the erection of the depot, and the commencement of the operation of the railroad into Palestine; that the bonds were to be issued upon the H. & G. N. R. R. doing three things: (*a*) building into Palestine; (*b*) putting up the depot at Palestine at the junction of the I. R. R., and within a half mile of the courthouse; (*c*) commencing to operate such railway, but also that the county ratified the Reagan-Grow agreement, and became the third party thereto.

It thus appears that this ground of the suit is that Judge Reagan, representing the people of Palestine, as differentiated from the county (but a portion of the county), and Grow, the President of the H. & G. N. R. R., agreed that if Judge Reagan would make a canvass of the county and use his influence *"to induce"* the county to adopt the contract with the railroad, then, on the side, Judge Reagan, for his services *in influencing the result, should receive a consideration* for such services, which he passed to the Town of Palestine, not taking anything individually for influencing the election; in other words, that the Town of Palestine, *hiring out Judge Reagan's services,* with Judge Reagan's consent, should receive therefor the general offices of the H. & G. N. R. R. forever, and the shops and roundhouses of the H. & G. N. R. R. forever, and that, when the I. R. R. and the H. & G. N. R. R. were married into one entity, termed the I. & G. N. R. R., the obligation was extended to the new entity (R., Sec. 9, pp. 49-50), and that the whole matter was submitted to the county voters, and explained to

them, and that the county accepted the proposals, thereby becoming the third party to the alleged three-party contract.

The balance of the allegation, in regard to this first position, is of its confirmation by the H. & G. N. R. R., and that Grow, its President, made a speech and told the county electors that he would do these things, and that Judge Reagan used his influence and canvassed the county; and that *Grow, when he went to get the bonds, assured the County Court that he would place the shops, roundhouses and offices at Palestine,* and that the court delivered to him the bonds in 1873. (R., 50-54.)

(2) The second ground includes the first, and is dependent upon the proof of the alleged Reagan-Grow contract made in 1872. As appears above, the H. & G. N. R. R. and the I. R. R. are alleged to have been merged in 1873.

It is alleged that about the beginning of 1875, the consolidated corporation, known as the I. & G. N. R. R., acting by Hoxie, its Manager or President, contracted with the citizens of Palestine and Wright and Ozment, two of them, that it would keep the alleged Reagan-Grow contract, and move its general offices from Houston, Texas, and maintain them and its shops and roundhouses *forever at Palestine, in performance and consideration of the alleged Reagan-Grow contract, and in consideration of the bonds issued by the county to the H. & G. N. R. R. (which bonds the H. & G. N. R. R. had received in 1873), and for the additional consideration that the citizens would at once construct rent houses, and rent them to the employes of the I. & G. N. R. R. at Palestine at reasonable rentals.* (R., 55-58, Secs. 21-23.)

It was shown, on trial, without dispute, that Anderson

County had sued the H. & G. N. R. R. in 1874 to cancel the bonds on various grounds of fraud, etc., and on the ground that the *H. & G. N. R. R. had promised* to put up its shops and roundhouses at Palestine, as an inducement for the issue of the county bonds, though this was left out of the written contract. Anderson County was defeated in this suit, it going to the Supreme Court, and a complete record before the Supreme Court being introduced, it being ruled, among other things, that the county could not contradict its order issuing the bonds, declaring that the H. & G. N. R. R. had complied with its undertakings, nor its own written contract, which was complete of the considerations to be rendered by the railroad, which were as appears above: (*a*) to build into Palestine; (*b*) to put up a depot within half a mile of the courthouse; and (*c*) to operate the railroad. (St., 132-147; 52 Tex., 228.)

The plaintiffs contended that, although these alleged contracts were admittedly purely personal in their origin, yet that, by the act of 1889, these agreements, alleged to have been made in 1872 and 1875, were by such subsequent statutes (now carried into the R. S., and known as the "office-shops act"), defined and secured *in rem* by a lien and burden on properties and franchises, physical and metaphysical, of the sold-out I. & G. N. R. R.; whereby it is claimed the act of 1889, though junior in time, gave a right prior in law to the mortgage of 1881, foreclosed as appears above, and to every decree of foreclosure thereof; and that such giving of a security did not vary the contract or its obligation or violate any rights constitutionally secured to the defendant or to the mortgagees of the mortgage under which it holds, and

that such act, as so applied, was not violative of the obligations of the alleged contract, and did not add thereto.

When this case was carried into the Court of Civil Appeals and Supreme Court, on the petition of the plaintiffs (without any opportunity to answer by the defendant, or any trial), the history of these matters was left out of the petition, including even the name of the court where the decree of foreclosure had been entered, the style of the foreclosure, and the terms of the decree of foreclosure, and the date of the foreclosed mortgage. On trial it appeared as shown in statements below, that the Reagan, Grow and Hoxie rent house alleged contracts were claimed to be oral; the bond contract with county being in writing.

By the evidence, it was made definite that the contract with the county on which the people voted, was in writing, and that all the matters on which the plaintiffs rely were claimed to be in parol, and none of them included in the writing.

The defendant excepted to the court's charge that a peremptory should be given, tendered the peremptory, which was refused, and excepted to the refusal, and preserved the history of these matters in its bill 41. (R., 507, 511, 545 and 546.)

The suit was instituted in the District Court of Anderson County. At the April term, next after institution, it was agreed that the case should be continued without prejudice to question of jurisdiction. (R., 31-2.)

The final report of the Master making the sale was filed September 22nd, 1911 (34-35), but therein, as is confirmed below, he stated that the court had already confirmed the sale which he had reported on June 14th, 1911, and that the purchaser had complied with the sale and made his

payments; that the I. & G. N. Railway, which was organized in Angust, 1911, had become the assignee of the purchasers, and had stipulated, with the Commissioner, to pay any other sums which the court might determine, and that the I. & G. N. R'y Company, or the original purchasers, had paid the whole bid in cash and bonds of $12,646,000.00, and he exhibited the assignment of Nicodemus to the I. & G. N. R'y Company, copy of the deed to the I. & G. N. R'y Company executed and delivered by the Master Commissioner, and reciting all of these considerations. Upon this report and the previous decree confirming the sale of the court on September 25th, 1911, dismissed the Receiver, and entered the decree upon which the appellees rely. (St., 47-52.) This decree recited that the sale had been made in accordance with the decree of foreclosure of May 10th, 1910, upon which we rely, and that in accordance therewith the I. & G. N. R'y Company, or Nicodemus, the original purchaser, had made payment of the purchase price, that the deed had been delivered to it, and that the matter up for consideration was *the final report of the Master and the final account and report of the Receiver;* that the purchase price at the foreclosure had been fully paid on September 13th, 1911, and all rights of the purchaser had been assigned to the I. & G. N. R'y Company, a corporation organized under the laws of Texas; and that a deed had been made to it, executed as prescribed by the deed of foreclosure on May 10th, 1910, and that this deed had been duly delivered to the I. & G. N. R'y Company; and that on *September 16, 1911,* T. J. Freeman, Receiver, had delivered to the I. & G. N. R'y Company, grantee in the deed, *full possession of all of the properties* sold; whereon the court decreed (1) that the final report of Flippen, the Master, be accepted

and approved; (2) that the final report of T. J. Freeman, Receiver, be accepted and approved, showing, among other things, that he had delivered the properties to the I. & G. N. R'y Company, which company is decreed to hold the same discharged "from the possession and custody of said Receiver and this court from and after September 16, 1911"; (3) that the final accounts of the Receiver be accepted; and (4) that he be discharged, and that all of the railroads and properties formerly in his possession or control were finally discharged from the custody and control of the Receiver and the court. On page 49 of St., and as a part of this decree of September 25, 1911, it is stated that the sale of the properties had been reported on June 13, 1911, "as heretofore reported to the court and confirmed," and that the deed had been executed and delivered in accordance "with the terms of said decree of May 10, 1910, as in said decree provided." (St., p. 50.)

The first decree of the court made on the report of June 13th, immediately after the sale, confirmed the sale. The report is set out in this statement. (St., 29-31.) It reports that the sale had been made for $12,645,000.00, in accordance with the terms of the decree of foreclosure. The decree of the court thereon was entered June 14, 1911, as follows: "Hereby ordered that the Master Commissioner's report of sale filed herein on the 14th of June, 1911, be and is hereby in all things ratified, approved and confirmed, and that the sale to Frank C. Nicodemus, Jr., *be and is hereby confirmed and made absolute,* and the said Frank C. Nicodemus, Jr., *is adjudicated the purchaser of said property, premises and franchises, subject, however, to all the terms and conditions of decree of foreclosure entered herein on May 10, 1910, and subject also to the due performance by said pur-*

chaser, his successor or assigns, of all the obligations therein described.'' (St., 33.)

Authorities.

Julian v. Central Trust Co., 193 U. S., 93; 48 L. Ed., 629.
Wabash Railroad v. Adelbert College et al., 208 U. S., 38 and 609; 52 L. E., 379.
Jessup v. Wabash R'y, 44 Fed., 663.
Lang v. Choctaw R'y, 160 Fed., 355.
St. Louis, etc., Co., v. Co., 148 Fed., 450.
Taylor v. R'y, 162 Fed., 452.
Trust Co. v. R'y, 59 Fed., 385.
Dietzsch et al. v. Hidekoper, 13 Otto (103 U. S.), 26 Law Ed., 497.
French, Trustee, v. Hay, 22 Wall., 250.
Root v. Woolworth, 150 U. S., 401; 37 L. Ed., 1123.
Lanning v. Osborne, 79 Fed., 657.
Gunter v. R'y, 200 U. S., 292; 50 L. Ed., 487.
Pacific R'y v. R'y, 111 U. S., 505, and 28 L. Ed., 498.
Hatcher v. Henchie, 133 Fed., 267.
Brown v. Morgan, 163 Fed., 395.
Story's Equity Pleading, paragraphs 429 and 959.
Bates Fed. Eq. Jur. Procedure, Vol. 1, Sec. 97.

NOTE: For argument on this point, see brief of appellant in the Court of Civil Appeals, pages 21 to 47, and separate printed argument for appellant in the same court, in reply to appellee's brief, commencing page 1 and extending to II, p. 14.

Third Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals substantially erred in its application of the substantive law of this case by holding that the District Court of the State of Texas had jurisdiction hereof, and that the jurisdiction was not exclusively in the United States District Court for the Northern District of Texas, because the litigation in the State Court is

in conflict with, and a denial of the right, title, privileges and immunities of the plaintiff in error as protected by the decree of the United States Circuit Court, by the exercise of powers conferred on it by the Constitution of the United States, by which decree it foreclosed the properties of the sold-out International & Great Northern Railroad, and as protected by Section 237 of the act of Congress of March, '11 (33 Stats., 1156, and the Statutes of the United States, Section 709), in that it acquired the properties of the sold-out I. & G. N. R. R. in 1911, under the decree of the foreclosure of the United States Circuit Court for the Northern District of Texas, wherein it was provided that any such contracts as the alleged contracts could be denounced by the purchaser or its assigns, if they existed, and whereunder the plaintiff in error denounced these alleged contracts, if any, in accordance with the terms of the decree, which also reserved the litigation of these matters exclusively for the foreclosing court.

Said erroneous ruling injuriously affected the rights of plaintiff in error to maintain its defenses for the reason that the State Court had no jurisdiction, and was calculated to and did result in an erroneous judgment.

Statement.

Same as the last above. This point was presented in the motion for a new trial in the terms of this assignment (R., 590-591) and in Section 5 of the motion for a rehearing, and in brief, page 47.

Fourth Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law of this case upon a point which substantially affected the plaintiff in error, against the main-

tenance of its defense, in that the court overruled and refused to maintain the contention that no contract can be founded upon the employment of services to influence or "induce" voters to vote for a bond issue, or to induce or influence any public official to enter into any contract or engagement or the body of the voters to adopt any contracts submitted to their votes; it being immaterial whether or not there was a bad intent or a corrupt motive; the plaintiffs alleging and introducing a great mass in evidence over the objections of the defendant in support of their allegations that a contract could be supported upon a consideration of a bargain for the use of Judge Reagan's influence and speeches and services to influence or induce the voters of Anderson County to vote the bond issue, to wit, the bond issue of 1872, and it being submitted to the jury to determine whether or not an agreement was made, based on such services of Judge Reagan, and whether or not Judge Reagan rendered such services as a consideration of the alleged contract sued on, to wit, made the speeches and induced the voters, the jury answering such questions affirmatively, it being the contention of the plaintiffs that such services in making the speeches "to induce the voters to vote the bond issue" could be the basis of a legally enforceable contract, and it being the contention of the defendant and plaintiff in error here that the law does not permit the inducing of voters by speeches or otherwise to be a consideration of a contract, but prohibits and denounces the same as contrary to public policy and as void. Such ruling of the Court of Civil Appeals and of the trial court was reasonably calculated to and did cause the rendition of an improper judgment in this case, in that it is founded upon

the verdict declaring that Judge Reagan did agree to induce the voters, and that he did so induce them.

Statement.

In the motion for re-hearing, this point was presented in Sections 9 and 10 thereof in the terms of this assignment. Section 6 of the motion for new trial presented that that the court erred in overruling demurrer 2 in Section 2 of the answer, which presented that the alleged consideration could not legally be a consideration, it being illegal to found a contract upon a supposed consideration of inducing the voters. (R., 564.) Section 8 of the motion for new trial presented that no contract could be founded upon such consideration, because the contract with the county was required to be in writing, and could not be proved, except by such writings, and because testimony could not be received to such alleged consideration, denounced as against the policy of law, *i. e.*, of inducing the voters. (R., 565.) By Sections 36, 37, 38, 39, 42, 44, 45, 46, 47, 48, 49 and 50 of the motion for a new trial (R., 571-572-573-574) there was presented the errors of the court in admitting in evidence (in order to show the existence of an agreement by Reagan to make the speeches as a consideration and to induce the voters, and what was said and done in that regard in the speeches), the testimony of Wright, Mrs. Reagan, Jacobs, Hughes, Watts, McClure and Ozment over the objection that no consideration could be founded upon inducing the voters to vote a bond issue, and showing that Judge Reagan had agreed to induce them, and made speeches to induce them, because public policy prohibited and the law did not permit any contract to be founded upon such consideration. All of these objections were overruled, and a great mass of testimony

received, in order to prove outside of the written contracts that the railroad had agreed to place the general offices, shops and roundhouses at Palestine forever, in consideration of Judge Reagan's alleged agreement to induce the voters, and the speeches he made for that purpose.

In Section 53 of the motion for new trial (R., 575) the same ground of error is insisted upon as against the admission in evidence (which was done over the same objection) of an article written by Judge Reagan and published in the Palestine paper in May, 1899, dealing with the terms and conditions on which the railroads built into Palestine, and making claim that it was then agreed that the shops, roundhouses and general offices should be at Palestine.

By Sections 54, 76 and 56 of the motion for new trial objection was made on the same ground, because these matters had been submitted to the jury over the request to withdraw them, and for a peremptory instruction. (R., 575 and 578.)

By Subsection "c" of Section 77 (R., 578-9, motion for new trial), the same point was presented in regard to the alleged contract made in 1879, embodying the alleged contract of 1872, which included the supposed consideration of inducing the voters, and by Section 127 (R., 609) of the motion for new trial, the same error was pointed out in admitting the testimony of Word over the objection of the defendant as to the parol representations and statements of Grow when he received the county bonds from the court. The assignments were brought forward in the brief from the motion for new trial. (Br., pp. 47-53.)

We refer to the first statement made above, under assignment No. 2, wherein it is set out by quotations from

the pleading that a three-party contract was made in 1872, formulated by Grow and Reagan, and accepted by the county, involving two considerations, first, Judge Reagan's agreement to make a thorough canvass of Anderson County, and second, the issue of the bonds by the county, which contract it is alleged was explained to the voters of the County and accepted by them, and that Judge Reagan canvassed the county and made speeches to induce the voters to vote the bond issue. The parties to this alleged contract were the people of Palestine, represented by Reagan, the railroad, represented by Grow, and the county. (R., 49-54, Secs. 9 to 17, inc.) It also was alleged, as appears under the referred to statement, that in 1875 the H. & G. N. and International, being consolidated but not having performed the undertaking of the H. & G. N. as to the general offices, shops and roundhouses, undertook, in consideration of the previous alleged contract, and of an agreement to furnish rent houses at reasonable rentals, to perform the same. (R., 55-56, Sec. 21.) The defendant demurred that inducing voters could not constitute a consideration, and these demurrers were overruled. (R., 83-84, Sections 2, 3 and 8; decree of court, R., 552-3.) As appears above, this error was assigned in the motion for new trial.

A great portion of the Statement of Facts is taken up with the testimony admitted over this objection, the testimony being offered to show that Judge Reagan did make this agreement, and did make the speeches.

To all of this testimony the objection was made that the speeches and services of Judge Reagan to induce the people to vote for a bond issue could not be the basis of a contract, and that it was contrary to public policy for it to be considered a consideration. Wright, one of the

plaintiffs, testified that in 1872 he was with Grow, the President of the H. & G. N., at Judge Reagan's house, and that it was there agreed that a bond issue of $150,000 should be issued, and Judge Reagan to canvass the county, and that Judge Reagan did make a canvass and made speeches over the county. (St., 155; Bill, R., 397-404; objections 4 and 7, St., 158.) Over precisely the same objection, all of the testimony now set out was admitted. Wright stated that he heard Grow and Reagan make a speech just before the election, at Palestine, to the county voters that in the agreement made at Judge Reagan's house it had been agreed that the shops, roundhouses and general offices should be at Palestine forever, and that Grow, in his speech made in the presence of Judge Reagan, said that the road intended to bring the shops, general offices and roundhouses to Palestine if the voters voted the bonds, and that, furthermore, Grow said the same thing when he went to get the bonds, and so assured the County Court after the road had been built in. (St., 158; R., Bill, 405; St., 159-160-162; Bill, R., 412-419.) As to the alleged rent house contract claimed to have been made in 1875, Wright said that Hoxie, the Superintendent of the road, stated that he had received a letter from Grow insisting upon the compliance with the alleged contracts of 1872 made upon the basis as claimed of Judge Reagan's political influence, and the bond issue, and he stated that Hoxie said he wished to keep that agreement. (R., Bill, 428; St., 166.)

Mrs. Reagan, relict of Judge Reagan, testified to a meeting between her husband and Grow, President of the H. & G. N., in her house in 1872, and stated that in that conversation Grow offered to have the road come to Palestine and connect with the International, "and to estab-

lish and maintain forever general offices and machine shops at Palestine." (Bill, R., 430; St., 207-209.)

Watts testified that he heard Grow and Reagan make speeches on the same occasion to the electors at the courthouse, before the bond election, and that Grow, the President of the H. & G. N., verified statements that Reagan had made that the offices and shops should be located at Palestine. (R., 449, Bill; St., 209.)

Hughes testified that he heard Grow and Reagan make the speeches mentioned above, and that Grow said that he corroborated Judge Reagan, and that the general offices, machine shops and roundhouses be located in Palestine for all time if the bond issue carried. (R., Bill, 443; St., 210.)

Jacobs testified that he heard Grow and Reagan make the speeches referred to, and that Grow said if the people voted the bond issue the offices and the shops should be at Palestine forever. (R., Bill, 437; St., 211-213.)

McClure testified that he heard Grow make the portion of his speech referred to. (R., Bill, 456; St., 213-214.)

Ozment testified that he heard the speeches made by Grow and Reagan on the occasion mentioned above, that Reagan said in the speech that he had an agreement with Grow to build into Palestine to connect with the International, and, further, that the shops and roundhouses should be located there always, and Grow said the same thing, provided the bond issue should be voted. (R., Bill, 462; St., 225.) And, furthermore, that afterwards, in 1875, Hoxie, the Superintendent of the I. & G. N., said on the occasion of the making of the alleged rent house contract, that he was anxious to carry out the agreement made with Reagan with reference to the general offices. (Bill, R., 469; St., 227.) Judge Reagan died in 1905.

1153

Word testified that he was present in 1873 when Grow, President of the H. & G. N., applied for the county bonds, and that Grow told the court that the H. & G. N. had promised the depot, shops and general offices, and that it was unnecessary to put these things into the record. (Bill, R., 494; St., 237.)

The plaintiffs also introduced in the evidence a newspaper article written by Judge Reagan, and published in Palestine in May, 1899, 27 years after the claimed formation of the alleged contract in 1872, and performance thereof, over the same objections, wherein it was stated that there was an understanding in consideration of voting the bonds that the general offices and machine shops should be located at Palestine. (St., 355-8, and Bill, R., 480.) The court submitted it to the jury to determine whether or not the alleged contracts of 1872 and 1875 were made, and whether or not Judge Reagan made the speeches; that is, that the general offices, shops and roundhouses should be at Palestine forever, as well as the road built in and the depot secured in consideration of Judge Reagan's agreement to induce the voters to vote the bond issue, and in consideration of such bond issue, the three-party alleged contract was made, and whether or not Judge Reagan did make a thorough canvass of the county in performance of his undertaking in that regard. (R., 553-7.) To the submission of which matters the defendant objected that no such alleged contract or contracts could be submitted as involving a consideration of inducing the voters, and this would render any such contract as illegal and void and against public policy. This objection was made before the delivery of the charge, and in writing. (R., Sec. 2, p. 508, and afterwards carried forward; Bill of exceptions 41, R., 545.)

The verdict of the jury was expressed in confirmation of this alleged agreement, and in finding that Judge Reagan made the speeches and rendered the consideration of inducing the voters, as appears in the judgment, it is founded upon the verdict embodied therein on special issues. (R., 553-554, q. 1 and 2, and affirmative answers thereto.) Whereby, it affirmatively appeared that the maintenance of such alleged contract upon the consideration of Judge Reagan's services necessarily led to a wrong result, to the injury of the plaintiff in error.

These sections of the motion for a new trial above were carried into the brief and assignments of error by copying them. (Br., pp. 48-53.)

Authorities.

Flynn v. Bank (T. C. A.), 118 S. W., 848.
Providence Tool Co. v. Norris, 2d Wall., 45.
King v. R. R. Co., 147 N. C., 263, and 60th S. E., 1133, and 125 Am. State Rep., 546.
Mills v. Mills, 40 N. Y., 543; and 100 Am. Dec., 535.
Burke v. Child (often cited as Trist v. Child), 21 Wall., 450, and 22 L. E., 623.
Susman v. Porter, 137 Fed., 161.
Doane v. R'y, 160 Ill., 22, and 35 L. R. A. (old series), 588.
Marshall v. R'y, 16 How., 314.
Crichfield v. Co., 174 Ill., 466, and 42 L. R. A. (old series), 347.
Houlton v. Nichols, 93 Wis., 393, and 33 L. R. A. (old series), 166, and 57 Am. St. Rep., 928.
Fuller v. Dane, 18 Pickering (Mass.), 472.
Wilcox v. Puryear, 12 Ky. Law Rep., 566.
Chippewa, etc., R'y v. R'y (Wis.), 6 L. R. A., 601.
Brooks v. Cooper, N. J., and 21 L. R. A., 617 (old series).
Richardson v. County, 59 Neb., 400, and 80 Am. State Rep., 682, 81 N. W., 809.

NOTE: The court is respectfully referred to argument in brief for appellant in the Court of Civil Appeals, here the plaintiff in error, commencing on page 124, and extending to second proposition, on page 139.

Fifth Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law of this case, in failing and refusing to hold that the contract alleged by plaintiffs to have been made between Grow, representing the railroad, and Reagan, representing the people of Palestine, and adopted by Anderson County, could not be valid, but was void, because it involved an agreement to pass to a portion of the voters a value contingent upon a certain election being carried, especially when that value was a large one, to-wit, as alleged, the large value of having the general offices, shops and roundhouses at Palestine forever, because any such element would be contrary to public policy, as well as the statute prohibiting the bribing of voters, but is void independently of such statutes.

This error was injurious to the plaintiff in error, and was reasonably calculated to produce a wrong result, and did produce an improper judgment, in that the verdict was directly founded on the testimony admitted on this theory, and on the affirmative answer of a question embodying it.

Statement.

This position was presented in Section XI of the motion for re-hearing. See the various assignments presented in last statement and objections to testimony and exceptions taken on trial also involving this point, which is a second proposition under the same assignments, and the last statement is now included in this statement by

reference. It is stated in the petition that the people of Palestine acting on these alleged contracts have acquired property rights in Palestine worth many hundreds of thousands of dollars. (R., 21.) In Bill 12 to Wright's testimony, objection 6 was made on the ground now assigned, that it was attempted to prove a consideration peculiar to the people of Palestine to induce them to vote for the bond issue, by obtaining for Palestine, as one of the three parties to the alleged contract, the shops and offices forever. The position was overruled, and a bill taken (R., 397), and Wright testified as has been set out above. (R., 404-405.) The same objection was taken to the testimony of the following persons set out above: R., 430, Mrs. Reagan; R., 437, Jacobs; R., 443, Hughes; R., 449, Watts; R., 456, McClure; R., 462, Ozment; R., 469, Ozment; R., 480, as to the newspaper article of 1899 written by Judge Reagan; and R., 494, as to testimony of Word, which need not be repeated here, having been stated in the last statement.

Authorities.

Roby v. Carter, 25 S. W., 725; 6 T. C. A., 725.
Doane v. R'y, 160 Ill., 22, and 35 L. R. A., 588.
Chippewa, etc., R'y v. R'y, 6 L. R. A., 601 (Wis.).
Brooks v. Cooper (N. J.), 21 L. R. A., 617 (old series).

NOTE: There is an argument of this point in the appellant's brief in the Court of Civil Appeals, commencing page 142, and extending to 31st assignment, page 145, to which the court is respectfully referred.

Sixth Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law of this case, in failing and refusing

to hold that the alleged contract, being the alleged three-party contract alleged to have been made between the railroad, by Grow, the citizens of Palestine, by Reagan, and the county, was not susceptible of proof by parole evidence, or the evidence other than the record, of the election proceedings, because the act of April 12, 1871 (page 29 of Acts, Vol. 6, Gam., p. 931), required the contract for the bond issue to be in writing, and that there should be a written record thereof made by the County Court, and that that court should determine and settle whether or not the terms of the contract had been complied with, and the considerations rendered both ways; the extant contract and the decree of the County Court thereon being all introduced in evidence, and being complete of the whole transaction, whereby the representations and statements of the advocates of the bond issue in speeches or otherwise, or prior negotiations, or testimony to that point, could not be admitted in evidence, the written contract not including the general offices and the shops and roundhouses. The proposition now made being that when the law requires a contract with the voters to be in writing, and when the whole matter is complete on its face, no parole or outside considerations, or inducements, or promises, whether made in public speeches advocating the bond issue, or otherwise, can be proved.

Said erroneous ruling of the Court of Civil Appeals injuriously affected the right of plaintiff in error to maintain its defense, for the reason that by failing and refusing to exclude parole evidence modifying, adding, changing, and contradicting it, plaintiff in error was held liable, the alleged contracts for the shops and general offices lying outside of the written contract, whereby the erroneous ruling complained of was reasonably calculated

to cause, and did cause, a rendition of an improper judgment in this case.

Statement.

This same proposition was made in Sections 14 and 15 of the motion for re-hearing, and was presented under the 11th and 23rd assignments of error, pages 49 to 52 of the brief, the 30th assignment, page 53, and the 31st and 33rd assignments, pages 145 and 146, which were copied from the motion for new trial under the present statute, as follows: The testimony of Wright, Mrs. Reagan, Jacobs, Hughes, Watts, McClure, Ozment and Word, and the newspaper article of 1899, set out in statement under fourth assignment hereof, above, were all given over the objection embodied in the proposition now presented that the contract was required by law to be in writing, and that it was also covered by the decree of the County Court directing the issue of bonds, the writings not including the matters sued for, but excluding them, and being set forth in motion for new trial, Sections 36 (R., 571), 37 (R., 572), 38 (R., 572), 39 (R., 572), 42 (R., 572-3), 44 (R., 573), 45 (R., 573), 46 (R., 573), 47 (R., 574), 48 (R., 574), 49 (R., 574), 50 (R., 574), and 53 (R., 575), and also as to the testimony of Word stated above the same objection was made. (Sec. 127, R., 509.) The above references to the sections are to those of the motion for new trial. The point was presented by demurrer No. 3 (R., 565, motion for new trial), and the same point in demurrer No. 4 (motion for new trial, R., 566, and Record), all carried forward as assignments. (Br., 145-146, and references to pp. 49-52, 53.) These demurrers set forth that no legal contract was plead, and that the contract was required by law to be in writing, if made, and there-

fore, that the writings were conclusive. (R., 83-84.) Under the statute of April, 1871, regulating railroad bond elections, not prohibited by the Constitution of 1869, and authorized by this statute, a proposition for the bond election was drawn up, signed by Judge Reagan, and over fifty other freeholders, as required by law. This was a petition for the election, and is set out in full in the Statement of Facts. It requested the County Court, referring to the statute of April 12, 1871, to submit to the voters of the county "*the following proposition: Whether or not Anderson County would vote $150,000.00 in bonds to the H. & G. N. R. R., on condition of its building into Palestine and maintaining a depot within one-half mile of the courthouse,*" and a second proposition on a consideration never earned, to wit, to vote bonds of $50,000.00 to any railroad, not confined to the H. & G. N., which should build north from Palestine to the northern line of the county. This proposition nowhere mentions the general offices or shops, but states as to the first proposition involving the $150,000.00 bond issue, the bonds "to be delivered to said H. & G. N. R. R. as soon as said railroad shall be completed from the north boundary of Houston County to its intersection with the International R. R. at said point in Palestine, and so soon as their depot shall be established within one-half mile of the courthouse of said Town of Palestine, and their cars commence running regularly thereto," provided these things were done by said first day of July, 1873. The signers of this petition are nearly all dead, as indicated by the detter "d"; some of them lawyers, indicated by the letter "L." Judge Reagan's signature is the twenty-fifth. (St., 132-136.)

Next followed the order of the County Court directing that the election should be held, and re-stating the prop-

osition, and stating that the bonds were to be delivered if voted if the railroad should do the things set forth in the quotation last above, that is, build in from the north boundary of Houston County to intersect the International at Palestine, and build and maintain a depot within one-half mile of the courthouse in Palestine, and commence, to run their cars regularly thereto by July 1st, 1873. The court also submitted the different proposition to give $50,000.00 additional to any railroad, not necessarily the H. & G. N., which should build to the northern line of the county. (St., 136-138.) It is next recited, in the record of the court, that the election was held and carried, and it is declared that $150,000.00 in bonds of the county should be delivered to the Houston & Great Northern R. R. Co. on conditions stated in quotations above, and $50,000.00 to any railroad on the other condition of building to the northern line of the county, which $50,000.00 was never earned. Provision was made for the issuance of the bonds, referring to the act of April 12, 1871, and for the levy of a tax to pay the interest and sinking funds, and the court adjourned May 17, 1872, just after the election was held. (St., 138-141.) The record of the court then proceeded, commencing again January 29, 1873, and stated that Grow, President of the H. & G. N., presented his petition for the levy of a tax, and set out his petition, which stated that his road had accepted the proposition carried by the county election to give $150,000.00 to it on the "conditions therein specified," and that the H. & G. N. R. R. Co. have "fully performed and complied with all the conditions upon which said proposition was made in the month of December, 1872, and prior to the 31st day of said month; by the terms of said proposition said bonds were to be issued to petitioner on its compliance with the

terms contained in said proposition, *and having fully complied therewith, your petitioner prays that the truth of these allegations be inquired into,* and if satisfied they are true, that said bonds be issued in accordance with said proposition and the laws of the State." (St., 141-142.) The record then proceeds and recapitulates the petition on the conditions and considerations to be performed by the railroad set out in quotations above, after the election had carried on the written proposition, and it is then stated in the decree of the court: *"It further appearing that by the terms of said proposition said bonds were to be issued to said railroad company on the completion of their said road from said north boundary of Houston County to its intersection with the International Railroad at said Town of Palestine, and on its compliance with the other conditions contained in said proposition, and that said road was so completed and all of said conditions complied with by the H. & G. N. R. R. Co., prior to the 31st day of December, 1872, and that said railroad company was then entitled to said donation, and to demand and have said bonds then issued to them."* It was ordered that the bonds be issued and a tax levy made. (St., 143-145.) The form of the bonds is then given, which recited that the proposition was made to the county on *"certain conditions therein expressed * * * and all of said conditions fully performed and complied with by said H. & G. N. R. R. Co., as by the records of said court fully appears, and by an order of said court requiring the issue of this series of bonds in accordance with said proposition."* It was directed that these orders be inserted in the bonds themselves. (St., 145.) Shattuck was a member of the court, and protested, as appears by the record, against the issue of the bonds, on various grounds,

among others that the railroad had not built or commenced the foundations of machine shops, "as promised by the agents and friends of said road, *the same being the inducements held out to the people of said Anderson County, and on account of such promises and agreements to build a roundhouse and machine shops the majority of those voting for the subsidy cast their votes for the same.*" This petition was overruled by the court, and found not to be true (St., 146-147), and the contrary decreed as appears above. These assignments are carried into the brief, pp. 145 and 146.

Authorities.

Act of April 12, 1871, to authorize counties, cities and towns to aid in construction of railroads and other works of internal improvement. Page 29 of Acts, Vol. 6, Gammel, p. 931.
Anderson County v. H. & G. N. R. R., 52 Tex., 242-244.
Sawyer v. Railroad, 62 N. H., 135; 13 Am. State Rep., 541.
Stevenson v. Bay City, 26 Mich., 44.
Mayhew v. District of Gay Head, 13 Allen (Mass.), 129.
Page v. Belvin (Va.), 14 S. E., 845.
Kerr v. Corsicana, 35 S. W., 696.

Seventh Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law, in failing and refusing to hold that the written contract indisputably proved in this case, and complete, on stated considerations could not be varied, added to or changed by parole modifications, it having been submitted to the voters and adopted by them. The plaintiff in error now submits that such a writing as that

1163

involved in this case was not subject to the great changes, modifications, conditions and contradictions to graft thereon additional consideration to be rendered on one part, to wit, by the town, Judge Reagan's political services, as alleged, and on the other part, to be rendered by the railroad, the shops, roundhouses and general offices forever, all outside of the writing; and it is now contended that the great mass of testimony admitted in order to show these extraneous matters was erroneously admitted, and that the Court of Civil Appeals erred in maintaining that such extraneous matters, testimony to speeches, etc., were not erroneously admitted. Said ruling injuriously affected the right of plaintiff in error to maintain its defense, for the reason that by failing and refusing to exclude the parole evidence plaintiff in error has been held liable on matters lying entirely outside of the written contract, and this erroneous ruling was reasonably calculated to cause, and did cause, the rendition of an improper judgment in this case, both in the trial court and in the Court of Civil Appeals, the verdict being founded on matters extraneous to the written contract.

Statement.

See the last statement for the assignments and motion for new trial. The last statement is in all its aspects adopted as a statement in support of this assignment, with these additions: This point was presented in Section 16 of the motion for re-hearing. When Wright and all the other witnesses testified, and the newspaper article was tendered, the defendant objected, objection 5, that it is not permissible to prove in connection with a written contract with the county and the public that where the inducements or considerations, or representations, outside

of a written contract, and that a written contract adopted by the voters cannot be so modified. As appears in the last statement, bills of exception were taken, and all of these matters were carried forward into the motion for new trial. This proposition is advanced on page 150 of the brief, and was the 16th section of the motion for a re-hearing.

Authority.

Wooters v. I. & G. N. R. R., 54 Tex., 294.

Eighth Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application and finding of the substantive law of this case by failing and refusing to hold (and by holding the exact opposite) that when a contract is made and adopted by the vote of the people over forty years before the trial, which contract was in writing, and duly passed upon, then that after such lapse of time, and indeed after a much shorter time, and not at all, it is not permissible to introduce in the evidence testimony to speeches concerning the bond issue, and testimony to agreements as alleged, adding to or changing such written contract, and inserting therein an additional party (in this case the City of Palestine), and additional alleged considerations, to wit, one way the supposed political services of Judge Reagan, and the other way the claimed agreement of the railroad to locate the shops and offices at Palestine forever, all outside of such written contract. The erroneous ruling of the Court of Civil Appeals and of the trial court injuriously affected the right of plaintiff in error to maintain its defense, for the reason that it has been subjected by the decrees of those courts to the liability for the shops and general offices

and roundhouses to be located at Palestine forever, based on contentions outside of the written agreement, and contradictory thereto, and this erroneous ruling was reasonably calculated to cause, and did cause, therefore, an improper judgment in this case.

Statement.

Same as last above, to which add that this contention was made throughout the trial that recovery could not be had on mere basis of evidence to alleged campaign promises, stump speeches or expectations held out. (Br., 151.) The position is taken throughout the case on all the testimony by the same objections made to all of it on the ground that after the lapse of over forty years, and after rights had been acquired and acted upon by various parties on the basis of the written contract, it was not permissible to prove by parole such stump speeches. See objections 5 and 8 in bills of exceptions, identified and minutely referred to in statement last above. This assignment was included in the motion for new trial, Section 17, and brief, p. 151.

Authority.

Sawyer v. Railroad, 13 Am. St. Rep., 541; 62 N. H., 135.

For argument of the last three assignments the court is respectfully referred to the brief of appellant in the Court of Civil Appeals, pp. 151-163.

Ninth Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in stating the substantive law of this case, and in its application hereto, in

failing and refusing to hold that the contract being fully formed at the time when Grow went to get the bonds from the county, and he then being either entitled to them or not being entitled to them, and the County Court adjudging that he was entitled to them, and that the railroad had performed all considerations incumbent upon it, any promises which Grow may have then made to the County Court could not have been based upon any valuable consideration, and were of no importance, and because the contract could only be formed by the vote of the people.

This erroneous ruling of the trial court was maintained by the Court of Civil Appeals and injuriously affected the right of plaintiff in error to maintain its defense, and was reasonably calculated to cause, and did cause, the rendition of an improper judgment in this case, because such objection being made was overruled on trial, and testimony was introduced that when Gro wwent to get the bonds in January, 1873, from the County Court, he told the court that he would perform his agreement as to the shops, roundhouses and general offices, and place them at Palestine forever, on which and like testimony the verdict is placed.

Statement.

The plaintiffs plead that when Grow went to get the bonds, in order to induce the court to deliver them to him, he made the promises set out in the assignment (R., 52, Sec. 16 of petition), to which the defendant demurred that neither Grow nor the County Court, nor both, could form the contract nor change it. (R., 84, Sec. 17.) This demurrer was overruled (R., 552), and the matter was assigned as now stated in Section 12 of motion for new trial (R., 556), carried forward as 34th assignment in

brief. (Br., 163.) When the witness Wright was offered to testify what Grow said when he went to get the bonds in January, 1872, the objection contained in the assignment was made (R., 418, bill 15), and being overruled the defendant took its bill, and Wright testified that in January, 1872, he met Grow at the hotel in Palestine, and went with him to the County Court; that Grow went to get the bonds, and that Shattuck, a member of the court, objected to giving Grow the bonds on the ground that the contract had not been completed, and Grow stated that he did not wish to encumber the bonds, that he had promised to do these things, to wit, put up the shops, roundhouses, and bring the general offices to Palestine, and that he thought Grow said he had already ordered the shops to be built, and that Grow said all of these things should be at Palestine permanently, and that he did not see any use in encumbering the bonds. (St., 162.) The matter of this assignment was brought forward in Section 39 of the motion for new trial. (R., 572, Sec. 39, and in br., 14th assignment, pp. 163 and 50.) Word was also tendered to testify to the same matters, and the same objection was made and was overruled, after which defendant took bill 38 (R., 500), objecting, among other things, upon the grounds of this assignment. Word testified that he was deputy sheriff, and remembered when Grow came to get the bonds in January, 1872, that Grow presented his application for the bonds to the court, and somebody, Shattuck, perhaps, did not want the bonds issued until the depot, shops and general offices were established, and Grow told them that it was understood that the company promised to do these things, and was able to do it, that it was unnecessary to put these things in the record, that it would interfere with handling the bonds. (St., 237-

239.) The substance of this assignment was presented in Section 127 of the motion for new trial (R., 609), and was carried into the brief. (Br., 163, 53.) This assignment is expressed in the 19th and 20th sections of the motion for re-hearing.

Argument.

See page 165 of brief for appellant in Court of Civil Appeals.

Tenth Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law of this case, by failing and refusing to hold, as contended by the plaintiff in error, that Anderson County was estopped from litigating any claim in this case by the previous litigation between the Houston & Great Northern Railroad Company and the County of Anderson, and by reason of the fact indisputably proved that the matter herein involved had been adjudicated in that cause, instituted in 1874, and litigated through the Supreme Court, wherein Anderson County attempted to show that there were certain inducements and agreements outside of the writings, to wit, the contract adopted by the voters and the investigation and settlement thereof by the County Court, the Supreme Court ruling that the matter was *res adjudicata*. The decree of the Court of Civil Appeals injuriously affected the right of plaintiff in error to maintain its defense, for the reason that it was subjected to a liability entirely outside of such contract in writing, and the decree of the County Court thereon ascertaining and declaring that it had been complied with, entered in 1873, and this ruling of the trial court and the Court of Civil Appeals was reasonably

calculated to cause, and did necessarily cause, the rendition of an improper judgment in this case.

Statement.

See statement under sixth assignment, hereinabove, setting out the written contract adopted by vote, and the proceedings of the County Court thereon decreeing in January, 1873, that the railroad had made ample performance, and overruling Shattuck's protest.

By a special plea, Section 11(a), R., 140-142, the defendant set up that in November. 1874, the County of Anderson sued the H. & G. N. R. R. Co. in the District Court of Anderson County for the cancellation of the bond issue, contending that the H. & G. N. R. R. and its employes had procured the people to vote for the bond issue by promising the people that the H. & G. N. R. R. would accept the other proposition submitted to them, to wit, the independent proposition to build from Palestine to the north line of the county, when $50,000.00 in bonds were to be given to any other railroad, the contention being that this railroad had promised the people (as is contended here outside of the writings) to accept the $50,000.00 bond proposition to build to the north line of the county if the people would vote the $150,000.00 proposition to the H. & G. N., which was expressed in the writings to be upon the considerations of building into Palestine and running the trains in within a year and maintaining a depot within one-half mile of the courthouse, and connecting with the International at that point. A certified copy of the whole record of this suit, which went off on demurrers, was introduced in evidence taken from the files of the Supreme Court. The pleadings of that suit charged that the bond issues had been fraud-

ulently procured, and that the promises had been made, and that but for this promise to accept the proposition for the $50,000.00 bond issue and to build to the northern side of the county, the bond issue for $150,000.00 would not have been voted, and the charge made that the company had not complied with the terms, intention and spirit of the proposition submitted to the voters. The case went off on demurrers, the court ruling that no cause of action was shown (St., 193-198), the position of the trial court of Anderson County being that the matter could not be extended beyond the express considerations stated in the contract adopted by the voters and affirmed by the decree of the County Court, and that the court would not receive evidence of such extraneous matters, inducements and promises. The terms of this assignment were presented in Section 112 of the motion for new trial (R., 605), and was carried forward into the brief (Br., 165), and was presented in Sections 22 and 23 of the motion for rehearing. For argument, see brief, page 167.

Authority.

Anderson County v. H. & G. N. R. R., 52 Tex., 242.

Eleventh Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law of this case, in that it omitted the following determined and undisputed matter from its opinion, and in that it refused to insert the same in its opinion, as requested in the 21st Section of the motion for rehearing, to wit, that the County Court of Anderson County had in January, 1873, made an order and adjudged that the Houston & Great Northern Railroad Company had

complied with its propositions to the county, and had done everything which it was required to do in order to obtain the bonds of $150,000.00, overruling the contention of Shattuck that it had not so complied. The refusal of the Court of Civil Appeals to so find, and to maintain the decree of the County Court, injuriously affected the right of plaintiff in error to maintain its defense, and was reasonably calculated to cause, and did cause, the rendition of an improper decree and affirmance, because it was impossible to state and maintain such undisputed decree and these terms therein, and to affirm this case.

Statement.

In 1873 Grow presented to the County Court, then composed of all the Justices of the County, his petition for the bonds, setting out that the railroad had complied with all the terms of this proposition, and had earned the bonds, neither the shops, general offices nor roundhouses being then in Palestine; whereupon, Shattuck, a member of the court, objected that the shops and roundhouses had been promised as an inducement to vote the bond issue, which objection was overruled by the court, and the court, as appears by the extant record, adjudging that the railroad had earned the bonds, and that it had performed all of its undertakings and considerations for the bond issue. (St., 142-147, and 189-192.)

Twelfth Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law of this case, by failing and refusing to hold, and by ruling to the contrary, to wit, that in its application to this case on the constructions claimed and

asserted for it by plaintiffs, without which they cannot recover, Articles 6423-4-5 of the Revised Statutes of 1911, did not impair the obligation of the contract, and are not in violation of Sub-section 1, of Section 10, of Article 1, of the Constitution of the United States, to wit, of the contract obligation of the mortgage of the sold-out I. & G. N. R. R. made in 1881. The contention of the plaintiff in error is that such statute, upon the construction given, is unconstitutional and invalid in the applications now disclosed for the first time, to wit, that it appears for the first time from the decree of foreclosure and evidence that the I. & G. N. R. R. Co. was sold out at a loss under a decree of foreclosure made in May, 1910, of the mortgage termed the second mortgage, made in 1881, and that the plaintiff in error is the assignee and holder as purchaser of all rights and interest whatsoever accruing to the mortgagee, it now contending that the act of 1889, above mentioned, violates the contract evidenced by the mortgage, in attempting to make prior in law rights, if any, which were junior in time, by giving security by such subsequent act of 1889 by way of a servitude, burden or duty, and as claimed by plaintiffs, against property or some of the properties of the sold-out railroad, whether tangibles or intangibles. Said erroneous ruling injuriously affected the right of plaintiff in error to maintain its defense, for the reason that it, the assignee of said mortgage, by purchasing under the decree of foreclosure, is entitled to all of the protection thereof, and as purchaser of the properties foreclosed, has been subjected to the claimed rights given by the statute of 1889, as construed, without which construction the plaintiffs could have had no judgment in this case; whereby the ruling complained

of was calculated to cause, and did cause, the rendition of an improper judgment herein.

The Court of Civil Appeals has upheld plaintiffs' contention that what were, at the most, in 1881, unsecured personal contracts binding on the I. & G. N. R. R. Co. personally, did become, after 1881, the date of the contract mortgage, secured contracts prior in law to the mortgage. Whereby, it is claimed a preference and right has been created by such statute subsequent in time, but prior in right, to the mortgage of 1881. The property was foreclosed and sold out at a loss under this mortgage.

By this assignment a Federal question is presented.

Statement.

This point was presented in the 25th and 26th sections of the motion for re-hearing in the terms of this assignment.

Defendant, in the eighth section of its answer, set up as follows:

In February, 1908, the Mercantile Trust Company filed its bill against the I. & G. N. R. R. Co. in the Circuit Court of the United States for the Northern District of Texas to foreclose what was called the third mortgage, issued in 1892. A receivership was taken out, and thereafter, on April 20, 1908, the Farmers Loan & Trust Company intervened in this case with its bill to foreclose the mortgage of June 15, 1881, of the I. & G. N. R. R. for the principal amount of $10,391,000.00, which mortgage covered all of the properties of the railroad, and all of its privileges, immunities, franchises and corporate rights already acquired and to be acquired, and a copy of which mortgage was exhibited with the answer of the plaintiff in error. Various persons intervened, but on May 10, 1910,

the second mortgage was foreclosed, and the property directed to be sold, and it was all sold out, as appears in the statement under assignment No. 2, above. The properties sold for $12,645,000.00, which was paid in bonds or in cash, being somewhat short of the total amount due. (R., 97-110.) The above allegations were repeated by reference in Section 9 of the answer, and it was set out that the foreclosure proceedings resulted in a loss to the second mortgage bondholders of over $300,000.00 (R., 125); that the defendant claimed that under Revised Statutes 6423-4-5 they acquired a burden or lien, or security, or servitude on the properties, tangible and intangible, and franchises of the sold-out railroad, and that the plaintiff in error had acquired the properties under the decree of foreclosure and sale and proceedings therein, being foreclosure of the mortgage of 1881. (R., 125.) Therefore, the plaintiff in error contended that the act was violative of the Constitution of the United States as construed and asserted, in that it was an attempt to enforce the act so construed and asserted against this defendant as fixing a burden, a lien or a servitude upon its properties, and adding to the obligations, if any, which would be null and void as against one holding under the foreclosed mortgage of 1881, and violative of its obligations. (R., 126, Sec. A.) The statement under the second assignment of error hereof is embodied herein, made above.

The deed executed under the sale made in accordance with the decree of foreclosure of May, 1910, was introduced. The decree followed the mortgage, and the deed the decree, conveying all of the properties, franchises and corporate rights of the sold-out property to the I. & G. N. Railway Company. (St., 52-67.) The charter of the

defendant, dated August 8, 1911, was introduced showing that it was domiciled and had its place of business as therein stated, and its general offices in the City of Houston, Harris County, Texas. (St., 67-74.) Wright, one of the plaintiffs, was tendered as a witness in order to testify to the alleged agreements sued on in this case, whereupon the defendant objected by objection No. 13, which objection was in the exact sense of the assignment now made (R., 408), this objection being overruled. Wright testified as set out above in statement under assignment four hereof, as did the following witnesses, and the newspaper article was introduced. See that statement. Wright's testimony on this matter on these grounds, among others, bill 12 was taken (R., 397); bill 13 (R., 404); to his testimony to Grow's speech, bill 14 (R., 405); to his testimony to Grow's statement to the County Court, bill 15 (R., 412); to his testimony in regard to conversations with Hoxie, bill 18 (R., 421); to testimony of Mrs. Reagan, bill 19 (R., 430); to testimony of Jacobs, bill 20 (R., 437); to testimony of Hughes, bill 21 (R., 443); to testimony of Watts, bill 22 (R., 445); to testimony of McClure, bill 23 (R., 456); to testimony of Ozment, bills 24 (R., 462) and 25 (R., 469); to testimony of Word, bill 38 (R., 494); and to admission of newspaper article written by Judge Reagan, bill 28 (R., 480.) The defendant's first exception to the court's charge was that a peremptory direction for the defendant should be given (R., 507.) Afterwards, this peremptory was tendered and refused (R., 511), and the defendant excepted to the overruling of this exception and refusal of the peremptory, and preserved its bills of exceptions. (R., 545-546, bill 41.)

This point was carried into the brief (br., 167-168) un-

der the following mentioned assignments therein, all being taken from the motion for new trial, to wit, 11th: Section 36 of motion for new trial, on ground of admission of Wright's testimony in regard to the alleged Reagan-Grow contract (R., 571); 12th, Section 37 (R., 572) on the ground of admitting Wright's testimony in regard to the speeches of Judge Reagan in canvassing the county, and that Judge Reagan made speeches; 13th, Section 38 (R., 572) of said motion for new trial, in regard to the speeches made by Judge Reagan and Grow in Palestine, and what they said and told the people about the shops, offices and roundhouses; 14th, as to what was said by Grow when he went to get the bonds from the County Court in January, 1873 (Sec. 39, R., 572); 15th, as to the conversations with Hoxie in connection with the alleged rent house contract (Sec. 42, R., 572-573); 16th, as to testimony of Mrs. Reagan in regard to conversation between Judge Reagan and Grow in March, 1872 (Sec. 44, R., 573); 17th, as to testimony of Jacobs in regard to speeches of Grow and Reagan in 1872 (Sec. 45, R., 573); 18th, as to testimony of Hughes in regard to speeches of Grow and Reagan (Sec. 46, R., 573); 19th, as to testimony of Watts in regard to speeches of Grow and Reagan in 1872 (Sec. 47, R., 574); 20th, as to testimony of McClure in regard to speeches of Grow and Reagan in 1872 (Sec. 48, R., 574); 21st, as to testimony of Ozment in regard to speeches of Grow and Reagan in 1872 (Sec. 49, R., 574); 22nd, as to testimony of Ozment in regard to conversation with Hoxie in 1875 (Sec. 50, R., 574); 23rd, as to the newspaper article written by Judge Reagan in 1899 (Sec. 53, R., 574); 30th, as to the testimony of Word relating to Grow's alleged statements to the County Court made in 1873. (Sec. 127, R., 609.) The

above references are to motion for new trial. These assignments are readopted on page 167 of the brief, from pages 48 to 53 thereof. The 24th and 25th assignments were as to the court's overruling the exception to the charge on the ground that he should peremptorily instruct for the defendant and his refusal to so instruct. (Secs. 54 and 76, motion for new trial, R., 575, and assignments, Br., 52, adopted again, 167.) The 36th assignment was a specification in the terms of the assignment now adopted as a proposition of the trial court's error in refusing to give a peremptory for the defendant, and set out in Section 136, motion for new trial (R., 613), and brief, page 167.

The assignment of error now presented as a proposition was presented in the motion for re-hearing in the terms expressed above, in Sections 25 and 26 thereof. This constitutional question, together with others, is argued in our brief, pages 179 to 238, which brief was filed in the Court of Civil Appeals, and to which argument the court is respectfully referred.

Authorities.

Art. I, Sec. 10, Sub-section 1, Const. of U. S.
Ogden v. Saunders, 12 Wheat, 213.
Toledo, etc., R'y v. Hamilton, 134 U. S., 299; 33 L. E., 905.
Giles, Receiver, v. Staunton, 86 Tex., 620.
Fordyce v. Dubose, 87 Tex., 78.
Woodward v. R'y, 62 N. E., 1051.
Davidson v. Richardson, 91 Pac., 1080; 17 L. R. A. (N. S.), 319.
Yeatman v. King, 2 N. D., 422; 33 Am. Rep., 797.
Crowther v. Co., 85 Fed., 41.
Andrews v. Atwood, 57 N. E., 387.

Vicksburg v. Water Co., 202 U. S., 453, and L. E., 1112.

Thirteenth Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law in this case, by failing and refusing to hold that R. S., 6423-4-5 of the Revised Statutes of Texas of 1911, as construed by plaintiffs, which construction was upheld by the Court of Appeals, is unconstitutional and invalid on the facts of this case, in that, as was applied thereto, it is maintained that the alleged contracts, claimed to have been made in 1872 and 1875, are secured by said statute by its imposing a duty or a lien, burden or servitude upon the property or properties, or some of them, tangible or intangible, or both, of the sold-out International & Great Northern Railroad Company, acquired by this defendant under foreclosure sale of May, 10, 1910, of the mortgage of 1881, in that, as now asserted, it is claimed that this statute, by its terms, attempts to burden and add to the contracts by statutory extensions and obligations, going beyond the alleged contracts, whereby it appears when applied to the facts of this case, that such act of 1889, as construed, is unconstitutional and invalid, and violates Sub-section 1, of Section 10, of Article 1, of the Constitution of the United States, prohibiting any State from passing a law impairing the obligations of contracts, the plaintiffs claiming that their alleged personal contracts became so first secured and extended in 1889 by the force of that statute.

By this proposition a Federal question is presented.

This erroneous ruling of the Court of Civil Appeals injuriously affected the right of plaintiff in error to main-

1179

tain its defense, for the reason that if this erroneous ruling had not been made, plaintiffs could not have recovered, as they depend entirely upon such construction of the statute of 1889 for recovery.

Statement.

This assignment was presented in its terms, Sections 27 and 28 of the motion for re-hearing.

The proposition stated in this assignment was Section 12 of the objections offered to all the testimony and matters in evidence, as set out in the last statement above. The statement under the last assignment is made a part hereof. The proposition was offered as a defense on the stated pleading. (R., 126b.) The point was preserved under the sections of the motion for new trial stated in last statement above, to the admission of all testimony therein stated, and also under the assignments contained in the brief, and referred to in the last statement above, except the 36th, and under the 37th assignment of error of the brief, which was Section 35 (R., 612-613) of the motion for a new trial, and which section, adopted as the 37th assignment (Br., 170), and is expressed by this 13th assignment, last above.

Authorities.

Texarkana, etc., Co. v. Texarkana, 123 Tex., 213.
Omaha Co. v. Omaha, 147 Fed., 1, and—

Also, see argument upon the unconstitutionality of these points (commencing p. 179 of brief in Court of Civil Appeals, and extending to page 238).

1180

Fourteenth Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law in this case, by failing and refusing to hold that the act of 1889, known as the office-shops statute, being Articles 6423-4-5 of the Revised Statutes of Texas, is unconstitutional and invalid, and violative of Section 1, of Article XIV of the amendment to the Constitution of the United States, commonly called the Fourteenth Amendment, as now construed, in that such statute imposes great penalties, and in that it is not applicable to the defendant, under the facts of this case, it having bought under the foreclosed mortgage of 1881, made prior to the statute, but as applied constitutes an attempt to abridge the privileges and immunities of the defendant, and deprive it of its property without due process of law, and to deny it the equal protection of the laws, by penalizing it, and threatening to penalize it, at the rate of $5000 per day, if it should resort to the court to resist this action and litigate its rights by refusing to obey such statute, invalid upon such application.

This proposition in its very terms was presented as a defense in the answer. (R., 128a.)

This assignment presents a Federal question.

The erroneous ruling of the Court of Civil Appeals injuriously affected the right of plaintiff in error to maintain its defense, in that it subjected it to such statute under these constructions, and this construction, under which the statute was invalid, was reasonably calculated to cause, and did cause, the rendition of an improper judgment in this case, which otherwise could not have been entered.

Statement.

This assignment in its terms is presented in Sections 32 and 33 of the motion for a re-hearing. The objection formulated in this proposition was objection 14 to all of the testimony and matters in evidence, as appears in the bills and assignments mentioned under assignment of error twelve, last above, except No. 36, and the same matters were carried into the motion for a new trial, as appears above under assignment 13 hereof. Also, the terms of this assignment were carried into Section 138 (R., 614-615) of the motion for a new trial, which section was based on the refusal of the court to give the peremptory charge for the defendant, and the proposition and the assignments were all carried forward in the brief for appellant. (Br., 172-173.)

Authorities.

14th Amendment, Constitution of the United States.
Ex parte Young, 209 U. S., 123; 52 L. Ed., 714.
Ex parte Wood, 155 Fed., 190.
State v. Railway, 100 Tex., 153.

See argument, pp. 179-238 of brief for appellant in Court of Civil Appeals.

Fifteenth Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law in this case, by failing and refusing to hold that the act of 1889 (now R. A. 6423-4-5 of the Revised Statutes of Texas of 1911) is unconstitutional and invalid as construed by that court and in its application to this case, because the same is violative of Section

1 of the 14th Amendment of the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the law, because, as the statute is applied to this case, and as construed, it creates an undue interference with the business of the plaintiff in error, and with its duties to the public, to its stockholders, and to other persons, both in state and interstate commerce, wherein it attempts to interfere with the lawful discretion and power of the plaintiff in error, as construed and applied, to conduct its business within its own discretion within the limits of law, and wherein it attempts by such subsequent statutes to place burdens, liens and additions onto and secure the alleged personal contracts of 1872 and 1875, as claimed by plaintiffs, thereby denying to defendant the equal protection of the law, and taking its property without due process of law by such illegal interference.

By this assignment a Federal question is presented.

This error of the Court of Civil Appeals injuriously affected the right of plaintiff in error to maintain its defense, and was reasonably calculated to cause, and did cause, the rendition of an improper judgment of affirmance, because, without such construction, the plaintiffs could not recover.

Statement.

This assignment was presented in the terms above in Section 34 and 35 of the motion for re-hearing.

The terms of this assignment were inserted as objection 15 in all the bills of exceptions taken and listed in the statement under assignment twelve, above, on which the

listed sections and statements contained in the motion for the new trial, as in that statement set forth, were made and carried into the brief, and re-adopted, as appear therein. (R., 174.) In addition, all of the assignments set forth in the statement under assignment twelve, above hereof, involved and were predicates to this proposition, except 36, and also this very assignment was stated in the motion for a new trial (R., 615, Section 139), and being based on the refusal to give peremptory charge No. 1, and is set out as the fortieth assignment in the brief. (Br., 174.)

This proposition was presented as a defense in the answer, in the terms thereof. (R., 128c.)

Authorities.

Lakeshore, etc., R'y v. Smith, 173 U. S., 684, and—
Argument, brief in the Court of Civil Appeals, pages 179-239.

Sixteenth Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law of this case, by failing and refusing to hold that the office-shops act of 1889, now carried into the Revised Statutes of 1911, Articles 6423-4-5, on its application to this case, and as construed by the Court of Civil Appeals, and applied, is unconstitutional and invalid, because this act is, by its terms, applicable only to chartered railroads, and not to individual receivers or other persons operating railroad carriers, or to other persons or corporations whatsoever, in whatever business engaged, and so violates Section 1, of Article XIV, of the Amendments to the Constitution of the United States, being as

now construed, and on the applications made, if such applications be correct, against a species or class not rightfully classified on any legal ground, and in that it places a burden on a species or class not placed on other persons or corporations not classified with it, thereby violating the provision of the Constitution of the United States, and denying to the plaintiff in error "the equal protection of the laws," and abridging its privileges and immunities, and depriving it of its property without due process of law.

This proposition presents a Federal question.

This erroneous ruling of the Court of Civil Appeals injuriously affected the right of plaintiff in error to maintain its defense, for the reason that it was reasonably calculated to cause, and did cause, the rendition of an improper verdict in this case, since, without such invalid statute, that is, invalid as construed and applied, the plaintiffs could not have recovered.

Statement.

This error was presented in the terms of this assignment in the assignment in the 36th and 37th sections of the motion for a rehearing.

This proposition in the terms above was made as objection 16 to all of the testimony objected to, and the documents given in evidence, as listed and set out with reference to bills, etc., in the statement under assignment 12 hereof, above, and the proposition now is made under the same sections of the motion for new trial, and assignments of error, as in that statement set forth, except the 36th, and also under the 41st assignment of error (Section 140, R., 616, of motion for new trial), which was founded on the refusal to give peremptory charge No. 1

for the defendant, and which expressed the terms of this assignment, all as appears in the brief. (Br., 175-176.) This proposition was presented as a defense in the terms hereof in the answer. (R., 129f.)

Authorities.

R'y v. Mackey, 127 U. S., 205; 32 L. E., 107.
Cotting v. Goddard, 183 U. S., 79; 46 L. Ed., 92.
L. & N. R'y v. Commission, 19 Fed., 679.

Seventeenth Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals has erroneously declared the substantive law of this case, by failing and refusing to hold that the act of 1889, being Articles 6423-4-5 of the Revised Statutes of Texas of 1911, in its applications to this case and as construed and enforced by that court, on the claim that it secures the alleged personal contracts of 1872 and 1875 on which the plaintiffs sue, is unconstitutional and invalid, and contrary to the Constitution of the State of Texas:

(*a*) Because the same assesses a penalty of an amount prohibited, being excessive and in conflict with Section 13 of Article 1 of the Constitution of Texas;

(*b*) Because the statute as construed and applied, is retroactive in its application to this case, it being now asserted that by it purely personal alleged contracts of 1872 and 1875 were in 1889 first secured, all in conflict with Section 16 of Article 1 of the Constitution of Texas;

(*c*) Because the plaintiffs seek a recovery in violation of the obligations and terms of the alleged contracts on which they sue, and of the mortgage contract of the sold-

out railroad, made in 1881, all in violation of Section 16 of Article 1 of the Constitution of Texas;

(*d*) Because, as construed and applied, the plaintiffs deny to the plaintiff in error the equal protection of the law, and violate the due process of law, in interfering with the just discretion of the plaintiff in error to manage its properties within the limits of the law, all in violation of Section 19 of Article 1 of the Constitution of the State of Texas.

This erroneous ruling injuriously affected the right of plaintiff in error to maintain its defense, and was calculated to cause, and did cause, the rendition of an improper judgment in this case, because, without such ruling, the act of 1889 could not have been given a retroactive effect.

Statement.

This assignment was presented in the terms above in the 38th and 39th Sections of the motion for re-hearing, and objection, expressed in the terms of this assignment, being No. 17, was made to all of the testimony and preserved in all of the bills, and also in regard to the newspaper article, set out in the statement above, under assignment 12 hereof, which bills were carried into the motion for a new trial, and made assignments as stated thereinabove, except assignment No. 36, and in addition the grounds as expressed above in this assignment were embodied in Section 110 (R., 602), of the motion for new trial, and was embodied in the forty-second assignment in the brief, and also plead in the terms thereof as a defense in the answer. (R., 129, Sec. 36.) (Br., 177-8.)

Connected Proposition under the Last Assignment.

Although the Constitution of the United States does not prohibit a retroactive law, the Constitution of Texas does prohibit such laws.

Statement.

As above.

Authorities.

Section 16, Art. 1, Constitution of Texas.
Mellinger v. City, 68 Tex., 37.
Gladney v. Sydnor, 172 Mo., 318; 72 S. W., 554; 95 Am. St. Reports, 517.
City v. Railway (Mich.), 97 Am. St. Rep., 238; 89 N. W., 932.

An argument upon the whole problem of the unconstitutionality is presented in the brief for appellant, pages 179-238.

Eighteenth Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law of this case, by refusing to hold that there was no ground, and by holding that the trial court did not err in submitting it as an issuable fact to the jury to determine whether or not Grow and Hoxie were authorized, or either of them, to make the alleged contracts sued on, Grow, as alleged, representing the H. & G. N., and Hoxie, as alleged, the I. & G. N.; and the court, in this connection, erred in refusing to sustain the contention of the plaintiff in error that there was no evidence whatever to show ratification of said contracts, or either of them, but that, on the contrary, evidence upon these issues showed and tended overwhelmingly to show that there

had been no ratification or authorization of such contracts by the Board of Directors of any railroad involved, it being conceded that the ratification or authorization would have to be by the board.

The trial court overruled these contentions, which ruling was sustained by the Court of Civil Appeals, and it was submitted to the jury to determine whether or not the Board of Directors of the railroads had ratified or authorized the alleged contracts, and the jury answered these questions affirmatively. Upon the trial of this case there was no evidence introduced whatever showing such ratification or authorization, or tending to show same; it being shown in the evidence that all of the minutes of the railroads had been submitted to the plaintiffs' counsel, and examined by them, and no minute being found showing authorization or ratification, and no testimony of any of the directors or officers being brought, except of two members being the only two surviving directors, who denied ever having heard of the alleged contracts sued on; and also there being introduced in the evidence numerous letters and correspondence passing between the officers of the roads (some of whom were directors) at the time of the transactions dealt with, directly showing that no such agreement was known to them, either of ratification or authorization. Said erroneous ruling of the Court of Civil Appeals injuriously affected the right of plaintiff in error to maintain its defense and was reasonably calculated to cause, and did cause, the rendition of an improper judgment in this case, because the judgment was founded dirtcely upon the verdict, which verdict affirmatively found in favor of the plaintiffs upon this issue.

1189

Statement.

This proposition was in the terms hereof presented in the 40th, 41st and 42nd sections of the motion for rehearing, wherein it was set out that the special issues submitting the questions of ratification or authorization were submitted to the jury without evidence, and the jury's verdict thereof without evidence, and that no authorization or ratification was shown in the evidence or tended to be shown, but, on the contrary, that the evidence showed and tended overwhelmingly to show that there had been neither, and that there was no evidence whatsoever.

When the trial court submitted to defendant's counsel his proposed charge, and which he gave, the defendant objected thereto, among other things, that no special issues should be submitted, and that a peremptory should be given for the defendant. (R., 507.) The court overruling the objection, exception was taken, as shown below, and the court's error in overruling this objection is assigned in these terms in Section 44 of the motion for new trial, R., 574, and the forty-fourth assignment. (Br., 238.) The defendant presented to the court special charge No. 1, requesting the court to direct a verdict for the defendant, which was refused (R., 511); on the ground of this refusal Section 76 of the motion for new trial was founded (R., 578), and assignment forty-three made that the court erred in refusing such motion. (Br., 238.) Question 1 submitted to the jury was for the jury to determine whether or not the Houston & Great Northern R. R., by Grow, its President, about the 15th of March, 1872, contracted and agreed with Reagan to build into Palestine, to establish a depot within one-half mile of

the courthouse, to commence running cars thereto within a year, to locate and forever thereafter maintain the general offices, machine shops and roundhouses of the H. & G. N. at Palestine, in consideration of agreement by Reagan to canvass the county to induce the voters to vote the bond issue, and in consideration that the voters should deliver its bonds. This was answered by the jury, "Yes." Question 2 was whether or not Judge Reagan made a thorough canvass of the county to induce the voters and whether or not the H. & G. N. and the I. & G. N. in part performance of the alleged contract established and maintained at Palestine machine shops and roundhouses. Question 3 was for the jury to determine whether or not the H. & G. N. R. R. Co. "authorized or ratified" Grow's action in making the alleged contract, and in this connection the jury was instructed that the power to authorize or ratify such action was vested in the Board of Directors, and that it was for the jury to determine whether or not the Board of Directors authorized Grow, or knowing of his having exercised such authority, approved his action, and that it was not necessary that there should be any formal resolution or minute of this matter. Question 4 was whether or not Hoxie, representing the I. & G. N., agreed with Wright and Ozment to carry out the alleged agreement made between Grow, Reagan and the county, and the additional consideration that the citizens should erect rent houses at Palestine for occupancy at reasonable rentals by employes of the company. Question 5 was whether or not these rent houses were constructed. Question 6 was whether or not the I. & G. N. R. R. Co. authorized or ratified the action of Hoxie in regard to the matters involved in question 6. All of these questions were answered "Yes" by the jury. (R., 553-

558.) To question 3 the defendant objected that it submitted to the jury the authority or ratification of Grow's action when there was no evidence to support the same, and also objected that the question stated submits as one authority and ratification. (R., 509.) These objections were overruled, as appears below, and overruling the same was presented in Section 61 (R., 576) of the motion for new trial, and in the forty-fifth assignment. (Br., 238.) To question 6 defendant made the same objections (R., 510) that there was no evidence of authority to Hoxie, or ratification of Hoxie's acts, which objections were overruled and exception taken, as appears below, and this matter presented in the 68th and 69th sections of the motion for new trial (R., 576) and carried into the forty-sixth and forty seventh assignments. (Br., 238.) All of these objections were preserved and stated in bill of exception 41, granted by the court, giving the history of the course of the charge. (R., 545-551.)

These matters are again presented in Section 103 of the motion for new trial, Sub-sections 3 and 7 (R., 585-586-589), wherein it was set out that it was not shown in the evidence that Grow made any such contract, or that the H. & G. N. authorized it, or that it ratified it, or that the I. & G. N. authorized Hoxie, or that it ratified the alleged contract alleged to have been made by him. This matter was presented in the forty-eighth assignment, and carried into motion for new trial. (Br., 239.)

The motion for new trial being overruled (R., 619), plaintiff in error made the proposition of this assignment. (Br., 239.)

The statement contained in the opinion of the court is incomplete and incorrect, and cannot be accepted. The court states, on page 5 of the opinion: "And it is the

purpose to have included in this statement, as a part hereof, all documentary evidence in the record, as same was without dispute, to relieve the necessity of extending this statement; and it should be so understood and considered." It is necessary to make a complete statement of the matters in evidence and bearing upon the issue of ratification or authorization. All the previous statements constitute part of the statement, and are not now restated.

It is necessary, therefore, to commence in and before the year 1872, when the alleged three-party contract between the railroad, represented by Grow, and the citizens of Palestine, represented by Reagan, and the county, is claimed to have been made, and so trace the matters on through that period, and through and after the period of the alleged making of the other alleged contract in 1875 between the citizens of Palestine and Hoxie, representing as alleged the I. & G. N. R. R., to assemble all of the evidence, except as stated previously.

The legislative charter of the H. & G. N. R. R., issued in 1866, contained this provision: "The direction and control of the affairs of said corporation shall be vested in a board of not less than five and not more than nine directors, as the by-laws may provide." (St., 3.) The legislative charter of the International, consolidated with the I. & G. N. in 1873, provided: "The immediate control and direction of the affairs of said company shall be vested in a board of not less than five directors." (St., 5.) The charter of the H. & G. N. also provided that the directors "shall cause to be kept accurate books of account, exhibiting the receipts and expenditures of the company," and that all conveyances and contracts in writing signed by the President, and countersigned by the

Secretary, or other officer authorized by the board under the seal, should be binding, and that the company should be authorized to construct a road from Houston northward to the Red River. (St., 3.) It was provided that the annual meetings and domicile should be at Houston. (St., 4.) The charter of the International R. R. was dated August 5th, 1870, to construct a road from Arkansas to the Rio Grande, near Laredo, and provided that the immediate control and direction of its affairs should be in a board of directors (St., 5), and that the company should have the right to connect and consolidate with any other railroad in the State. (St., 6.) By the acts of 1874-1875 the consolidation of the H. & G. N. and International into the I. & G. N. R. R. were inferentially recognized, and it was provided that all acts done in the name of either company should bind the I. & G. N. to the extent that it bound either company, and that all rights or liabilities of either company "shall inure to said railroad company the same as existed with the respective company." (St., 6-7.) The decree of foreclosure of the mortgage of 1881 made in 1910, and above sufficiently described, was introduced together with deeds and proceedings therein showing the conveyance of the properties in 1911 into the plaintiff in error. (St., 8-66.)

The charter of the plaintiff in error of August, 1911, was introduced, which provided that the place at which should be established its principal business office, public office and general office should be Houston, Harris County, Texas. (St., 67-70.)

A. R. Howard, Secretary of the plaintiff in error, and official custodian of its minutes and records, and previously Secretary of the sold-out I. & G. N. R. R. for many years, and custodian of the records of the H. & G.

N. and International and I. & G. N., as well as of the plaintiff in error, was called by the plaintiff, and brought all of the minutes of these various corporations into court. The by-laws of the H. & G. N. of December 4th, 1871, were introduced. They provided that the management and direction should be vested in the Board of Directors (St., 74, Sec. 1); that a majority of the board should be necessary to constitute a quorum (St., 76, Sec. 6); that full minutes of all of the proceedings of the board should be entered by the Secretary in a book to be kept for that purpose (St., 77, Sec. 9); that the business of the company, during the intervals of the meetings, should be transacted by the executive officers. "But all contracts, not of immediate necessity for the proper management of the business of the company, and not otherwise provided for, to be subject to the approval of the board, or executive committee," and that the executive committee should be vested with the powers of the board, during the intervals of the meetings, subject to the ratification of their action by said board at the next stated meeting. (St., 77, Secs. 10-12-13.) That the President should sign deeds and contracts, and have the general management and supervision of the affairs of the company, and that "he shall have the power to negotiate contracts during the intervals of the meetings of the board, subject to the approval of the board at its next meeting, save and except in cases specially provided for, and he shall perform such duties not otherwise provided for, as are usually devolved upon the President of incorporated companies." (St., 78-79, Secs. 1 to 5.) The Secretary was required to keep "full minutes" and attend all meetings, and to have charge of all contracts. (St., 80, Secs. 3-5.) It was provided that the by-laws should

1195

not be changed except at regular annual meetings of the stockholders or special meeting for that purpose. (St., 83, Art. 6.)

Howard testified from the minutes that these by-laws were in force up to December 2nd, 1872, when certain changes were made, but making no changes in the matters stated above or relevant hereto. (St., 85-89.) Grow was elected President in 1871, and authorized to act as General Superintendent, and in February, 1872, authorized to proceed with the work of extending the road, provided the counties made satisfactory subscriptions. (St., 90.) The agreement for the consolidation of the H. & G. N. and International was made in December, 1872, but to be ratified by the stockholders. It was provided that in the meantime each board should retain its own existence, the business of the two companies to be in the hands of a joint board, which would consist of all the members of each board, and that all resolutions concerning the interests of the two companies were to be submitted to and be passed upon by the joint board, separate minutes to be kept until consolidation, as formerly, of each railroad. (St., 91.) This agreement was made the 19th of February, 1872, and anticipated that legislation might be necessary to perfect the consolidation, but it was agreed that from the 19th of February, 1872, "the administration of the two companies shall be run and conducted in the following manner," to wit, as stated above, by a joint board. (St., 91.) The minutes of the H. & G. N. showed February 4th, 1873, a minute authorizing a draft to Grow not to exceed $25,000.00, for extra services in procuring private donations of land and county bonds to the International and H. & G. N., and on January 11, 1873, a minute that Grow was thereby authorized to receive

from the County of Anderson, or any other county having donated bonds, the bonds donated "in aid of the building of the road, and to receipt for the same" (St., 96); and on December 22, 1873, from the minutes of the H. & G. N., the minutes showing that the company had on hand $100,000.00 in bonds of Anderson County. The joint companies adopted the by-laws September, 1873 (St., 97), which were identical, as far as relevant, with those of the H. & G. N. above set out. (St., 97-98.) Grow was elected a director of the International in November, 1872, and President thereof at the same time, and a minute of the I. & G. N. of 1874 allowing Grow $5,000.00 as an addition in full payment for extra services and expenses, and the General Manager was authorized to perform the duties of President in Texas. (St., 99-100.) Grow resigned as President in 1874, and Sloan was elected President in 1875, and Hays Vice-President. On April 5, 1875, at Houston, it was resolved that the general offices be moved to Palestine as soon as practicable, due notice to be given by advertisement. (St., 100.) It was agreed that the minutes of the H. & G. N., International and I. & G. N. were turned over to counsel for the plaintiffs by defendant, and that they have investigated those minutes, and that the only matters found by them which they think relevant are those portions thereof which they have introduced in evidence. (St., 122.) Howard further testified that he came to Texas in 1871, in the service of the International, then having its headquarters at Hearne, Texas, whence it moved in 1872 to Houston, in the same building where the H. & G. N. had its headquarters, and that the two roads were finally consolidated in September, 1873, and became known as the I. & G. N. R. R. Co., and the annual meetings were then held at Houston, of stock-

holders and directors, up to June, 1875. He was in the Auditor's and Treasurer's offices in Houston, and moved to Palestine with these offices (St., 123); that in 1875 the General Manager, Auditor, General Freight Agent, General Passenger Agent, Chief Engineer, Treasurer and Secretary. and perhaps the head of the Legal Department, constituted the general offices, but now constitute only a part of them. (St., 124.) The general offices remained in Palestine until in 1881, when they went to St. Louis, except the primary records. Witness became a director in 1881, ceased to be one in 1883; became a director in 1893, and remained such of the I. & G. N. R. R. down to 1911. The general offices remained in St. Louis fro mAugust, 1881, until May, 1888, with all their employes, records and activities, when they returned to Palestine. (St., 125.) The witness went to St. Louis with the offices, and returned, and has progressed up through the services of the various companies. (St., 126.) A list was given of all of the officers of the H. & G. N., International and I. & G. N. during their respective histories, and Howard testified that Ira H. Evans was Secretary in 1874, down to in 1879, when he was succeeded by D. S. H. Smith, who continued down into 1889, and both are alive; that Evans was very close to Hoxie and Sloan while he was Secretary, and lived in Palestine almost opposite the general office building, and was, he thinks, in charge of the land department, and also a director. (St., 127-128.) A list of the directors of the International, H. & G. N. and I. & G. N. was exhibited down to 1885, from the beginning, which showed that Evans had been a director of the I. & G. N. R. R. from April 5, 1875, to 1880, again in 1882, remaining until 1885; that Smith had been a director from April 5, 1875, in 1876, 1879-1880;

and that all the executive officers except Smith and Evans before 1885, wer dead, except Pollock, now living in Missouri, who was an accountant, and who entered the service after the offices were moved to Palestine. Hoxie, Noble, Hays, Grow, Van Duersen, and all others, with the exceptions stated, are dead. (St., 129.) The bond record of Anderson County was introduced, all of which has been set out above, showing the written contract and the decree of the court, the result of the election and issuing the bonds, and declaring that the railroad had complied with all the conditions and undertakings (St., 133-147); and also Shattuck's protest, and the overruling of the same. (St., 146.) These matters have been stated above, together with the testimony of Grow, Ozment, Jacobs, Word, Hughes, McClure, and Mrs. Reagan, in regard to Judge Reagan agreeing to make a canvass of the county, and that Grow and Hoxie said the offices and shops and roundhouses should be at Palestine forever, and the speeches made by Grow and Reagan, all as set out above, and the litigation between Anderson County and the H. & G. N., commenced in 1874, and as above set out. (St., 193.) The plaintiffs introduced the various deeds and plats made to land in Palestine by the railroads, none of which mention or refer to the general offices or shops or have any indication on them or in them in that regard. (St., 216-224.) The defendant introduced the various documents embodied in and attached to the defensive pleadings, and which have been stated above, including the mortgage of 1881, foreclosed May, 1910, and the mortgages prior thereto, foreclosed in 1879. (St., 241-307.) It was agreed that the bonds secured by the mortgage of 1881 were duly issued by the I. & G. N. R. R., approximately on the date of the mortgage. It was also shown

that the I. & G. N. R'y Co., the plaintiff in error, had denounced, as appears above, the alleged contracts sued on under the terms of the decree.

The defendant then introduced the deposition of Ira H. Evans, who stated that in 1873 he was elected Secretary of the H. & G. N. R. R., and in 1874 Secretary of the International, and in July, 1874, Secretary of the I. & G. N., and was a director of the I. & G. N. R. R., on April 5th, 1875, and continued, with the exception of two years, until November, 1909, and as Secretary until about the beginning of 1880. That Grow was President of the H. & G. N. when he became Secretary, and also, as he recollects, of the International. Hoxie became Superintendent of the I. & G. N. in 1874. Witness stated that he was intimately associated with Grow, and knew Hoxie well. That the general offices of the H. &G. N. were maintained in Houston during his connection therewith, and during its consolidation with the I. & G. N., from consolidation until about 1875, when they were moved to Palestine. That he had no recollection (St. 307) of hearing any other reason for the removal to Palestine except that it was considered the most convenient place. (St., 307-8.) That then Hays was Vice-President and General Manager, Hoxie, General Superintendent, D. S. H. Smith, Treasurer, and witness Secretary, and that they were all intimately associated in the conduct of the business of the railroad, and witness did not recall any other reasons than the stated convenience of Palestine for the removal. The alleged contracts claimed by plaintiffs were stated to the witness. He stated that he had never heard of them until recently, nor of any contract about the bond issue except the written one, which was for the extension of the road to Palestine, and putting up a depot within half

a mile of the courthouse, at the junction point with the International Railroad, in consideration of $150,000.00 in bonds of Anderson County, and that it was only recently that this claim was brought to his attention. That as Secretary of the I. & G. N. Railroad, he had intimate, personal knowledge of all such matters as those inquired about, and as custodian of its records was acquainted with all its official acts, and so of the H. & G. N. That he became Secretary in September, 1873 (St., 308); that Hays became in 1874 chief executive officer, and Hoxie Superintendent, and that it did not seem to him possible that Hoxie or Hays, separately or together, could have made the alleged contract of 1875, without action by the Board of Directors, whose Secretary witness was. That he had kept all the minutes of the H. & G. N. and I. & G. N. carefully and correctly, and that neither as Secretary nor director of either company, or in any way, had he ever heard of the alleged parole contracts sued on; that he did not think that Hoxie had any authority to make any such contract. That he, Evans, to the best of his recollection, was at Hearne in 1872, and at Houston in April and May, 1872. (St., 310.) Hays was a strong man, and Hoxie was Superintendent; they all worked together, and were able men. (St., 310.)

D. S. H. Smith testified that he now lives in St. Louis, where he had lived since 1881, going there when the general offices of the I. & G. N. were moved to that point in that year; that he entered the employment of the International Railroad in 1871, and the I. & G. N. when the International and H. & G. N. were consolidated; that he was first Land Agent for the International, and afterwards Treasurer and Paymaster for the I. & G. N., and Secretary. In 1871 he lived in Hearne, in the fall of

1201

1872 moved to Houston, in the summer of 1875 moved to Palestine, thence to St. Louis, in 1881. He knew Hoxie in 1871, then Superintendent of the International, and for ten years lived with Hoxie in Hoxie's house, first at Hearne, then at Houston, then at Palestine, and was quite intimate with him. In 1875 the I. & G. N. moved its headquarters to Palestine because it was the center of the system, and more convenient and economical; that he knew why the offices were moved to Palestine, as this was a general topic of conversation and discussed among the officers, including Hoxie, Grow and himself; that he never heard of any contract between Hoxie or any other persons of Palestine whereby the headquarters of the I. & G. N. should be moved to Palestine in consideration of rent houses: the reason for moving to Palestine has been stated just above. That he knew of the contract between the H. & G. N. and Anderson County, which was in writing, and is of record, for $150,000.00, and had been lived up to on both sides. (St., 305.) He never heard of any contract, except the written contract. He was on intimate relations with the officials of the I. & G. N., and would have been almost certain to have been acquainted with any new policies to be adopted, living with Hoxie in the same house for ten years at Hearne, Houston and Palestine, and never heard of any parole agreement between Hoxie, Wright and Ozment and the citizens of Palestine. He was a director of the I. & G. N., its Secretary, must have been director in 1875; and acted as Secretary until after 1881; that neither as Secretary nor director, or in any other way, did he ever hear of the alleged parole contracts, or additions to the written contracts, sued on, claimed made by Grow with Reagan, or by Hoxie

in 1875 with Ozment, Wright and other citizens of Palestine. (St., 306.)

Three letters were introduced by defendant without objection, written by Judge Reagan: one of March 26th, 1872, before the county bond election, addressed to Barnes, President of the International Railroad, and stated that "we have met the people of this county, in small numbers, in the northern part of this county, canvassing the question of donating $150,000.00 to the H. & G. N. R. R. Co. to build that road to its intersection with the International at this place." It then stated that the writer was to meet them at other places; that a petiion had been presented to the County Court, and the election was to be held commencing May 1st. Also, letter May 7th, 1872, from Judge Reagan to Barnes, stating that the election had been held "on the giving a donation of $150,000.00 to the H. & G. N. R. R. Co.," and that it carried, and the County Court had made the necessary orders to carry into effect the vote of the people; that it cost a hard struggle. Then it referred to the donation of Smith County and to certain movements in Texas antagonistic to capital, of which the writer highly disapproved. (St., 319-321.) Next, a letter of November 20th, 1874, by Judge Reagan, to Hays, General Manager. This was after Anderson County had sued the H. & G. N. to repudiate the bonds, partly an attempt, as here, to add to the written contract, all stated above, and the letter, as set out, was in answer to a letter from Evans, Secretary to the company, offering to employ Judge Reagan to defend that suit. He explained that he could not undertake the defense; that he had been at considerable sacrifice; "I advocated, and in doing so lost another term of our court, the giving of the subsidy by our county to secure the

junction of the Great Northern with the International at this place." Then it is stated that Judge Reagan's firm had been the local attorneys of the railroad; that he had been charged by people of the county with interested motives in procuring the bond issue, and with fraud, all of which he repudiates. He states the emergency of the people on account of the poor crops, and that Barnes and Grow, and the presidents of the road, had given assurances that one of the benefits to the community resulting from the junction of the roads would be the establishment at Palestine of machine shops, and that this was the argument used to get the people to vote the subsidy. It is nowhere stated that the offices were promised, and the plain inference is that the assurances as to the shops were exterior and no part of the contract. (St., 321-323.)

The defendant next introduced various letters, and it was proved that Mr. Maury, Consulting Auditor of the railroad, and long in its service, had made search to find and bring with him to court everything in the files of the company he could find, and had brought with him great numbers of letters which had been turned over to plaintiffs' counsel and investigated by them, and the following were introduced. These letters discussed locations of shops, of general offices in an interior discussion, between the officers of the road and directors as an open matter, never mentioning the alleged contracts, though clearly contemporaneous with the dates alleged therefor.

Letter of October 5th, 1872, from Hoxie to Barnes, as President of the International. This was after the arrangement for the consolidation, as appears above. It states that he had received a letter from Barnes "relevant to shops for both roads." It suggests that they wait

to determine a shop location and to make a complete investigation, and discusses a point on Wells Creek east of Palestine, a point between Crockett and Palestine, favored by Grow and Noble, and suggested delay. (St., 324.)

Letter from Hoxie, General Superintendent, to Barnes, President International R. R., May 28th, 1872, suggesting that the joint board of both companies should determine at an early date where they would build the shops, and discussing locations and water supplies, and referring to conversations with Grow. (St., 325.) Letters March 3rd, 1873, and June 25, 1873, from Hoxie, Superintendent, to Wetmore, Financial Agent, stating that the writer and President Grow had just returned from an extended trip over the whole road, and that "we" must soon decide on a point for building shops, and stated that water had been found at Palestine, which was above the yellow fever belt, and in the center of the road, and it seemed the most available place. (St., 325 and 326.)

Letter December 3rd, 1874, by Kennedy, President I. & G. N., to Hays, General Manager, suggesting that temporary shops be put up at Palestine. Letter from Van Deusen, Auditor I. & G. N., dated Houston, February 13, 1873, to Barhydt, Secretary, recommending that the offices of the International be removed to Palestine, on which was endorsed the approval of Grow, and suggested that the board authorize the necessary publication. (St., 328.)

In addition to the above documents, showing statements of officers and directors of the road, and that there were no shop or office contracts, but this was an open matter, the defendant introduced report of Grow of December 2, 1872, to stockholders of the H. & G. N., wherein it is stated that Anderson County had voted the subsidy, and other

counties subsidies, and nowhere mentioning the alleged contract sued on. (St., 328-329.)

Letter of General Attorneys of I. & G. N. to Evans, Secretary, giving opinion as to whether there were legal impediments to remove the principal offices to Palestine, and expressed the opinion that there were none, but never referring to any alleged contract sued on. (St., 331.) Letter from Hays to Sloan, April 30th, 1875, stating that at Palestine no additional ground could be obtained by donation, that the donations of land and money had been made to the International, and the county bonds to the H. & G. N., and that the road had all the ground there it desired. (St., 346.)

Authorities.

R. S., 1159 and 1160, 6445.
K. C. M. & O. R'y v. Sweetwater, 104 Tex., 329.
R'y v. Logue, 139 S. W., 11.
Logue v. R'y, S. C. Tex., 167 S. W., 805.
10 Cyc., 774, 781-782.
Cook on Corporations, 6th Edition, Vol. 3, Sections 712, 713a, 714, 726.

For argument see brief for appellant in Court of Civil Appeals, pages 249 to 262.

Nineteenth Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law in this case, in failing and refusing to hold, as contended by the plaintiff in error, that the authorization or ratification of the alleged contracts sued on, on which the plaintiffs depend, if ever made, had to be made by the Board of Directors, acting as a body, and that it is not sufficient that a majority of all the board, not

acting as a body, may authorize or ratify, it being essential that the board should act as a body, with the opportunity for consultation, the plaintiff in error contending that it was entitled to have the jury so charged, and the trial court refusing this charge, and the Court of Civil Appeals upholding the trial court.

This ruling injuriously affected the right of plaintiff in error to maintain its defense, and was reasonably calculated to cause, and did cause, the rendition of an improper judgment, because the jury found that the directors had ratified or authorized the alleged contracts sued on, whereas, if they had been charged as requested, they could not reasonably so have found, even if there had been evidence of individual ratifications by the directors, though there was none.

Statement.

This proposition was presented in the 43rd, 44th and 45th sections of the motion for a re-hearing. In the motion for new trial it was objected that the court had erred in overruling objection 3 to question 3, submitted in the charge to the jury (R., 576, Sec., 63, of motion for new trial), and this was assigned as the 49th assignment. (Br., 244.) Also, in the motion for new trial, it was pointed out that the court had erred in overruling objection 3 to question 6 of the charge (R., 576, Sec. 70), and this was assigned as the 50th assignment. (Br., 244.) Also, as a ground for a new trial, it was pointed out that the court erred in refusing special charge 1 requested by defendant in connection with question 3 submitted by the court to the jury (R., 585, Section 99, motion for new trial), and this was assigned as the 51st assignment. (Br., 245.) Under these assignments, the proposition now ad-

vanced was made. (Br., 245.) The error of the court in overruling the assigned objections to the charge was preserved in bill 41. (R., 545-551.) The court charged with reference to the alleged contract of 1872 alleged as a three-party agreement between the citizens of Palestine by Reagan, the railroad by Grow, and the county, that it was necessary to find whether or not the Board of Directors conferred the authority on Grow, or knowing of his exercise in the same, approved his action, but that it was not necessary that a formal resolution should have been spread upon the minutes, or that the board should both ratify and authorize. (R., 502-503.) As to the authorization and ratification by the I. & G. N. Railroad of the alleged rent house contract of 1875, the court charged that if the I. & G. N. had full knowledge, and acting by its board, with the intention to adopt, located the general offices in Palestine, question 6 should be answered "Yes," and also gave the same as above as to the authorization and ratification. (R., 505-6.) The defendant objected to the charges in writing that it was necessary that the court should act as a body, and that the charge did not state that the separate action of the majority of the board was insufficient, and that the court had given no instruction that ratification or authority should be conferred or established. (R., 510.) And subject to the refusal to maintain these objections, the defendant requested special charge 1, in connection with question 3, directing the jury that individual directors, when not assembled and acting as a board, could not bind the company by anything they might say or do or omit to say or do. (R., 530.) The statement is otherwise as the last statement.

1203

Authorities.

Kolp v. Specht, 33 S. W., 714; 17 T. C. A., 685.
10 Cyc., 774.
Cook on Corporations, Edition of 1908, Vol. 3, Section 712, pages 2234-5.

Twentieth Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law of this case, by failing and refusing to hold that since the H. & G. N. R. R. and the I. & G. N. R. R. had the legal right to establish and maintain their general offices, machine shops and roundhouses at Palestine, without any contract, the fact that they did establish them there was not evidence that these companies, or either of them, had authorized or ratified any contract binding them to do so.

Said erroneous ruling of the Court of Civil Appeals injuriously affected the right of plaintiff in error to maintain its defense, for the reason that it was reasonably calculated to cause, and did cause, the rendition of an improper judgment in this case, because, if it had been submitted to the jury in the terms of this proposition, they could not have reasonably answered the special issues in favor of the plaintiffs.

Statement.

This proposition was made in the 46th section of the motion for re-hearing, and also in the 47th. In Section 73 of the motion for new trial (R., 577) it was pointed out that the court's special charge 3, given by it, not requested by defendant, contained the statement that if the jury found that an agreement had been made, they might

consider the establishment and maintenance of the shops and offices at Palestine, along with other evidence in the case, in determining whether or not the company knowingly acquiesced in or ratified such agreements, if any were made. It was objected in writing that there was no other evidence of ratification or knowledge, and that the establishment of these institutions at Palestine was no evidence. This was made the 52nd assignment. (Br., 247.) The objection was in writing to the charge (R., 542), Section 3), and was included in the bill of exceptions. (Section 3, R., 544, and R., 550, bill 41.) The defendant requested special charge 3 in connection with question 3, stating that if the H. & G. N. had the right to establish their general offices and shops at Palestine without any contract, and the fact that they did so, would not be in itself a ratification. (R., 532-3.) The court refused to give this charge, and his action was excepted to (R., 549, Section 20, of bill 41), and this error was made ground 101 of motion for new trial (R., 585), and the 53rd assignment. (Br., 247.) Under these assignments the propositions now stated were advanced. (Br., 247.)

Twenty-first Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law of this case, by failing and refusing to hold that the establishment and maintenance of the offices and shops at Palestine was not in itself evidence of authorization and ratification, and therefore it was error of the court to assume that such matters might be such evidence in connection with other facts, rather than to make the question depend upon such other facts, if any

there were, and that there was no such evidence. This error injuriously affected the right of plaintiff in error to maintain its defense, because that it is reasonable to suppose that if the jury had not been charged as they were charged, they would not have rendered the verdict they did.

Statement.

Same as last above. (Br., p. 248.)

Authorities.

On last above two propositions:

K. C. M. & O. R'y v. Sweetwater, 104 Tex., 329.
Railway v. Logue, 139 S. W., 11.
Logue v. Railway (S. C. of Tex., Opinion June 17, 1914), 167 S. W., 805.

There is an argument on this whole subject of ratification and authorization in brief for appellant in Court of Civil Appeals, commencing page 249, extending to middle of page 262, and to which the court is respectfully referred.

Twenty-second Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law of this case, in holding that the foreclosure sales in 1879 (whereby all properties, corporate rights, privileges and franchises of the International Railroad Company, of the Houston & Great Northern Railroad Company, and of the International & Great Northern Railroad Company, their successor, were sold under decrees of foreclosure by the United States Circuit Court for the Western District of Texas, to John S. Kennedy

and Samuel Sloan, the sales having been confirmed by that court, and the deeds for all of said property, corporate rights, privileges and franchises having been executed by the Master designated by the court to said Kennedy and Sloan as purchasers), did not have the effect to vest in the purchasers at said sales the title to said properties, corporate rights, privileges and franchises of the International Railroad Company, of the Houston & Great Northern Railroad Company, and of the International & Great Northern Railroad Company, their successor, free from liability for the debts and other merely personal obligations of the International & Great Northern Railroad Company, the Houston & Great Northern Railroad Company, and the International & Great Northern Railroad Company; and in failing and refusing to hold that the fact that Kennedy and Sloan, after purchasing said properties, corporate rights, privileges and franchises, executed a conveyance thereof to the International & Great Northern Railroad Company, and that the fact that the stockholders were mostly the same persons as they were prior to said sales did not have the effect of reviving or restoring the liability of said companies or any of them for their debts and other purely personal obligations. Said erroneous ruling of the Court of Civil Appeals injuriously affected the right of plaintiff in error to maintain its defense, for the reason that the plaintiff in error has been subjected to liability for obligations that were extinguished long before plaintiff in error came into existence, and the erroneous ruling, therefore, was reasonably calculated to cause and did cause the rendition of an improper judgment in this case.

1212

Statement.

This position was presented in motion for re-hearing, as above set out, in Sections 49 and 50 thereof. The defendant objected to the court's charge that a peremptory should be given (R., 507.) It tendered this peremptory for the defendant, which was refused (R., 511), all as shown in the bill taken, showing the trial court's action (R., 545-546), and objection thereto. In the motion for new trial it was presented that the court erred in overruling the exception to the charge, and in refusing to give a peremptory (Sections 54 and 76, R., 575, 578), and the same grounds assigned as the 54th and 55th assignments (Br., 262), under which this proposition is made.

In the answer the defendants plead the foreclosure of the mortgages next stated, and the history of those mortgages, all made in 1879, and the proceedings thereunder (R., 116-126) on which pleading is deduced, in its answer, that by the foreclosure proceedings of the United States Courts, and sales thereunder made in 1879, every right or claim whatsoever of the plaintiffs was eliminated, and that R. S. 6423-4-5 of 1911, being the office-shops act of 1889, could not be enforced on the applications made in this case, but would be on them unconstitutional and invalid; as, after said sales had been made, and the title to the property passed free of purely personal obligations, if any there were (of the alleged contracts sued on as of 1872 and 1875), the act of 1889 could not subsequently give a lien and fix a burden or duty or service or servitude upon the properties or any of them, and that therefore, if that be the right construction of the fact, without which the plaintiffs cannot recover, it is violative of Subsection 1, of Section 10, of Article 1, of the Constitution of the United States, and also of Section 1, of Article XIV, of

the Amendments to the Constitution of the United States, as to the first, because an attempt is made to change the obligations of the contract, and as to the second, because by attempting to revive and secure such dead personal contracts of 1872 and 1875, after the properties had all been sold out, attempt is being made to take property without due process of law. (Sec. 38, answer, R., 130-132.)

The United States Circuit Court for the Western District of Texas, in 1879, foreclosed the following mortgages, to wit:

(1) Mortgage of April 1st, 1871, executed by the International Railroad Company to Stewart and Osborne by decree against the International and International & Great Northern Railroad Co., both being chargeable. The decree included all corporate rights, privileges and franchises of the International Railroad, including the franchise to be a corporation. The property was sold under the decree for one-half million dollars, the mortgage being for over five million, and the sale was confirmed. (St., 298-299; R., 309, and 321-325.) The purchasers were Kennedy and Sloan, Trustees, to whom the Master conveyed all such franchises, including the franchise to be a corporation. (R., 325-329; St., 299.)

(2) On the bill of Barnes and Pearsall v. I. &. G. N. Railroad in August, 1879, said court foreclosed the mortgage of the International Railroad, and also a mortgage on the same date by the Houston & Great Northern Railroad, to the same trustees. By the decree it was established that the International & Great Northern Railroad Company was the successor of the International and the H. & G. N. Railroad, and had assumed their obligations to the amount of over eight million dollars, and the decree

directed the sale of all the corporate rights, privileges and franchises of the International and the Houston & Great Northern. (St., 300; R., 329-339.) The property was sold to Kennedy and Sloan, and the court confirmed the sale. (St., 300; R., 339-342.) The Master made a deed to Kennedy and Sloan, purchasers, as trustees. (St., 301; R., 342-346.)

(3) On bill brought by Taylor & Dodge, Trustees, v. the H. & G. N. and the I. & G. N. Railroads et al., decree was rendered by said court, April, 1879, foreclosing the mortgage of the H. & G. N., as against that road, and the I. & G. N. assuming the same for over five million dollars. (St., 301; R., 347-353, full copy.) The property was sold and bought by Kennedy and Sloan for $500,000 in gold, and sale confirmed, and the Master made a deed. (St., 302; R., 358-362.) This deed conveyed all the franchises and charter powers and privileges of the H. & G. N. and I. & G. N. covered by the mortgage, and the decrees the consolidation of the International and the H. & G. N. to form the I. & G. N. Railroad, as shown above, and on pages 6 and 7 of the Statement.

Kennedy and Sloan, as trustees, on November 1st, 1879, made a deed conveying to the International & Great Northern Railroad all the property of the International Railroad, including its corporate rights, privileges and franchises, among which was the franchise to be a corporation, and also all of the properties and the franchises of the Houston & Great Northern and the International & Great Northern for over ten million dollars. (St., 214-215.) The shareholders after the conveyance were the same persons as those before the conveyance, except to the extent of 250 shares. (St., 215, 216.)

Authorities.

Newell v. G. C. & S. F. R'y Co., 73 Texas, 334.
Acres v. Moynes, 59 Texas, 623.
H. & T. C. R'y Co. v. Shirley, 54 Texas, 125.
I. & G. N. R'y Co. v. Anderson County, 156 S. W., 499.
I. & G. N. R'y Co. v. Anderson County, 150 S. W., 239.
I. & G. N. R'y Co. v. Smith County, 65 Texas, 21.
K. C. M. & O. R'y Co. v. Cole, 145 S. W., 1094.
Texas Southern R'y Co. v. Harle, 101 Texas, 170.
G. C. & S. F. R'y Co. v. Morris, 67 Texas.
Paschal's Digest, Articles 412 to 416, inclusive.
Thompson on Corporations, Vol. 5, Sections 5981, 5991, 5994, 6007 and 6008.
Cook on Corporations, Vol. 4, Sec. 886.
Stewart's Appeal, 72 Penn. St., 291.
Ferguson v. Ann Harbor R'y Co., 45 N. Y. Supp., 172.

Twenty-third Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law of this case against the contention of plaintiff in error that the foreclosure sales of 1879 and the proceedings thereunder, described in the last ground, did not vest in the purchasers at such foreclosures the franchises and rights both to do and to be of the sold-out railroads, as well as their other properties, and the franchise to be, of the sold-out I. & G. N. Railroad;

Because, under Article 4912 of Paschal's Digest, being Article 4260 of R. S. of 1879, the purchasers and their assigns of the sold-out railway were relieved of any necessity to take out a new charter, but might adopt the charter of the old sold-out railroad and operate under it free of all alleged contracts claimed in this case, if any there were, there being at that time no provision for chartering a

railroad to own the sold-out properties of another railroad, the object and effect of the statute being to eliminate all unsecured obligations and personal contracts, and to subject the franchise to be a corporation to the foreclosure sales, whereby the act of 1889, known as the office-shops act (R. S., 6423-4-5 of 1911) is as construed and applied unconstitutional and invalid:

(*a*) Because it would be in violation of Section 1 of Article I of the Constitution of the United States, prohibiting the passage of a law violating the obligation of contracts for such statute to revive and secure personal contracts eliminated as to the franchise to be, and operating franchises, and all property, as well as a personal obligation, by the decrees and foreclosure and sales thereunder;

(*b*) Because to revive and secure such contracts would violate Section 16, of Article I, of the Constitution of the State of Texas, prohibiting the passage of retroactive laws.

This error injuriously affected the right of plaintiff in error to maintain its defense, because only by such erroneous construction and such failure to maintain the foreclosure proceedings of 1879 as a complete defense could a judgment have been entered for the plaintiffs in this case; that is, only by ignoring this absolute defense now presented; not yielding the contention that there were other absolute defenses.

Statement.

This proposition as here stated was presented in the 49th section of the motion for a re-hearing. Statement is otherwise identical with the last statement.

See the argument and authorities, argument, brief for appellant in Court of Civil Appeals, pp. 269-284.

Twenty-fourth Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law of this case, wherein the court stated in its opinion, with reference to the foreclosure sales of 1879, and the proceedings thereunder, and the defense made, that "under these pleadings the question of a *bona fide* sale to any third person becomes issuable. The facts and circumstances warrant the inference of fact, which, in support of the court's judgment, we must assume that the court found that there was not a *bona fide* judicial sale; hence, in such finding of fact the legal effect of the sale and deeds to the trustees would not discharge admitted corporate obligations." (Page 20 of opinion.)

Because this theory is first advanced in the opinion of the court, and because no such issue was submitted to the jury, and it was not for the trial judge to find such issue of fact; and because he did not find it. Whereby, the Court of Civil Appeals has made an entirely unsupported finding, both in the evidence and in proceedings in the trial court, to sustain the propositions that the plaintiff in error can recover on the act of 1889 in connection with the alleged contracts of 1872 and 1875, when such alleged contracts, purely personal (at least before 1889), had been eliminated absolutely from all relation to the I. & G. N. Railroad Company or its properties by such foreclosure proceedings of 1879, the Court of Civil Appeals having found a fact never raised in the evidence nor submitted to the jury, and having found the same directly against the decrees of the United States Circuit Court of the Western District of Texas of 1879, undoubtedly made in good faith, but the good faith of which was not in issue.

It is apparent that such finding was injurious to the plaintiff in error, and that except therefor the court would have reversed this case.

Statement.

Same as last above.

Twenty-fifth Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law of this case, in that the court ruled against the contention of plaintiff in error that the office-shops statute of 1889 (R. S. 1911, Arts. 6423-4-5), at most, purports to require the general offices, shops and roundhouses of a railroad coming within its provisions to be maintained permanently at the place where they have been contracted to be kept, the word "permanently" not meaning forever, but meaning only for a less period, completely complied with (if there was any obligation) by keeping these institutions in Palestine, as to the shops from in 1875 to the present time, and as to the general offices from in 1875 to in 1881, and from 1888 to in 1911, the court, to the contrary, maintaining that permanently means "perpetually," or forever, and "perpetually" enjoining their removal from Palestine, whereby the most essential word of the statute is changed; said finding being injurious to the plaintiff in error, and leading to an improper judgment, because it is apparent that the "permanently" of the statute has been complied with, were there even a cause of action.

1213

Statement.

This position was presented in the terms stated in the 53rd and 54th sections of the motion for re-hearing. The defendant on trial excepted to the court's charge on the ground that he should charge peremptorily for the defendant, and to his refusal to give special charge 1, instructing a verdict for the defendant generally (R., 507-511) and excepted to the court's action in overruling its exception and request, all made in writing, and preserved its bill. (R., 545-546.) The error of the trial court in overruling the exception and refusing the peremptory were presented in Sections 54 and 56 in the motion for new trial, and carried forward in the 56th and 57th assignments (Br., 285) and the above proposition thereunder. (Br., 295.)

Authorities.

T. & P. Railway v. Marshall, 136 U. S., 395.

Argument.

Brief of appellant in Court of Civil Appeals, pages 299-303.

Twenty-sixth Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law of this case, in that the court refused to maintain that the alleged contracts sued on are to be measured and determined by the laws and statutes existing at the time of their creation, and that the adding of more extensive obligations thereto is violative of Subsection 1, of Section 10, of Article I, of the Constitution of the United States, prohibiting any State from passing

any law impairing the obligation of any contract, whereby, Articles 6423-4-5 of the Revised Statutes of Texas of 1911, commonly known as the office-shops act of 1889, are invalid in its applications hereto, and as construed and enforced herein, because by such construction these alleged personal contracts of 1872 and 1875 were claimed to be secured *in rem*, or made to inhere, or be a duty on, or be a servitude upon the properties of the defendant, thereby adding to the obligations of such alleged contracts, and violating the same, and because, as contended, this act extended and re-defined the terms "general offices," as understood under the laws existing in 1872 and 1875, whereby numerous obligations were added to the definition given by those laws to general offices and numerous persons included and added thereto, with the residence of themselves and families at Palestine, and whereby the Constitution of the United States, as pointed out, is violated, and the same provision in the Constitution of Texas.

This is a Federal question, as well as one arising upon the State law.

This error injuriously affected the right of plaintiff in error to maintain its defense, because, without this ruling, there would have been no basis to submit anything to the jury in favor of the plaintiffs, whereby the error did bring about a wrong result.

Statement.

This is made as a third proposition under the 56th and 57th assignments as mentioned last above, and the last above statement is included herein. The point was presented in the 55th section of the motion for re-hearing.

Authorities.

Jefferson, etc., Bank v. Skelley, S. C. of U. S., 1st Black, 443.

Butz v. City, 8 Wall., 382.

Proposition.

This proposition is connected with the last assignment. The Act of 1889, known as the Office-Shops Act, carried into R. S., pp. 6423-4-5 of 1911, did not purport or propose to change or burden the pre-existing contracts by securing them by a lien, servitude, duty or burden connected with or upon the property of any railroad making the contracts, and yet without this theory it is impossible for plaintiffs to recover, the alleged contracts on which they sue being purely personal in their origin and being of date, as alleged, 1872 and 1875.

Statement.

As last above, and see this proposition, Br., p. 297. For argument see brief for appellant, Court of Civil Appeals, p. 297.

Twenty-Seventh Assignment of Error Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law of this case wherein it refused to hold that the alleged contracts sued on, of dates 1872 and 1875, being alleged to be forever and to create an obligation for performance forever, and to be secured by the Office-Shops Act of 1889 (R. S. of Texas of 1911, Articles 6423-4-5) forever, are invalid and void, and such statute in the application made thereof hereto as securing the

same, is in its applications hereto invalid and unconstitutional, if it bears the constructon that the word "permanently" therein means "forever" or "perpetually," as contended by the plaintiffs and secured in their decree. Because then the Constitution of the State of Texas is violated, which prohibits perpetuities, and thereby the indefinite restraint on alienation and the indefinite tying up of property or the securing of any obligation or contract by a servitude, duty or burden, whereby the contract is to be performed forever or perpetually, thus violating Section 26, of Article I, of the Constitution of Texas. This error of the Court of Civil Appeals in maintaining such statute and such contract as valid upon the construction given it, injuriously affected the right of plaintiff in error to maintain its defense, and was reasonably calculated to cause, and did necessarily cause, the rendition of an improper decree and judgment in this case, in that without such construction no judgment or decree could have been rendered herein securing performance perpetually or forever.

Statement.

The proposition in the terms stated was presented in Section 57 of motion for rehearing. The allegation of the petition was that the alleged contract formulated by Reagan and Grow as claimed, Reagan representing the citizens of the town, Grow the railroad, being the three party contract, which it was alleged was adopted by the county, and the alleged Hoxie rent house contract of 1875, bound the railroad to performance forever as to the shops, roundhouses and general offices. (R., 49, Sec. 9; 51, Sec. 13; 55, Sec. 21.) The judgment restrains the defendant, without any limit of time and perpetually, from keeping its general offices,

shops and roundhouses at any place except Palestine. (R., 559.) To the charge of the court the defendant objected that it should be peremptory for it and presented a peremptory, which was refused, and to this action in overruling the objection and refusing the peremptory the defendant excepted, all in writing, and preserved its bill of exceptions to this action (R., 507-511, 545-546); and in Sections 54 and 76 of its motion for new trial assigned the error of the court in refusing to sustain the exception and for refusing to give the peremptory. (R., 575-578.) These assignments were carried forward in the brief. (Br., 298, referred to p. 285 where they are stated.)

In addition, the defendant in Section 125 of the motion for new trial set out that the alleged contracts sued on are represented to be binding forever and that they were not of that class which under the fixed principles of law and the Constitution of Texas could bind forever or perpetually; and that if the alleged contracts were indeterminate in time, they rested in the discretion of either party and could have been terminated by the railroad at any time for lack of definition of the time for which performance was to exist. (R., 608-609.) This section was carried into the brief as the 58th assignment (Br., 297), and the above proposition made thereon.

Authorities.

Const. of State of Tex., Bill of Rights, being Art. 1, Sec. 26.

Also, Art. 1, Sec. 18, in Consts. of 1845, 1861, 1866 and 1869.

Purvis v. Sherrod, 12 Tex., 161.

In Re Walkerley's Estate, 108 Calif., 647; 41 Pac., 772; 49 Am. State Reps., 97.

McIlwaines v. Hockaday, 81 S. W., 54.

Starcher v. Duty (W. Va.), 123 Am. State Rep., 995; 49 Am. State Reps., note, p. 119, near bottom.

For argument see brief commencing page 299, to second proposition on page 303.

Twenty-Eighth Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law of this case by refusing to hold that, if the alleged contracts were contracts at all, and that if the alleged rent house contract of 1875 (not stating how long the rent houses were to be rented, and not so plead) was an agreement, then it was an agreement for performance during an indeterminate time and was subject to be terminated at the option of either party, as by the defendant refusing further to perform in this case. This error injuriously affected the right of plaintiff in error to maintain its defense and was reasonably calculated to cause, and did cause, the rendition of an improper judgment in this case, because it was undisputed in the evidence that the plaintiff in error had refused further to perform the obligation, if any to perform, and, therefore, the rendition of a judgment to compel it to perform forever necessarily violated this rule of law.

Statement.

This position is presented in the 58th Section of the motion for rehearing, and is second proposition under the assignments last stated and preserved in our brief at page 303. The statement is otherwise as last above.

Authorities.

East Line R. R. v. Scott, 72 Texas, 70.

See argument commencing page 310, extending to bottom of page 316, brief for appellant in Court of Civil Appeals, to which the court is respectfully referred.

Twenty-Ninth Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law of this case in refusing to hold that the alleged rent house contract, stated to be of the date of 1875, is within the statute of frauds, the evidence showing that there was no such contract in writing and the effort being to show the existence of this alleged contract by parol, and it not being performable on either side within a year; it being plead that a consideration to the I. & G. N. R. R. was the agreement by the people of Palestine, through Ozmont and Wright, that if the railroad kept the alleged contract of 1872, the people of Palestine, as a further consideration, would construct and furnish rent houses to the railway employes at reasonable rentals; it not being plead or proved that the houses were to be rented for any specific time, but if there be any implication from the pleading that the houses were to be rented for any definite time, then they were to be rented forever; and it being plead that the shops and offices were to be maintained forever at Palestine, whereby it would result that there could not be performance on either side within a year on this theory; the alternative theory that if performance in renting the houses was for an indefinite time, there was no contract, being presented above and below. This erroneous ruling of the Court of Civil Appeals injuriously affected the right of plaintiff in error to maintain its defense, because it was reasonably calculated to cause, and did cause, the rendition of an improper

judgment and affirmance in that the trial court submitted to the jury to determine whether or not the alleged contract was created and complied with and the jury answered affirmatively, on which verdict the judgment stands.

Statement.

This point is presented in Sections 59 and 60 of the motion for rehearing.

The plaintiffs plead that the alleged contract of 1872, as having been made between the town per Reagan, the railroad per Grow, and the county voters or county, being the alleged three party contract, and also that about the first of 1875 the I. & G. N. R. R. by Hoxie, contracted and agreed with the citizens of Palestine, per Wright and Ozment, to perform the alleged contract of 1872 by locating the general offices of the I. & G. N. R. R. at Palestine, and thereafter forever keeping them and the machine shops and roundhouses at Palestine, and for the further consideration that the citizens of Palestine should construct at their own expense all rent houses which the railroad might demand on its plans for occupancy by its officers and employes at reasonable rentals, and that these houses were built within a year. Nowhere is it stated how long the houses were to be rented, or that there was an obligation to rent them for any time, unless the obligation was impliedly to rent them for a time corresponding to the time for which the railroad was to perform, that is forever. (R., Sec. 21-26, pp. 55-57.)

In question 4 of the court's charge he submitted it to the jury to determine whether or not the alleged rent house contract was entered into. (R., 503.) The defendant objected in writing, objection 2, to question 4, being that if the alleged contract did exist, it was not in writing and not

to be performed within a year. (R., 510, Sec. 2.) The court overruled these objections and the defendant took its bill 41 thereto, excepting. (R., 545-546.) In their pleading the plaintiffs carefully avoided stating whether or not the rent house contract was in writing. The defendant endeavored to compel them to so state by demurrer, which was overruled. (R., 85, Sec. 9, and judgment of court, R., 551-552.) The error of the court in overruling these exceptions was presented in Sec. 69 of motion for new trial (R., 576), and was carried into the 50th assignment. (Br., 303.) Wright and Ozment were called by plaintiffs, being two representatives of plaintiffs, to testify on this matter. In its plea 7 the defendant sets up (R., 97) that the alleged contracts sued on were neither of them in writing and that the performance was incapable of being completed within the time prescribed by law upon both sides, or either side, and that there was no contingency whereby performance might be complied on either side within a year; and plead the statute of frauds.

Wright testified that Ozment had a telegram from Hoxie appointing a meeting at Palestine *about May, 1875*, and stated that at that meeting Hoxie stated he had a letter from Grow insisting that Hoxie should comply with the Reagan-Grow contract; that Ozment was the secretary of a building company at Palestine and Wright a stockholder; that Hoxie said he wished to perform the prior alleged contract, and wished to know how many houses for employes the railroad could rent, and Ozment agreed with him to commence building the houses right away; but that Hays was present. (St. 76-77.)

Ozment testified that he met Hoxie in his private car on the occasion mentioned by Wright in 1875, and that he

1227

agreed with Hoxie to build the houses, and that houses were built. No written contract was shown. (St., 224-228.)

Authorities.

R. S. of Texas, 3965, Secs. 4 and 5.

For argument see argument commencing page 304 of brief for appellant in Court of Civil Appeals.

Thirtieth Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law of this case by refusing and failing to hold that the alleged rent house contract of 1875 alleged as having been made between Hoxie, representing the I. & G. N. R. R., and Wright and Ozment, representing the citizens of Palestine, was not a valid contract, because the consideration of renting the houses alleged was no consideration, it not being plead or proved that the houses were to be rented for any specified time; whereby the consideration of the renting of the houses did not exist, but if there be any implication from the pleading that the houses were to be rented for any definite time, then they were to be rented forever and the alleged agreement was within the statute of frauds as set out above; but now assuming the only other alternative that they were not to be rented forever, then no time was stated and there was no obligation to rent the houses for any definite time; and on this alternative theory the alleged agreement would be no contract since there would be no consideration, because when the consideration is to be performance on one side or the other, and when no time for the extent of the performance is given, then it resting in the option of that obligor to discontinue at any time, there is no consideration

1229

and no contract. This error injuriously affected the right of plaintiff in error to maintain its defense and was reasonably calculated to cause, and did cause, the rendition of an improper judgment in this case, since the basis of recovery was submitted to the jury as to whether or not the alleged rent house contract was made and performed and the jury answered affirmatively on this basis, and judgment was awarded thereon.

Statement.

See the last statement. In question 4 the court submitted to the jury to determine whether or not this rent-house contract existed on the terms stated in his charge, which question they answered affirmatively. (R., 503-504.) The defendant filed its written objections, first, that the pleadings and evidence did not show the essentials of a contract. (R., 509, objections to question 4, Sec. 1.) The defendant requested the court to give special charge 4, withdrawing from the consideration of the jury the so-called rent-house contract. (R., 514.) The court overruled these objections and refused to give this charge and submitted the question to the jury. The defendant excepted to his overruling the objections and also to his refusal to give charge 4, as shown by bill 41. (R., 545-546, Secs. 1 and 5.) Demurrer 8 was that the allegations of this matter were insufficient to show the formation of a contract. (R., 84.) No testimony was given that the houses were to be rented for any specified time, nor was it plead that they were to be rented for any specified time, but only for reasonable rentals. All demurrers were overruled and defendant excepted. (R., 552-553.) In the motion for new trial the defendant pointed out the error of overruling demurrer 8 mentioned above, because the alle-

gations were insufficient to show a contract between Hoxie, representing the railroad, and the citizens of Palestine. (R., 567, Sec. 13.) This was assigned as the sixtieth assignment. (Br., 307.) Also error was assigned in the motion for new trial because of the court's overruling objection 1 to question 4 in his charge, and this error was assigned in the sixty-first assignment. (R., 576, Sec. 64, and Br., 307.) Also in the motion for new trial error was assigned because of the refusal of the court to give special charge 4, withdrawing the alleged rent-house contract, and this error was assigned in the sixty-second assignment. (R., 582, 583, Sec. 81, and Br., 307.) The terms of this assignment were presented as the 61st section of the motion for rehearing in the Court of Civil Appeals.

Authorities.

Eastline Railroad v. Scott, 72 Tex., 70.
M. K. & T. R'y v. Smith, 98 Tex., 47; 107 A. S. R., 607; 66 L. R. A., 741.
El Paso, etc., Light Co. v. El Paso, 54 S. W., 798.
R. R. v. Morris, 69 S. W., 102.
C. G. R'y v. Dane, 43 N. Y., 240.
Bailey v. Austrian, 19 Minn., 465.
Tarbox v. Gotzien, 20 Minn., 122.
Vol. 107 Am. State Reps., 618, note.

For argument, the court is respectfully referred to argument commencing on page 310 and extending to bottom of page 316 of the brief of appellant in the Court of Civil Appeals.

Thirty-First Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of

the substantive law of this case by failing and refusing to hold that: Since the plaintiffs rely upon the Office-Shops Act of 1889 (R. S. of 1911, Art. 6423-4-5), without which they cannot recover, on ground that Hoxie and Grow and the I. & G. N. R. R. and H. & G. N., along with the County of Anderson, had contracted to keep the general offices at Palestine, Texas, forever, then that the act provides that the railroad company shall keep its general offices at the place designated in its charter and prohibits the enforcement of any contract in contradiction to the place for the general offices designated in its charter; it being shown without dispute that the charter of the H. & G. N. R. R. located its general offices in the City of Houston, and the charter of the International authorized it to consolidate with any other railroad and did not locate its general offices, except on its lines, and that the International and the H. & G. N. consolidated, coalescing their charters, to form the International & Great Northern Railroad, assuming and being bound to assume the duties, obligations and requirements of the charter of the Houston & Great Northern and moving their general offices to Houston, Texas, whereby such consolidation of the charters located the general offices of the consolidated railroads at Houston, Texas; and whereby the act of 1889 relied on by the plaintiffs, does not enforce any contract, if any there was, to locate the general offices at Palestine, but on the contrary prohibits the enforcement of any such contract, if any there was. Whereby this error of the Court of Civil Appeals injuriously affected the right of plaintiff in error to maintain its defense as to its general offices, for the reason that it was reasonably calculated to cause, and necessarily did cause, the rendition of an improper judgment in the lower court and the affirmance thereof by

the Court of Civil Appeals as to said general offices, since plaintiffs' right to recover, if any, was based entirely upon the act of 1889, which had no application whatsoever as to said general offices.

Statement.

This point was presented in the terms of this assignment in section 63 of the motion for rehearing in the Court of Civil Appeals. Beginning with the witness Wright after the plaintiffs had introduced the charter of the H. & G. N. R. R. Co. with reference to any attempt to have the general offices moved to Palestine on the basis of R. S. 6423-4-5, the defendant objected (Sec. 19 in all of its bills of exceptions) that any testimony for the purpose of showing a contract to locate the general offices at Palestine was inadmissible, because plaintiffs have introduced the charter of the defendant, from which it appears the general offices were located at Houston, Texas; thereby the charter being legally issued, the defendant is bound to maintain its general offices at Houston, Texas. And also (Sec. 20 in all of its bills of exceptions) it objected "because it also appears that the H. & G. N. R. R.'s charter, introduced by the plaintiffs, required said offices to be at Houston, Texas, and the charter of the International, introduced by plaintiffs, not designating a definite place for the offices, and the two roads having consolidated, under the act of 1889, the offices are obliged to be kept at Houston, Texas." These objections were overruled and Wright testified. The same objections were made by the same numbers and all overruled, and testimony introduced for the purpose of showing that the agreements had been made to cover the general offices to be located at Palestine, the testimony being

offered for the same purpose as Wright's testimony was offered and in support of the two alleged agreements sued on, to-wit, that alleged to be of the date 1872 and that alleged to be of the date 1875. All of this testimony is stated above. The following persons testified in addition to Wright, viz: Mrs. Reagan, Jacobs, Hughes, Watts, McClure, Ozment, Word and also the newspaper article of 1889 written by Judge Reagan was introduced, all as set out above. In the statement above attached to the fourth assignment hereof, is a complete account of the admission of all of this testimony, and of the bills of exceptions taken, and of the testimony, and of the motion for a new trial, embodying that there was error in admitting this testimony, over the objections, and the assignment of such objections in the brief, to-wit: by assignments 11th to 23rd, here repeated by reference from pages 49 to 52 of the brief referred to (Br., 36), and the thirtieth assignment (Br., 53) referred to. (Br., 316.) In addition, in section 110(h) of the motion for new trial (R., 602-603), carried into the brief (Br., 316, sixty-third assignment), in the very terms of the assignment now made, this point was taken. Before Wright or the other witnesses had testified, or the newspaper article mentioned had been offered, plaintiffs introduced the charter of the H. & G. N. R. R. and the International, and the history of their consolidation into the I. & G. N. R. R., which became complete in September, 1883, the legislative charter of the H. & G. N. providing that its domicile and principal office should be in the city of Houston (St., 4), and the legislative charter of the International providing merely that it should be on the line of its road. (St., 5-6.) The Act of April 24th, 1874, provided that all

acts done in the name of either road should bind the I. & G. N., as well as all of the liabilities of either.

Authorities.

R. S., 6423-4-5.

For argument, the court is respectfully referred to the argument in the brief for appellant in the Court of Civil Appeals, commencing page 319, extending to bottom of page 325.

Thirty-Second Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law of this case, wherein it refused to hold that all right of action, if any, was barred by the statute of two years' limitations on account of the general offices and shops, or either, not being moved to Palestine within two years after the making of the alleged Reagan-Grow contract of 1872, and the railroad became obligated to perform, if they were so obligated, it being shown in the evidence as to the offices, without dispute, that they remained in Houston until in 1875 for more than two years after the alleged three party contract of 1872 was alleged to have been made and to have been completely performed on the part of Palestine and the county by furnishing Judge Reagan's political services and speeches to induce the voters of the county to vote the bond issue, and by their voting the bonds and delivering the same, and that the shops were not brought to Palestine for over two years; whereby the statute of two years' limitation (R., 5687, Sec. 4) applied.

This error injuriously affected the right of plaintiff in

error to maintain its defense and was reasonably calculated to cause, and did cause, the rendition of an improper judgment, because if the statute of limitation had been upheld there could have been no submission of this case as to the general offices, and no judgment therefor.

Statement.

This point is presented in the terms hereof in the 64th section of the motion for rehearing. The defendant plead the two years statute of limitation. (R., 94-95, Secs. 4 and 4a.) The general offices remained in Houston until moved to Palestine by resolution of the board of directors of the consolidated I. & G. N. passed in April, 1875, the move being made in June and July of that year. (St., 100.) It appears by Judge Reagan's letter of November 20th, 1874, that the shops on that date had not been moved to Palestine. (St., 323.) On July 13, 1875, there were at Palestine only a roundhouse and machine shop valued at $12,500.00, a car shop valued at $800.00, a paint shop valued at $700.00, and tools valued at $8,000.00. (St., 326.) These shops had not been commenced to be erected in December, 1874, and at the most it was suggested at that time to put up temporary shops in Palestine. (St., 327-328.) The H. & G. N., as was shown above, in 1872 for executive business was consolidated with the International. The Reagan-Grow contract is alleged to have been an essential part of the Hoxie rent-house contract, represented to have been made in the beginning of 1875, and only attempted to be proved as in parol. (R., 75-76.) The general charge was excepted to on the ground that a peremptory charge should have been given for defendant, which was refused, and exception taken to the overruling of the exception and the overruling of the peremptory.

(R., 507-511, 545-546.) The court submitted questions to the jury to include all of the shops and offices. (R., 501-506.) Error in overruling objections to the charge and refusing to give a peremptory was presented in the motion for new trial, Secs. 54 and 76 (R., 575-578), and carried into the brief in the 24th and 25th assignments (Br., 52), referred to and readopted, page 326, where this proposition is made. The defendant requested a special charge, subject to the refusal of this peremptory, withdrawing the alleged Reagan-Grow contract from the jury, which was refused. (R., 512.) Exception was taken. (Sec. 3, R., 546, bill 41.) This error was presented in section 78 of the motion for new trial (R., 582) and carried into brief. (Br., 327.)

Authorities.

R. S., 5687, Sec. 4.
Robinson v. Varnell, 16 Texas, 382.
Mellinger v. State, 68 Texas, 37.
Constitution of 1876, Article I, Sec. 16.
Argument, brief, commencing page 331.

Thirty-Third Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law of this case by failing to hold that, if the evidence did not absolutely show that limitation of two years had run absolutely, it undoubtedly raised the issue of whether or not limitation had run as to the general offices, or under the testimony that the general offices had been moved to St. Louis in 1881 and remained there until 1888. The suit was brought in 1912, and the defendant was entitled, at the least, to have it submitted

1237

to the jury to determine whether or not the removal to St. Louis and the stay there was a breach of the contract, which error of the trial court, affirmed by the Court of Civil Appeals, injuriously affected the right of plaintiff in error to maintain its defense, and was reasonably calculated to cause, and did most probably cause, the rendition of an improper judgment in this case; since if it had been submitted to the jury, as requested, to determine whether or not the stay in St. Louis was adverse to the alleged contracts and presented facts breaching the same, the jury most reasonably would have rendered their verdict for the defendant as to the general offices.

Statement.

This point was presented in the 66th section of the motion for rehearing. The defendant did not request special issue 9 until after the court had refused to give a special peremptory in its favor, as shown by bill of exceptions 41 (R., 546, Sec. 2, bill 41.) And, then, special issue 9 was presented and refused, whereupon the defendant excepted. (Bill 41, R., 547, Sec. 11.) This charge requested the court to submit it to the jury to determine, subject to the refusal of the peremptory, whether or not the I. & G. N. R. R. committed a breach of contract or contracts by moving its general offices from Palestine in 1881, and thereafter keeping them elsewhere until 1888, and in this connection it was requested that the jury be instructed that if they found that the books and records (except the minutes and stock books) and all of the general officers, clerks and employes were moved and kept away, except two or three, then they were to answer that the contract was breached in that particular; otherwise, to answer that it was not. (R., 522-523.) The defendant

plead that in 1881 the general offices, that is, all of the offices of the I. & G. N., were moved by it from Palestine (except its local offices), and that all of the employes of the general offices were moved to St. Louis in breach of the alleged contracts, and remained there until in 1888; and plead the statute of two years and of four years limitation as to the general offices. (R., 96-97, Secs. 5 and 6.) Error of trial court in refusing to give the charge was presented in the motion for new trial and assigned. (R., 584, Sec. 91, Br., 328.)

Howard, who was the secretary of the I. & G. N. R. R., and in its employ in 1881-1888, testified that with the exception of the minutes and stock books, which remained at Palestine, the general office employes, books, records and the whole general office force, with all the clerks and all the heads of the departments, general manager, auditor, treasurer, paymaster, secretary, traffic managers, and all of the executives of the railroad with their employes and general offices, were moved to St. Louis in 1881 and remained there until in 1888, and the assistant secretary remaining in Palestine. (St., 125-126.)

Maury, consulting auditor of the railroad, testified that he was auditor of the I. & G. N. from May, 1888, and entered its service in St. Louis and moved to Palestine in 1888. (St., 311-312.) That the general offices of the I. & G. N. were in St. Louis, in consolidation with other railroads, from 1881 up to in 1888. The whole operation was conducted from St. Louis, where the auditor, general solicitor, treasurer and traffic managers resided, and had their offices, clerks and assistants, and were moved back to Palestine in 1888. Only the minutes remained at Palestine and directors' and stockholders' meetings were held there for this period, where there was a superin-

tendent of transportation and assistant claim agent. A few carloads of records were brought back from St. Louis, the others remained there. (St., 311-314.)

The record of the case of State v. I. & G. N. R. R., involving this move to St. Louis, was introduced in evidence. The petition alleged that the I. & G. N. R. R. did not have its general offices in Texas, or its directing officers here and no executive officers; this suit being filed by Attorney General Hogg. Judge Townes, trying the suit, found that the general and principal offices of the I. & G. N. had been moved out of Texas to St. Louis, and kept there until after the institution of the suit, it being tried in 1888, but that there had been an assistant secretary, general claim agent, road agent and superintendent at Palestine, paid by the M. P. Railway, and stockholders' and directors' meetings at Palestine. (St., 316-318.)

Authorities.

R. S. 5687, Sec. 4, and 5690.
Mellinger v. State, 68 Texas, 37.
Bywaters v. Railway, 73 Texas, 628.
Bill of Rights Constitution 1876, Article I, Sec. 16.

Thirty-Fourth Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law of this case, wherein it refused to hold that if the two years' statute of limitation was not applicable, then at least the four years' statute of limitation, being the Omnibus Statute, was applicable, and refusing the charge as requested in special issue No. 9, contended by the defendant; which error was reasonably calculated

to injure, and did injure, the plaintiff in error, in that if such charge had been given the jury could not reasonably have found for the plaintiffs as to the general offices.

Statement.

This proposition was presented in section 67 of the motion for rehearing, and is the third proposition under the last above assignment. (Br., 330.)

Thirty-Fifth Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law of this case, in that the court refused to maintain the proposition that it being at least raised in the evidence whether or not any right of action as to the general offices was barred, the Office-Shops Act of 1889 (R., 6423-4-5), passed after the accrual of the bar, would be retroactive and unconstitutional when construed to remove such bar. The refusal to submit to the jury whether or not the facts (well supported in the evidence) would constitute a bar, was to rule that the statute was retroactive and remove the bar, which error made by the trial court and affirmed by the Court of Civil Appeals, was reasonably calculated to injure the plaintiff in error, and did injure the plaintiff in error, and cause the rendition of an improper judgment in this case as to the general offices, because if charge 9 had been submitted it is unreasonable to suppose on the evidence that the jury would have found for the plaintiffs as to the general offices.

Statement.

Same as last above, this being the fourth proposition

under the last assignment (Br., 331), and was presented in section 69 of the motion for a rehearing.

Authorities.

Same as last above.

For argument upon the whole matter of limitation, see brief for appellant, pages 331 to bottom of page 338.

Thirty-Sixth Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law of this case, wherein it refused to hold that by giving effect to the alleged contracts alleged by the plaintiffs and by deciding that by the operation of the general office statute of 1889 (R. S., 6423-4-5) plaintiff in error is forever bound to keep and maintain its general offices, machine shops and roundhouses at Palestine, that thereby there is no violation of sub-section 3, of Section 8, of Article I, of the Constitution of the United States, conferring upon Congress the power to regulate commerce among States, the consequence of the ruling of the court upon this subject being to deprive plaintiff in error of the power to so regulate its affairs as best to serve the interests involved in interstate commerce, and to place a perpetual burden upon such commerce, this interference not being a matter of indirect police regulation, but being an attempt to regulate, not of a legal nature, and an attempt to bind down at Palestine the residences of the executives of the railroad and its other means of operating in interstate commerce as to the shops, etc., whereby the field exclusively reserved for Congress by the Constitution of the United States is attempted to be invaded.

This point presents a Federal question.

The error of the court in affirming the judgment of the trial court was reasonably calculated to cause and did cause the rendition of an improper judgment in this case, because if the contention of plaintiff in error had been sustained no judgment for the plaintiffs could have been entered.

Statement.

This proposition was presented in the 71st section of the motion for rehearing.

The defendant plead that Palestine is an interior town of 10,000 population, not a manufacturing city, and that it has not a large industrial or clerical population, and that the plaintiff in error has a main trackage of over 1107 miles operated in connection with continental and interstate railroads, and intensely engaged in interstate traffic and foreign traffic to the port of Galveston and into and out of the Republic of Mexico; that Houston is a large place of over 100,000, rapidly growing, with a large mechanical and industrial population, and one of the great railroad centers, affording a large supply of trained mechanics and expert clerical help, and that the attempt to bind down the general offices and shops at Palestine would be a burden upon interstate commerce forever, from which it was deduced that subdivision 3, section 8, Art. I of the Constitution of the United States, vesting Congress with the power to regulate interstate commerce, was valid. (R., Sec. 11, pp. 137-140.)

Booth, general freight agent of plaintiff in error, testified that 50 per cent of its business of the road, which has 1107 miles of main track, was interstate or foreign business; that it had different gateways, Galveston, Houston,

San Antonio, Laredo, Fort Worth and Longview, and numerous interstate connections, with connection with the ship channel at Houston; that to move the offices back to Palestine would interfere with the operation of the railway; that it was necessary to keep in close contact with competitors (St., 331-334); that there had been a sharp increase in gross revenues by moving to Houston. (St., 347-8.) These views were contradicted to some extent by Campbell, Bowers and Turner. (St., 358-359.) Turner, however, admitted that it would be a bad thing to bind the road down forever, and Bowers refused to answer whether it would or not. The defendant first objected to the court's charge on the ground that a peremptory should be given for it. (R., 507.) It tendered this peremptory, which was refused. It then excepted and all of its objections were in writing, and exception duly taken and reserved in its bill. (R., 511, 545-6.) The overruling of this exception and the refusal to give the peremptory were assigned as error in the motion for new trial. (Sections 76 and 56.) And also adopted as assignments of error in the brief. (R., 575-578; Br., 52.) Assignments adopted. (Br., 338.)

Authorities.

Sub-sec. 3, Sec. VIII, Art. I, Const. of the U. S.
Robbins v. Tax District, 120 U. S., 492, and 30 L. E., 696.
T. & P. R'y v. Marshall, 136 U. S., 395.
I. C. R. R. v. Illinois, 163 U. S., 142; 41 L. E.
Eckington v. McDevott, 191 U. S., 103; 48 L. E., 112.

Argument.

For argument the court is respectfully referred to brief

for appellant, Court of Civil Appeals, pp. 343 to middle of page 384.

Thirty-Seventh Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law of this case in that it refused to hold that the trial court erred in refusing to give question 7, requested by the defendant, which was requested, not yielding contention that as a matter of law to place the shops and offices at Palestine forever would be a burden upon interstate commerce and subject to the same the defendant had a right to have it submitted to the jury whether or not the placing of the general offices in Palestine forever, binding them down there forever, would be a burden upon interstate commerce, in violation of Subsection 3, of Section 8, of Article I, of the Constitution of the United States; for if it were, then as to the general offices, the act of 1889 could not apply, since the Legislature cannot burden, regulate and tie down interstate commerce forever.

This error injuriously affected the right of plaintiff in error to maintain its defense, because that the issue being raised by the evidence, if it had been submitted to the jury, the jury under the evidence might have determined that it would be a burden upon interstate commerce, whereby this error was reasonably calculated to cause the rendition of an improper judgment in this case.

Statement.

This point was presented in section 72 of the motion for rehearing. The court refused a peremptory and made other rulings subject to which the defendant presented,

after it had taken all of its exceptions to that period, special issue 7, which the court refused and the defendant excepted. (R., Bill 41, p. 547, Sec. 9.) Special issue 7 requested the court in the event he refused to charge peremptorily for the defendant to submit it to the jury whether or not upon a preponderance of the evidence, if the defendant was required to have its general offices at Palestine forever; that thereby a burden would be placed upon interstate commerce. (R., 520.) The defendant also requested the court by special issue 8, subject to the refusal of the peremptory, to give the same charge in regard to the shops at Palestine, and the court did give a charge in regard to the shops, changing the form of the question so as to conform to the general scheme of plaintiffs that the jury could answer every question "yes" in their favor, as they did, and submitted the inquiry to the jury exclusively as to the shops as question 8, as submitted by the court. (R., 540, charge 6, question 7.) He refused this question as to the general offices, although the testimony of Booth directly raised the issue. (See last statement.) In the judgment the verdict of the jury showed (R., 558) that the jury were required to answer as to the shops, but not as to the general offices. (R., 5[illegible]3-560.) It then appears that the court refused to submit it to the jury to determine whether or not the binding down the general offices at Palestine forever would be a burden upon interstate commerce. This error was assigned in section 89 of the motion for new trial, and in the sixty-sixth assignment of error in the brief. (R., 583, section 89, and Br., 341.)

For argument see pages 343 to middle of 348 of brief for appellant in Court of Civil Appeals.

1246

Thirty-Eighth Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law of this case, in that the court failed and refused to maintain that the trial court erred, for the reason that the foreclosure of the mortgage of 1881 upon the properties of the International & Great Northern Railroad, under which foreclosure plaintiff in error bought and takes all of its rights, was valid and had the effect to vest the complete title of all such properties, including all the franchises to do as well as the physical properties in the plaintiff in error, and that at most defendants in error were left with the right to redeem from such foreclosure, which they have not offered to do, the law of mortgage foreclosure being that all persons subsequently entitled, who were omitted from the foreclosure proceedings, have no right to claim that the foreclosure proceedings are void as to them, but only and at most are entitled to redeem the mortgage and to redeem from such foreclosure, which the defendants have not offered to do in this case. In this case, as the plaintiffs would have had to pay over $12,000,000 to redeem from the foreclosure proceedings, it becomes unimportant, since they could not redeem, and their equity, if any, was not worth that sum.

This error injuriously affected the right of plaintiff in error to maintain its defense, and did cause the rendition of an improper judgment in this case, because if the point had been sustained the plaintiff below, not offering to redeem, no judgment could have been entered for them.

Statement.

This point was presented in the 73rd and 74th sections of the motion for rehearing. Defendant made a general

objection to the court's charge that the peremptory should be given, and tendered the peremptory, which was refused and exception taken and bill, all in writing. (R., 507-511; 545-6.) In its answer the defendant specially plead all of the foreclosures which have been stated above and of the second mortgage of 1881, under which it bought, and set out that if plaintiffs had any rights which were denied, yet that they were given them as against any properties of defendant by way of duties, liens, or burdens, in connection with the properties by the act of 1889, and were therefore junior to the mortgage, and that the plaintiffs, as a condition of litigation, were obligated to pay off the second mortgage, of which the plaintiff in error was an assignee by reason of purchasing under its foreclosure, but that it was obvious that they could not do so, since it involved the payment of over $12,000,000, whereby their omission from the foreclosure was immaterial, and they were estopped through such foreclosure. (R., 142, section 12.) The point was presented under 24th and 25th assignments, fully stated above, and also carried into the motion for a new trial, all as set out above in connection with the last assignment but one. Also in the motion for new trial the point was separately stated in the terms of this proposition, which was carried into the 67th assignment in the brief. (Section 113, R., 606, motion for new trial, and Br., 348.)

Authorities.

Citizens Nat'l Bank of Waco v. Strauss, 69 S. W., 86. 29 T. C. A., 407; writ of error refused without opinion, 97 Tex., 675.

Proctor v. Baker, 15 Ind., 178.

1243

Argument.

See page 350 of brief of appellant in Court of Civil Appeals.

Thirty-Ninth Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred, in its application of the substantive law of this case, by failing and refusing to hold that the trial court erred in refusing to give plaintiff in error's peremptory instruction No. 1, because the trustee and bondholders under the mortgage of 1881 took their lien without any notice of the contracts alleged by defendants in error, and also at a time when said contracts could not have affected the lien of the mortgage upon the property or title of the purchaser thereunder at foreclosure sale, but were purely personal obligations of the corporation which made them, if ever made, for which reason plaintiff in error purchasing under the foreclosure of said mortgage of 1881 and succeeding to all the rights of the trustee and bondholders therein, acquired title freed from the operation of such contracts and from the operation of the general office statute passed subsequent to the attaching of the mortgage lien, thereby entitling the plaintiff in error to be protected under the provision of the Constitution of the State of Texas prohibiting the passage of any retroactive law, or any law impairing the obligation of contracts, and under Sub-section 1, of Section 10, of Article I, of the Constitution of the United States prohibiting any State from passing any law impairing the obligation of contracts, and under that part of Section 1, of the Fourteenth Amendment of the Constitution of the United States, providing that no State shall pass any law depriving any person of life, liberty or property without due

process of law. Said erroneous ruling of the Court of Civil Appeals injuriously affected the right of plaintiff in error to maintain its defense for the reason that plaintiff in error has been subjected to liability under an unconstitutional enactment and thereby deprived of substantial rights; and the erroneous ruling complained of was reasonably calculated to cause, and did cause, the rendition of an improper judgment in this case.

This proposition presents a Federal question.

Statement.

This point was presented in section 77 of motion for rehearing. Sections 8 and 9 of the answer (R., 97-132) have been fully set out above. They contain a history of the mortgages and foreclosures of the mortgage of 1881 and the sale thereunder and acquisition of the properties by the defendant, all of which have been fully proved and are stated above. The defendant requested the court to give peremptory charge 1, directing the verdict for it, which was refused (R., 511), and it took a bill of exception to the court's refusal. (R., 545-551.) The terms of this assignment were presented as section 134 of the motion for new trial (R., 612), and brought forward in the brief as the sixty-ninth assignment. (Br., 353.)

Fortieth Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law of this case by failing and refusing to hold that the trial court erred in admitting in evidence the certain newspaper article published in the "Daily Visitor," a Palestine newspaper, of date May 16, 1899, and signed by Judge Reagan; because, first, he was not un-

der oath or subject to cross-examination, and because, second, the article was confusing and therefore prejudicial, and because, third, it was hearsay, and because, fourth, it related to matter with which Judge Reagan had been concerned and was a principal party, according to the allegation of the defendants in error, and contained self-serving declarations written in 1899, not in explanation of letters introduced by plaintiff in error without objection, written in 1872 and 1874, and because, fifth, said article was inadmissible, being, as it was, a mere political article, stating conclusions, and prejudicial to plaintiff in error. Said erroneous ruling of the Court of Civil Appeals injuriously affected the right of plaintiff in error to maintain its defense, for the reason that by virtue thereof plaintiff in error is subjected to liability upon inadmissible evidence, properly objected and excepted to; and the erroneous ruling complained of was reasonably calculated to cause, and did cause, the rendition of an improper judgment against the plaintiff in error, by putting such matter before the jury as a basis of a verdict.

Statement.

The admission of this newspaper article was presented in Section 78 of motion for rehearing. When it was offered it was objected to by all the objections made to the testimony of various witnesses as has been stated above, and also on the grounds contained in this assignment, and these objections were all overruled. (R., Bill, 28, pp. 480-487.) The newspaper article was then admitted. It was published and written in May, 1899, in the Palestine daily papers. It starts off with referring to an editorial in the Advocate of the day before, relating to the consolidation of the H. & G. N. and the International,

made in 1872-1873, and which Judge Reagan took to be a criticism of himself. He then states (evidently by recollection, for some of the dates are inaccurate) that the consolidation was made in 1874-1875, whereas it was made in 1872-1873, although recognized by the legislature on the date stated; but the consolidation was effected before the Constitution of 1876 took effect, as stated by Judge Reagan. The article then states that the H. & G. N. was building north through Cherokee County, which would leave Palestine and Anderson County to the west, and gives a quite different account from that already testified to by Wright in this case. He says that the people of Houston County and of Cherokee County, and those of Anderson County and Palestine, were anxious to get the road through Crockett and Palestine, and at a public meeting held in Palestine, the citizens (i. e., the citizens of the county and town, indiscriminately) appointed Wright and himself to meet Grow at Crockett, which was done, and that at Crockett he and Wright offered on behalf of their people (i. e., the people of Anderson County) to pay $100,000 in bonds for the junction of these roads at Palestine, with the understanding that the general offices and machine shops should be at Palestine, and that Grow rejected this offer, and that afterwards he (Reagan) returned to Palestine, and after a full discussion at another meeting it was determined to offer $150,000 in county bonds to secure the junction of these roads at Palestine, with the understanding that the general offices and shops should be located there; that this question was submitted to the vote of the people of Anderson County and carried, and that they (the people of the county) determined to give the H. & G. N. $150,000 in bonds to secure the junction

of that road with the International R. R. at Palestine, and location of the general offices and shops of the two companies there. (St., 356-358.) The error of admitting this newspaper article, as shown by bill of exceptions 28, was assigned in the motion for new trial (R., 575, Section 53), and carried into the brief as the seventieth assignment. (Br., 354.)

For an argument the court is respectfully referred to pages 356-8 of the brief of the appellant, filed in Court of Civil Appeals.

Forty-first Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law of this case by failing and refusing to hold that the trial court erred in refusing peremptory instruction No. 1, requested by the plaintiff in error, for the reason that the evidence did not show nor tend to show that Judge Reagan, in the transaction with Grow, was representing the citizens of Palestine as distinguished from the citizens of Anderson County, which was a necessary fact to sustain the action of defendants in error on the alleged contract between Reagan and Grow. Said erroneous ruling of the Court of Civil Appeals injuriously affected the right of plaintiff in error to maintain its defense, for the reason that the plaintiff in error has been subjected to liability on a contract alleged to have been made by Judge Reagan as representing the citizens of Palestine, when in fact he did not represent them; and therefore the erroneous ruling complained of was reasonably calculated to cause, and did cause, the rendition of an improper judgment in this case.

This position in the terms of the assignment was taken in the 80th section of motion for a rehearing. The defendant requested the court to give charge 1, peremptorily instructing for it. (R., 511.) This was refused. The defendant excepted and took its bill 41. (R., 561-2.) In the motion for new trial it was set out that the evidence did not show that Judge Reagan was representing the citizens of Palestine as differentiated from the citizens of the county, it being necessary, on the pleadings, if there be any such contracts as those sued on, to show that he was representing the citizens of Palestine. (R., 578-9; Sec. 77, sub-section (d) of motion for new trial.) This ground was carried into the 71st assignment. (Br., 359.) It has been sufficiently stated above that the plaintiffs sue upon two alleged contracts, one a three-party contract, wherein it is stated that Judge Reagan represented the people of Palestine, Grow represented the railroad, and the county electors and the county themselves; there being alleged two considerations to the railroad, to wit, Judge Reagan's political influence in inducing the people to vote the bond issue; and secondly, the rent house contract, which embodied the previous alleged contract, just stated, and added, as alleged, a new consideration thereto, to wit, the obligation to rent houses, and being made in 1875. In support of this pleading the witnesses were called to show by parol that Judge Reagan agreed with Grow, representing the people of Palestine, to use his political efforts, and to make speeches in support of the bond issue. This element entering into both of the alleged contrcts. To show that Judge Reagan represented the people of Palestine and made such

an agreement, the following witnesses were called and evidence introduced:

(1) Wright, one of the representative plaintiffs, who said he kept a livery stable in Palestine in 1872, met Grow in Tyler, and with him and Noble, the company's chief engineer, came to Palestine and went out to Judge Reagan's house at night in the county, two or three miles out from Palestine (St., 149), and that he (Wright) was present at the conference at the house that night, when Grow said that he had come to make a definite agreement with reference to bringing the H. & G. N. to Palestine to connect with the International, and for the permanent location of its shops, roundhouses and general offices, and that Reagan asked Grow what would be expected, and Grow said for them to give bonds in $200,000. Judge Reagan contended for $100,000. He corrected this statement by saying that the bonds were to be issued by the County of Anderson, and that after discussion, $150,000 was agreed upon, subject to consultation in the morning by Judge Reagan with citizens; the proposition being that there were to be $150,000 in bonds (i. e., county bonds), and that Judge Reagan was to make a canvass of the county, and that this was ratified the next morning at his livery stable. (St., 157-158.) That Judge Reagan made a canvass of the county, and that just before the election Reagan and Grow made speeches to the electors at Palestine, in which Grow stated the authority given Judge Reagan to state the proposition to the people, and that afterwards witness was with Grow, when the railroad had built in, when it got the bonds from the County Court, and Grow told the County Court that he agreed to locate the shops and offices at Palestine permanently, a member of the court objecting that he had not complied

with his undertaking. (St., 158-9; 160-1-2.) And afterwards that in 1875, about May, Hoxie made the alleged rent house contract with himself and Ozment in Palestine, embodying and reaffirming the alleged Reagan-Grow contract. (St., 164-168.) He further stated, after the lapse of 42 years, that he voted at the election; and, on cross-examination, that Judge Reagan agreed to canvass the county and use his influence, and Grow promised the general offices and shops, provided the bond issue was voted, in consideration of the bond issue of $150,000, "if he (Reagan) would make this canvass of the county"; that Grow seemed to be depending on Judge Reagan's influence (St., 173-5); that he had heard it was necessary to wedge in a different contract with Palestine as differentiated from the county, on account of the fact that the county had a written contract, but that Reagan "could not represent Palestine without representing the citizens of the county." That he could not now say that there was any special distinction whereby Judge Reagan was representing the citizens of Palestine as differentiated from the county; that nobody was barred from the meeting (St., 177-180); that Judge Reagan was not working entirely for the benefit of Palestine, but for every man in Anderson County; that as far as he can now recollect, Judge Reagan may have said that he was representing the county and Palestine, or either. He was representing the county and Palestine in making that speech. (St., 181.) And finally, that he had no ground to think that there was a separate contract differentiating the citizens of Palestine from the citizens of the county. (St., 182.) Palestine then had 1200 or 1500 people, and in the meeting no effort was made to exclude the county people. (St., 183.)

(2) Mrs. Reagan (the relict of Judge Reagan), testified: Remembered the meeting in March, 1872, at Judge Reagan's house, between him and Grow; that no final conclusion was reached that night, but that Grow offered to have the road come to Palestine and connect with the International, and to establish and maintain forever general offices and machine shops at Palestine, in consideration of a bond issue of the county. Mrs. Reagan did not testify that Judge Reagan agreed to barter his political influence for the benefit of the people of Palestine, or that he was representing the people of Palestine. (St., 207-9.)

(3) Watts testified that he was present at the public speaking in Palestine before the bond election in May or April, 1872, and heard Reagan and Grow speak, and that Reagan said that Grow would verify his statement in regard to the location of the shops and offices, and Grow said that some people doubted what Judge Reagan said, but that they would be placed in Palestine. He never stated that either Grow or Reagan differentiated the people of Palestine from the people of the county. (St., 209-210.)

(4) Hughes testified he had heard the speeches last mentioned, and that Grow therein stated to th people in the presence of Reagan that he was authorized to carry out the contract that Judge Reagan had made to the citizens of Anderson County, and that the offices, shops and roundhouses were promised by Grow to the people of the county at large. Hughes did not differentiate the people of Palestine as recipients of these advantages. (St., 210-211.)

(5) Jacobs testified that he was living in Palestine in 1872, when the speeches were made, and that Reagan in-

troduced Grow, and that Grow told the people that the road would come to Palestine if the people would give him $150,000 in bonds, and if the people voted that amount, they would be placed in Palestine, and promised he would bring not only the road, but the offices and the shops and retain them there forever for that amount of bonds. The witness stated with the utmost clearness that the consideration was exclusively of the bonds, and did not testify that Judge Reagan was representing the people of Palestine. (St., 211-213.)

(6) McClure testified that he heard a portion of the speaking on the occasion last mentioned; but never heard Grow say anything about any contract; did not know whether he mentioned the words "offices" or "shops."

(7) Ozment testified: Ozment signed the petition which contained the contract and which has been set out above, and which did not mention the offices and shops. He testified to the speech that Grow made at the courthouse in 1872, a few days before the bond election, Judge Reagan introducing him; that Judge Reagan then said that he and Grow had been in Congress together, of course, before the civil war, and that they talked about building the railroad into Palestine, and that the shops, offices and roundhouses should be located there always, Reagan stating this, and that he had an agreement with Grow that Anderson County was to issue $150,000 in bonds, and then Grow passed the compliments back and stated that the agreement with Reagan and the citizens of Palestine was to establish the roundhouses, shops and general offices there in consideration of a bond issue of $150,000 by the county, to be kept there for all time. (St., 224-227.) Ozment also testified to meeting Hoxie in 1875, when the alleged rent house contract was claimed

to have been made in the presence of Wright, and testified to by Wright, and embodying the previous alleged Reagan-Grow-County contract. (St., 224-225.) On cross-examination he stated that Grow said in his speech in 1872 that his proposition was through Judge Reagan to the voters of Anderson County, the railroad to get the bond issue and to build in and put in the machine shops, roundhouses and general offices at Palestine (St., 230), and furthermore, that the county was to furnish the bonds, and all this was in consideration of the bond issue in the sum of $150,000. (St., 230-232-233.)

(8) Word testified that he was in the County Court in 1873, when Grow came to get the bonds, and that then Grow promised the County Court, in consideration of the bonds, to put the shops and general offices at Palestine. (St., 237-9.)

Judge Reagan's newspaper article was written in 1899. It did not state that Judge Reagan represented the people of Palestine, or that he had bartered his political influence to put over the bond issue, but the direct contrary. In it Judge Reagan stated that the consideration was the bond issue of $150,000 to secure the junction of the two roads at Palestine, with the understanding that the general offices and machine shops should be located there, and that the bonds were given to secure the junction at Palestine and the location there of the general offices and machine shops, that is, the bonds of the county, and that public meetings (i. e., of county at large) had authorized him to promise the county bonds. (St., 355-358.)

Forty-second Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law of this case in upholding the ruling of the trial court, and failing to hold that such ruling was an error, and in failing and refusing to hold, as contended by the plaintiff in error, that the trial court erred in refusing plaintiff in error's special charge 2, instructing the jury to leave out of consideration the alleged contract alleged to have been first formed by Grow and Reagan, since there was no evidence or justification of submission of the question to the jury whether or not Judge Reagan bargained for the location of the shops and offices for the people of Palestine in consideration of his political influence, that is, advocacy of the bond issue.

This error injuriously affected the right of plaintiff in error to maintain its defense, because without this ruling there could have been no basis to submit to the jury whether or not such alleged contract was formulated in 1872, and whether or not Judge Reagan had rendered the consideration by making the speeches in promotion of the bond issue; all of which was submitted to the jury and affirmatively answered on behalf of the plaintiffs. There was no evidence to show that Judge Reagan was representing the citizens of Palestine as differentiated from the citizens of the county, and that he bargained for the shops and offices for the people of Palestine in consideration of his political influence.

Statement.

This assignment was presented as the 82nd section of the motion for rehearing.

After the refusal of the peremptory the court was requested by defendant to exclude from the jury, because unsupported in evidence, any theory of recovery upon the alleged Reagan-Grow contract, contending that there was no evidence to justify its submission. (Special charge requested 2, R., 512.) The court refused this instruction, and the defendant excepted to this refusal. (Bill 41, R., 546.) The refusal to give this charge was presented in the motion for new trial, and carried into the brief as the 72nd assignment. (R., 582, Sec. 78, motion for new trial, 72nd assignment, Br., 359.) The last statement is adopted as a part of this statement. There was no evidence whatever that Judge Reagan agreed to represent the people of Palestine as differentiated from the people of the county, and for their benefit bargained his influence, with the people of the county, to the railroad, in order to induce the people of the county to vote the bond issue.

Forty-Third Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law of this case, in that the court refused to make a finding of fact as to which there was no dispute in the evidence, and which, if the court had found, would as a matter of law, when put with the other proved facts, have made it impossible for plaintiffs to prevail in this case; in that the court failed and refused, as specified and requested by the plaintiff in error in the 83rd ground of its motion for rehearing, to make a finding of fact that there was no element in either the alleged contract of 1872, alleged to have been formulated by Reagan and Grow and adopted by the county, or the alleged

contract of 1875, alleged to have been made between Hoxie for the railroad and the citizens of Palestine, involving the other alleged contract of 1872, to the effect that Judge Reagan should advocate a county bond issue to the railroad company before the voters, and should make speeches in consideration thereof; it being essential upon the theory of defendants in error that the alleged contracts should contain that feature as an element, and it having been submitted to the jury to determine whether or not they did contain that feature, and whether or not Judge Reagan made the speeches, and the jury having answered affirmatively, and there being no evidence that Judge Reagan agreed for the people of the City of Palestine that his efforts and public advocacy of the bond issue should be a consideration for the contract of the railroad company.

This error injuriously affected the right of plaintiff in error to maintain its defense herein, and to prevent an affirmance of the decree of the trial court, and was reasonably calculated to bring about an improper decree of affirmance, and did bring it about, because, if the requested finding had been made, the verdict of the jury would have been entirely overthrown.

Statement.

See same statement as last above. This point was brought forward in the 83rd section of the motion for rehearing. And the court refused and failed to make the finding requested, and refused to pass upon the point other than by overruling the motion for rehearing.

Forty-fourth Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in declaring the substantive law of this case, in that the court affirmed the finding of the trial court that there was evidence to support the existence of the alleged contract between Hoxie and the citizens of Palestine, claimed to have been made in 1875, since there was no evidence whatever justifying the theory that any such contract existed; and the court erred in supporting the refusal of the trial court to give special charge 4, requested by the defendant, withdrawing from the jury the consideration of the alleged rent house contract.

This error injuriously affected the right of plaintiff in error to maintain its defense, and reasonably must have lead to a wrong result, because this alleged contract was submitted to the jury as a basis of recovery, and is a basis of the judgment; and the Court of Civil Appeals erred in not finding, as requested in the motion for rehearing, that there was no evidence to support the verdict in this regard.

Statement.

This point was presented in the 84th and 85th sections of the motion for new trial, which set out that there was no evidence to support the alleged contract, and requested the court to make a special finding in that regard. Defendant requested special charge 4, withdrawing from the jury the alleged rent house contract of 1875, which was refused. (R., 514.) The defendant then excepted to the refusal of this charge, which was requested subject to the refusal of a general peremptory, and took its bill. (R., 546, Sec. 5, Bill 41.) (The 73rd assignment,

Br., 360.) Only two witnesses testified to the alleged rent house contract, to wit: the representative plaintiffs, Wright and Ozment. We have set out above the testimony of directors at this time, 1875, Smith and Evans, Evans also then being Secretary of the company. Both of them stated that they had never heard of the alleged contracts sued on, that they never were submitted to the board of directors, and that their relations with the officers of the company were such that they necessarily would have heard of them if they existed. (*Supra*, page [illegible]) The resolution by the directors of the I. & G. N. R. R. Co. to move their headquarters to Palestine merely directed the move should be made, and due notice given as provided by statute. The resolution was passed April 5, 1875, and the move made to Palestine in June, 1875, all as appears in the referred to statement above. Evans and Smith were members of the board at this meeting, and Evans Secretary, as he had been of the I. & G. N. R. R. since it was formed by consolidation in 1873, and of the H. & G. N. before that time.

In this connection Wright testified that the alleged rent house contract of 1875 was made at a date which he fixed as follows: "In the early part of 1875, and it must have been about May, 1 guess." (St., 165, near bottom.) He stated that Ozment told him he had a telegram from Hoxie, the Superintendent of the road, and that in response thereto he and Ozment and others met Hoxie and found Hays with him; that Hoxie told Ozment that he had a letter from Grow insisting on his complying with the alleged contract with Reagan, in which Grow said that he had agreed with Reagan to locate the offices at Palestine as well as the shops and roundhouses; and then, that Hoxie said that they desired to come to Pales-

tine, but wanted to get rent houses; and that Ozment was Secretary and General Manager of a building company, and that it was agreed to put up rent houses such as should be demanded. (St., 166-167.) He did not testify that these houses were put up by the citizens of Palestine generally, but only testified to some houses being put up by the building company, or himself and another for the building company. (St., 168-171.)

Ozment testified that he got a telegram from Hoxie to meet him in Palestine, and that he did meet him with Wright and some others in Hoxie's car; and that Hoxie said he desired to carry out the alleged contract with Reagan, but needed houses at Palestine for officers and employes, on plans to be furnished by the railroad; and that the Palestine Loan and Building Company built certain houses (St., 226-228); and that the houses would not have been built unless it had been for this agreement, which was made in the spring of 1875. (St., 228.)

Plaintiffs' pleading was that the consideration for this agreement was Hoxie's undertaking to carry out the previous alleged Reagan-Grow town-county-railroad three-party agreement of 1872, and "for the further additional consideration that said citizens should at once construct and complete, or cause to be constructed and completed, at their own cost and expense, any and all houses at Palestine, Texas, which might be demanded by the I. & G. N. R. R. Co., in accordance with such plans and specifications or directions as might be furnished by the company, through its officers, for occupancy, at reasonable rentals, by employes of said company and their families, and especially by general officers of said company, their families and clerks." (R., 56, end of Sec. 21.)

It was alleged that the agreement was made about the

first of 1875. (R., beginning Sec. 21, p. 55.) There was no testimony (a) that the agreement was made in 1875 before the railroad decided to move to Palestine, which was done on April 15, 1875, but the testimony of Ozment was that it was in the spring of 1875, and of Wright that it must have been in May, 1875, after the railroad had passed the order to move to Palestine; (b) there was no allegation and no testimony that the houses were to be rented for any particular time, but that they were to be rented for reasonable rentals, the plaintiffs contending that they were not obligated to rent the houses, but only to build them; (c) there was no testimony that the houses were built on behalf of the citizens of Palestine, or that the agreement was that they, but merely the building association, agreed to build houses.

Forty-fifth Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law of this case by affirming the action of the trial court and by failing and refusing to set aside such action, wherein the trial court erred in overruling plaintiff in error's objection 1 to question 1 in the charge, that there was no evidence of a contract including the town, and that this alleged contract of 1872 was based merely on alleged parol conversations between Reagan and Grow which did not contain the elements of a contract, but were merely preliminary negotiations at the most, leading up to a proposition to be submitted to the voters of Anderson County, afterwards formulated in writing, and excluded the matters in litigation.

This error injuriously affected the right of plaintiff in error to maintain its defense, for the reason that the al-

leged Reagan-Grow-County contract (the three-party alleged contract between the town, the county and the railroad), was submitted to the jury as involving Judge Reagan's political services and making speeches as a portion of the consideration, and was affirmed by the jury not only with regard to the alleged contract of 1872, but also as a part of and as involved in the alleged rent house contract of 1875, which were the bases of the judgment. Whereby, the error did cause the rendition of an improper judgment herein.

Statement.

This error was assigned in the terms hereof in the 86th section of the motion for rehearing. On the submission of the court's general charge the defendant made the objections stated in this proposition (R., 507), and it being overruled, as shown upon the written objection, the defendant took its exception. (R., 545, Bill 41.) The error was presented as a ground for new trial in the motion therefor, and was carried forward into the 74th assignment in the brief. (R., 575, Sec. 55, and Br., 360.) The plaintiffs' pleading has been stated above, which stated (as has been shown) that there were two alleged contracts upon which they stood for recovery, in these elements entirely outside of the written contracts, to wit, the alleged contract of 1872 between three parties, with the town represented by Judge Reagan, the railroad represented by Grow, who are alleged to have formulated this contract, and that afterwards it was submitted to the county, the third party, which ratified the same upon a full exposition of all of the matters, and that Judge Reagan performed his undertaking and rendered the considerations stipulated

1267

involving his influence by making speeches to induce the electors to vote the bond issue (R., 49-52, Secs. 9-14); and also the alleged rent house contract of 1875, as having been made by Hoxie, representing the I. & G. N. R. R., and Wright and Ozment for the citizens of Palestine, involving the alleged contract of 1872, for the additional consideration of agreeing to build rent houses for reasonable rentals. (R., 55-57, Secs. 21-22.) All of these contracts were submitted to the jury, as has been shown above, and as there has been set out above in the testimony of Wright, Ozment, Mrs. Reagan, Jacobs, and all of the others, and the various documents bearing thereon, including the written contract between the county and Judge Reagan, formulated after the date when the supposed parol contract was alleged to have been formulated; and to the foregoing statement, pages 79-82 and 81-90, 181-186 above, the court is respectfully referred.

Forty-sixth Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law of this case, in that it failed and refused to hold, as contended by plaintiff in error, that if the court did not err in refusing to classify any matters passing between Grow and Reagan (not in the written contract) as mere negotiations (it being presented above that the court did err in this matter), then that the court erred, subject to the above insistence, in not submitting to the jury, as requested, to determine whether or not these matters passing betwen Reagan and Grow were mere negotiations, rather than a contract. This error injuriously affected the right of plaintiff in error to maintain its defense, for the reason that it was rea-

sonably calculated to cause the rendition of an improper judgment, and probably caused the same, because, if the evidence did not show that these matters were, at most, mere negotiations afterwards left out of the written contract (as is earnestly contended was conclusively shown), yet at least, subject to the overruling of such contention, it was for the jury to determine whether or not these alleged contracts and statements were mere negotiations.

Statement.

This point was presented in Section 87 of the motion for rehearing. A general peremptory having been refused, and the objection overruled, stated in the last assignment that the matters referred to were mere negotiations, the court was requested (without waiving the insistence upon such matters, but contending for the same), to charge the jury that mere conversations between Grow and Reagan, or the starting of proceedings for and the carrying of the election, would not be the basis of a contract, if they believed that such conversations amounted to that purpose. (R., 525, special charge 1 in connection with Q. 1.) The court refusing the charge, the defendant excepted (Bill 41, R., 548, Sec. 13), and presented this error in its motion for new trial, and carried it forward in its brief as the 75th assignment. (R., 584, Sec. 93, and Br., 361.)

Forty-seventh Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law of this case by holding, in affirmance of the trial court, that the plaintiff in error, as defendant below, was not entitled to charge the burden of

DARK PAGE

proof upon the plaintiffs, to prove by a preponderance of the evidence each fact made essential to enable it to answer question 1, which related to the alleged Reagan-Grow-County three-party contract of 1872, in the affirmative. This error injuriously affected the right of plaintiff in error to maintain its defense, for the reason that it did cause, or was calculated to cause, the rendition of an improper judgment, because that under the evidence tho jury would have probably rendered their verdict for the fendant if the charge had been given, it being reasonable to suppose that they would have so decided.

Statement.

This point was carried forward in the 88th section of the motion for rehearing. The defendant requested the after it overruled objections and refused to charge peremptorily, to give charge 4 stated in this assignment in connection with question 1, and the court refused to give the same (R., 528), and the defendant excepted to such refusal (Bill 41, R., 548, Sec. 16), and the defendant carried this error into its motion for new trial, and presented it in its brief as the 76th assignment. (R., 584, Sec. 86, and Br., 362,)

Forty-eighth Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law of this case, in that it affirmed the action of the trial court in refusing to submit to the jury question 6, requested by plaintiff in error, subject to its prior objections and exceptions and request; whereby, it was sought to have the jury find, subject to the same,

whether or not Wright and Ozment and others, with reference to the alleged rent house contract stated as of 1875, bound themselves to rent the houses referred to to officers and employes of the I. & G. N. R. R. Co., and if they did, for how long; because there would be no consideration to the railroad,, unless the citizens of Palestine were bound to lease, and for a definite time. This error injuriously affected the right of plaintiff in error to maintain its defense, for the reason that the court submitted it to the jury to determine whether or not such alleged rent house contract existed and was carried out, but refused to specify or submit it to the jury whether or not there was any obligation to rent the houses, and if there was, for how long; without which there could be no contract.

Statement.

This point was presented in Section 90 of the motion for rehearing.

The defendant, after the refusal of the peremptory and the refusal of the court to exclude the alleged rent house contract, and the overruling of the contentions that no contract was alleged, or if it was alleged it was within the statute of frauds, that is, that the renting was to be forever, or that there was no obligation to rent at all; subject to all of these contentions requested the court to charge the jury that if they found that the alleged rent house contract existed, they must determine whether or not Wright, Ozment and others bound themselves to rent the houses, and if they did, for how long. This all being subject to the contention that there was no evidence that they bound themselves to rent the houses for any length of time whatever, the plaintiffs contending that they were

not obligated to rent the houses, but merely to build them. This charge was refused, and no such issue was submitted to the jury. (R., 519-520.) Bill was taken showing the course of the trial in this regard, and subject to when the charge was requested under protest and the exceptions to its refusal. (Bill 41, R., 547, Sec. 8.) The refusal of this charge under the conditions stated was presented in the motion for new trial, and brought forward in the brief as the 78th assignment. (R., 583, Sec. 88, and Br., 363.) This matter has been in other aspects fully stated. See pages 191-3, above, and authorities, pp. . For argument see note, brief for appellant, page 364.)

Forty-ninth Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law of this case by holding that the trial court did not err in its position that the record of the County Court of Anderson County, showing the written contract submitted to the voters, its approval by them, and the proceedings of the County Court therein, was not the exclusive evidence of the contract between the County of Anderson and the railroad company; and in refusing to hold that it furnished no basis for recovery by defendants in error, and that, therefore, the promises, if any, made by Grow and others during the canvass preceding the election, or afterwards, when the bonds were issued and delivered to Grow, constituted no contract with the County of Anderson or anyone else, and that the jury could not base a verdict upon any contract thus claimed to have been made between the County of Anderson and the railroad company. This error injuriously affected the right of plaintiff in error to maintain

its defense, because it did cause, and was calculated to cause, the rendition of an improper judgment, in that the jury were permitted to consider all of the parol testimony, as appears by the assignments above set out, the jury being practically informed that all such extraneous matters could be considered.

Statement.

This point is presented in the 91st section of the motion for rehearing. The defendant on trial presented charge 3, enforcing the terms of the above proposition. It was refused and the defendant excepted. (A., 513, Bill, 41, R., 545, and Section 4, R., 546.) The error was then presented as here stated in the motion for new trial, and was carried forward into the brief as the 79th assignment. (R., 582, Sec. 80, and Br., 364.) This assignment is to be taken with assignment 93, above. For statement see pages 191-2 above.

Fiftieth Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law of this case by holding that the trial court did not err in maintaining that there was evidence to show that in the transactions between Reagan and Grow, as alleged and testified to, the former was acting for the citizens of Palestine; whereas, there was no such evidence, but, on the contrary, the evidence showed affirmatively that he was acting for the citizens of Anderson County at large, and not for the citizens of Palestine, a portion of the county, as differentiated from the whole county. Which error was reasonably calculated to injure the plaintiff in error, and did bring about a wrong judg-

ment, in that the plaintiffs plead an alleged three-party contract as made in 1872, and as first formulated by Reagan, representing the town, and Grow, representing the H. & G. N., and submitted to the county and approved by them, upon the consideration of Judge Reagan's political services in inducing the voters of the county to vote the bond issue and in consideration of the bond issue, there being two considerations. And which alleged contract was involved in and constituted a part of and reaffirmed, as alleged, by the claimed rent house contract of 1875.

Statement.

This point was presented in the 93rd section of the motion for rehearing in the terms hereof. Various objections and exceptions were taken, as appears above, and in the motion for new trial it was set out that the jury had answered yes to question 1 as to whether or not the three-party contract existed, involving Judge Reagan's political services as one consideration, and the bond issue as another, and as the two considerations which the railroad was to receive, and wherein, as alleged and submitted to the jury, it was stated that Judge Reagan was acting for the citizens of Palestine and Anderson County, it being presented in the motion for new trial that there was no evidence to show that he was acting for the citizens of Palestine as differentiated from the citizens of the county. (R., 585, Sec. 103 of motion for new trial, sub-sec. 1(a).) And the refusal of the court to adopt this assignment was presented as the 80th assignment in brief (Br., 365); and in Section 103, subsection 1(a) of the motion for new trial (R., 585-586), it was presented that the jury had answered this question "yes"; whereas, there was no evi-

dence whatever that Judge Reagan had agreed to make a thorough canvass of Anderson County to induce the electors to authorize the issue of the bonds in consideration of an agreement with the citizens of Palestine, made through Reagan, but that it was shown directly in the evidence that no such agreement was made; and this point was carried forward in the 82nd assignment of brief. (Br., 366.) This point is also presented in the 96th section of the motion for rehearing. See statement, pp. above. Evidence immediately bearing upon this precise point is now stated.

It was submitted to the jury to determine whether or not the citizens of Palestine, by Judge Reagan, made the alleged contract. (R., 553-556.)

Wright stated that at the meeting at Judge Reagan's house in Anderson County, near Palestine, and before the written contract was drawn up, the discussion between Reagan and Grow was in regard to the amount of the bond issue: "the proposition before Judge Reagan at that time was $150,000.00, and him make a canvass of the county." (St., 156.) He said that the proposition was approved the next morning, and that Judge Reagan made the canvass, and that at the speaking at Palestine just before the election, where all of the voters of the county assembled to vote at one place, in May, 1872, Reagan and Grow both made speeches, and that when Grow went to get the bonds, after the railroads had built in, he promised the county, not the town, that he would locate the offices and shops in Palestine. (St., 162.) On cross-examination he said that he knew that Judge Reagan agreed with Grow to use his influence to carry the election in favor of the bonds, and that Judge Reagan stated that his understanding was that the railroad was

to bring the offices, machine shops and roundhouses and keep them at Palestine (St., 173-174); and that if the City of Palestine and Anderson County would vote the bonds, these things should be done; and that Grow agreed that he would accept $150,000.00 in bonds if Reagan would canvass the county; that Grow was depending on Judge Reagan's influence. (St., 175.) This witness first stated that he understood that Judge Reagan represented the City of Palestine because there had been a meeting in the city; but he went on to state that Judge Reagan did not live in Palestine, that farmers may have been at the meeting (St., 176), that he had heard that it was necessary in order for the plaintiff to recover to wedge in a different contract for the citizens of Palestine, but that "Reagan could not represent Palestine without representing the citizens of the county," and he finally admitted: "I could not say at the time there was any special distinction; I know that he was authorized to represent them at the meeting held in town. He could not represent the citizens of Palestine without that far affecting the citizens of the county." (St., 179-180.) He further stated that Judge Reagan's efforts were not entirely for Palestine, but were for the greatest good; that there was no attempt for the special benefit of Palestine; that Judge Reagan was working not for the benefit of Palestine exclusively, but for every man in Anderson County equally, and he would not say that 42 years after "Judge Reagan was representing the citizens of Palestine; he might have been representing both them and those of the county. He represented everybody interested. He may have said that he represented both the citizens of Palestine and the county." And the witness said he had no ground to think there was a separate contract differentiating the citizens

of Palestine from the citizens of the county; and that at the mass meeting held, which delegated Reagan to represent the people, the citizens of the county were welcome and no attempt was made to keep out people not from the town, Palestine then being a village of 1200 to 1500 people (St., 181-183); and that, furthermore, Grow, in his speech at the courthouse, in presence of Judge Reagan, may have said that Judge Reagan was representing Anderson County instead of the people of Palestine. (St., 204.) The witness was tested on a recent written contract which he had signed two or three years ago, in regard to getting another railroad into Palestine, and in regard to securing for Palestine the general offices, machine shops and roundhouses of that road, and was requested to state its terms, but refused to state them, and stated that he could not state them, although he testified of the alleged Reagan-Grow agreement of over 42 years ago. (St., 205-206.)

Mrs. Reagan, the relict of Judge Reagan, testified that in 1872 Grow and Judge Reagan met at Judge Reagan's house, near Palestine, and discussed the bond issue of the county, in consideration of which Grow offered to have the road come to Palestine and connect with the International, and to establish and maintain forever general offices and machine shops at Palestine; and she stated that they discussed a compromise as to the amount of bonds, but that no final conclusion was reached at that time, the final agreement being deferred until the next morning for a meeting at which she was not present. She did not state that Judge Reagan represented the people of Palestine as distinguished from the county. (St., 207-209.)

Watts testified that he heard Reagan and Grow make

their speeches at the courthouse in 1872 in promotion of the bond issue, and that Grow told the assembled county voters of the benefits which would result from having the general offices and shops at Palestine. (St., 209-210.)

Hughes testified to the same speeches, and that Grow confirmed the agreement "that Judge Reagan had made to the citizens of Anderson County," and said that he (Grow) had agreed with Judge Reagan that if Judge Reagan would canvass the county the general offices, shops and roundhouses should be located there, " in consideration of his services." (St., 210-211.)

Jacobs testified to the same speeches, and that Grow told the people, in the presence of Judge Reagan, if they voted a bond issue of $150,000.00 he would bring the offices and shops, as well as the road, and that he would do this for that amount of bonds, to wit, the county bonds. (St., 211-213.)

McClure testiefid that he heard only a portion of the speaking, and he did not thing that Grow said anything about any contract, but merely dwelt upon the bonds being voted, and the benefits resulting therefrom. (St., 213-214.)

Ozment testified that he heard the speakings, and that Judge Reagan explained to the voters that he had made an agreement with Grow to build into Palestine, and further, that the shops, offices and roundhouses should be located in Palestine, and that Anderson County was to issue $150,000.00 in bonds; and that Grow replied, stating that he would do all these things on condition that a bond issue of $150,000.00 was carried by Anderson County. (St., 92.) On cross-examination he stated that the proposition was to the voters of Anderson County, the railroad to get the bonds, to build in the road, and put

in the machine shops, general offices and roundhouses at Palestine. (St., 230.) He stated that he heard that it was necessary to prove a contract with the people of Palestine differentiated from that of Anderson County, and admitted that he understood that Anderson County could not recover. He had heard Jacobs, McClure, Watts, Hughes and Mrs. Reagan testify, but what he stuck to was that Grow's agreement with Reagan was that if Anderson County would vote the bonds, that he would do these things, and "that all this was in consideration of the bond issue in the sum of $150,000.00." (St., 232-233.)

Word testified that he was present in January, 1873, when Grow went to the County Court to get the bonds, and that Grow told the court that it was unnecessary to put these matters into ihs contract with the county, as he would perform without putting the minto the writings. (St., 237-239.)

Judge Reagan died March 8th, 1905. A newspaper article, written by him in 1889, and published in Palestine, was introduced in the evidence, and is copied completely in the Statement of Facts. (St., 355-357.) In this article Judge Reagan stated that the understanding was that the general offices and machine shops of the company should be located at Palestine, in consideration for the bond issue of $150,000.00 by the county, and that the matter had been submitted to the voters of the county, and they "determined to give to the Great Northern R. R. a bonus of $150,000.00 in 7 per cent. bonds, to secure the junction of that road with the International at Palestine, and to secure the location of the general offices and machine shops of the two companies at Palestine," and that this had been done, and the bonds issued. (St., 357.)

1279

Fifty-first Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law of this case in failing to correct the error of the trial court, which error of the trial court was in failing to uphold the contention of the plaintiff in error that the trial court erred in its judgment in failing to confine and restrict the judgment and command in its decree to the shops and roundhouses at Palestine, and in refusing and failing to state that the decree did not apply to other shops and roundhouses, and did not require them to close or go out of operation, there being no ground in the pleading or in the evidence for the judgment as formulated by the trial court and as affirmed by the Court of Civil Appeals in this particular. This position is made without waiving the contention that there was no ground for the judgment whatsoever; whereby the error committed injuriously affected the right of plaintiff in error to maintain its defense, because it did cause and was calculated to cause the rendition of an improper decree, in that the decree was made so extensive as to compel the location of the shops and roundhouses of the railroad generally at Palestine forever.

Statement.

This position was presented in these terms in Section 98 of the motion for re-hearing. The allegation of the petition was that the Houston & Great Northern made a contract that the shops, offices and roundhouses of the H. & G. N. should be located and maintained forever at Palestine. (R., 49.) This was carried into the alleged rent house contract. In the decree the defendant is per-

petually enjoined from changing the location of the machine shops and roundhouses as operated by the defendant from the City of Palestine, and perpetually enjoined from changing its general offices from Palestine. (R., 559.) The I. & G. N. R. R., as stated above, has 1107 miles of main track road in Texas. Its consolidation with the International has been shown above, and that the H. & G. N. R. R. only extended from Houston to Palestine, when consolidated in 1873, a distance of not over 160 miles, or about 1-7 of the whole mileage of the railroad. Booth testified that the I. & G. N. now extends to Fort Worth, to the Rio Grande, on the Mexican border at Laredo, connects at Longview with the T. & P., extends to Houston, has trackage rights into Galveston, and has various trackages and mileage in Texas of over 1107 miles. (St., 332-334.) The position now taken was assigned as error in the proposition stated above in the motion for new trial, and carried into the 85th assignment. (R., 617, Section 142a, and Br., 367.)

Fifty-second Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law of this case, in that: It affirmed the trial court, and particularly as now stated, and failed and refused to hold that there was no foundation either in the issues found by the jury or in the evidence for the recovery by Anderson County, in favor of which as well as the other defendants in error judgment was entered, and because the consideration for which the bonds were issued was evidenced by a contract in writing, made with the county, fully proved and not including the matters claimed by the plaintiffs herein, whereby an erroneous

result was reached, injuriously affecting the right of plaintiff in error to maintain its defense, since this cause and necessarily did cause the rendition of an improper judgment.

Statement.

This position was assigned in the terms hereof in the 99th section of motion for re-hearing. The decree of the court, affirmed, was in favor of the county, as well as the other plaintiffs. (R., 559.) The writing with the county was fully proved and the judgment of the County Court thereon evidencing the issue of the bonds on the consideration therein stated, all as set out above, pages 87-89, and excluding any theory of recovery for the matters sued for. This error was pointed out in the motion for new trial, and assigned in the 86th assignment in the brief. (R., 618; Br., 368.)

Fifty-third Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law of this case, wherein it held, on page 8 of its opinion, and elsewhere generally, against the contention of plaintiff in error, that under laws under which the charter of the plaintiff in error was taken out, it could not name the place for its general offices and principal place of business, and that the statute commonly known as the office-shops statute of 1889 applied to this case, and as against the plaintiff in error, although it never entered into any contract therein mentioned, which position of the Court of Civil Appeals injuriously affected the right of plaintiff in error, for the reason that it fundamentally sustained the judgment in this case,

whereas if the court had not so ruled the judgment could not have been so sustained.

Statement.

As above. This position was presented in Section 108 of motion for re-hearing. See pages 21, above.

Fifty-fourth Assignment of Error, Submitted as a Proposition.

The Court of Civil Appeals erred in its application of the substantive law of this case, wherein it held differently from the prior decision of the Supreme Court in this case upon the question of law as to the operation of the general office statute of 1889, the same being Articles 6423-4-5 of the Revised Statutes of 1911. The Supreme Court held that the effect of that statute, in connection with alleged contracts for the location of the general offices, shops and roundhouses and franchises to do of the sold-out I. & G. N. R. R. (acquired by the plaintiff in error under the foreclosure sale of the United States Court of 1910, foreclosing the lien and mortgage of the I. & G. N. R. R. of June 15, 1881), was to create a burden, or servitude, upon all or some of said property or franchises, operating as a qualification of said franchises and as an incumbrance upon said property or a part thereof, and on said franchises, and a servitude upon the shops, roundhouses and general offices. Whereas, the Court of Civil Appeals of the Sixth Judicial District, in its decision and opinion (now on review) held that this statute did not operate to create a burden, lien, claim or right or any right *in rem* upon any of said property or franchises, said different holding of the

Court of Civil Appeals is plainly upon a question of law, and arises upon the same issue as passed upon by the Supreme Court. In making this contention the plaintiff in error does not yield its other and prior contentions herein, and its contention that such statute, under the facts of this case, never did give any security for such contracts, and was personal merely, and therefore has no application to it. But it does now point out the conflict and maintain that the Court of Civil Appeals is in conflict with this court, and is plainly in error in being in such conflict; and that this error injuriously affected the right of plaintiff in error to maintain its defense, for the reason that it did cause and was calculated to cause the rendition of an improper judgment of affirmance herein; because by such conflict and repudiation of the declaration of this court, the Court of Civil Appeals has maintained that the exclusive jurisdiction was not in the United States Court, and admitted in effect that if the Supreme Court's declaration were correct, the jurisdiction would be in the United States Court, as is now contended by the plaintiff in error.

Statement.

This error arose in the opinion of the Court of Civil Appeals. On page 20 it is stated that the plea to the jurisdiction was made (as to which see second assignment of error, above, and statement thereunder). The Court of Civil Appeals says: "Clearly the Federal Court had the power to reserve jurisdiction to determine the validity and priorities of any liens and *burdens* against the sold-out properties of the I. & G. N. in the hands of the purchaser or his assigns, and its jurisdiction in that respect would be certainly exclusive; but the appellees, by their

suit, are not seeking, in the nature of a private or personal right, to subject the property to any burden, lien, claim or right growing out of or attached to the acts of the sold-out company." (Opinion, page 20.) Whereas, this court, in the decision of this case upon a prior writ of error, declared that plaintiffs in error were asserting and maintained this theory, and placed any possible right of their recovery upon their so asserting a prior "incumbrance," a "qualification," a qualification of its franchise, and "inseparable from it," "a burden which accompanies its enjoyment to be borne as a privilege of its use and inheres in it" (156 S. W., 502), "and a duty imposed upon property, and that being of such nature the plaintiff in error could not succeed to the ownership of the railroad and privilege of operating it without at the same time succeeding to the duty of similar rights imposed upon the former company." It was "a limitation that pertained to the use and enjoyment of essential parts of the railroad company." That it "inhered" in the corporate franchises exercised by the former company, and necessarily subsists in the franchises in the hands of the present owner; that the transfer to this defendant of the right to own and operate the road also transferred the obligation attached to such road, and the enjoyment of the right would be in observance of the obligation. It was declared to be "a burden upon the franchise with which it is likewise charged in the hands of the plaintiff in error" (156 S. W., 104), and at the end of the opinion this court says: "We think that the effect of the statute in the requirement that the location therein provided of the general offices, machine shops and roundhouses of a railroad company, subject to its operation, should be maintained, is to impress them as property or

instrumentalities necessary to the use of property with the character of servitude for the benefit of the particular community, from which they are not exempt in the hands of a purchasing company." (156 S. W., 508.) As appears above, it was shown that the I. & G. N. was sold out in 1911, under the foreclosure decree of 1910, and the defendant created in 1911 by a new charter, and that the franchises to do of the old railroad passed with other property to the new company, and the franchise to be of the old railroad died. The Supreme Court, referring to the franchises to do of the old road passing down to the new road through foreclosure as the franchise in which the alleged rights might inhere. The franchise to be was dead. This error was pointed out in Section 4 of the motion for re-hearing in the terms of this assignment.

For authorities see list under second assignment of error herein.

Argument.

An argument will be separately printed in support of this application. Reference is made above to various arguments in the brief on file.

Conclusion.

Wherefore, on account of the manifest and injurious errors committed by the Court of Civil Appeals, this court is respectfully prayed to grant the writ of error herein, and to review the opinions and decrees of the Court of Civil Appeals, in order that they may be corrected and justice be done.

Plaintiff in error also prays for all other relief which may be its due.

Respectfully,

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY,

By F. A. WILLIAMS,
N. A. STEDMAN,
ANDREWS, BALL & STREETMAN,
MORRIS & SIMS,
WILSON, DABNEY & KING,
Its Attorneys.

(Endorsed:) App. No. 9285. I. & G. N. R. R. Co., Plaintiff in Error, vs. Anderson County et al., Defendants in Error. Application for Writ of Error. Filed in Supreme Court Mar. 15, 1916. F. T. Connerly, Clerk, by H. L. Camp, Deputy. Refused Apl. 5, 1916.

Clerk's Office.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the foregoing two hundred and fourteen (214) pages contain a true and correct copy of the Application for Writ of Error in App. No. 9285, I. & G. N. Railway Company vs. Anderson County et al. Filed in the Supreme Court March 15, 1916.

Witness my hand and the seal of said Court, this the 23rd day of July, A. D. 1916.

["L. S."]

F. T. CONNERL, *Clerk,*
By M. F. VINING, *Deputy.*

THE STATE OF TEXAS,
County of Bowie:

I, E. T. Rosborough, Clerk of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, do hereby certify that the foregoing 214½ pages, is a true and correct copy of a certified copy of Application for Writ of Error certified to by the Clerk of the Supreme Court of the State of Texas, filed in this Court on the 28th day of July, A. D. 1916, in the case of I. & G. N. Ry. Co., Plaintiff in Error, vs. Anderson County et al., Defendants in Error.

Witness my hand and seal of said Court this the 29th day of July, A. D. 1916.

[Seal Court of Civil Appeals of the State of Texas.]

E. T. ROSBOROUGH,
Clerk Court Civil Appeals, Sixth Supreme Judicial District of Texas.

1315 Vol. 5.

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY
vs.
ANDERSON COUNTY et al.

Proceedings in Supreme Court of Texas, and Proceedings Taking Writ of Error Thereto; Supreme Court of the United States to Court of Civil Appeals of the Sixth Supreme Judicial Distri Texas, "Certificate Thereto, and General Certificate to the W Transcript."

Index.

Application for Writ of Error to the Supreme Court of Texas; See Vol. 4, next preceeding this volume, being a certified copy of a copy thereof certified by the Clerk of the Supreme Court of Texas and filed in this Court.
Decree of the Supreme Court overruling and refusing Application for a writ of error ..... p.
Motion for rehearing filed in Supreme Court ..... p.
Decree of Supreme Court overruling motion for rehearing .... p.
Petition for Writ of Error from Supreme Court U. S. signed by S. P. Willson ..... p.
Will of McAshan; Probate thereof and Letters to his wife .... p.
Supersedeas Bond approved by S. P. Willson, Chief Justice ... p.
Citation ..... p.
Copy of Citation showing acceptance of service ..... p.
Writ of Error signed by Clerk U. S. Court and Chief Justice S. P. Willson ..... p.
Assignments of Error ..... p.
Prayer for reversal ..... p.
General Certificate ..... p.

1316 In Supreme Court of Texas.

From Cherokee County, Sixth District.

I. & G. N. R. R. Co.
vs.
ANDERSON COUNTY.

April 5th 1916.

This day came on to be heard the application of I. & G. N. R. Co. for a writ of error to the Court of Civil Appeals for the Si District and the same having been duly considered, it is ordered t said application be refused. That the applicant I. & G. N. R. R. and its sureties, J. E. McAshan and B. D. Harris pay all costs incur on this application.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, her

certify that the above is a true and correct copy of the judgment rendered by the Supreme Court on the application for writ of error in the above styled cause.

Witness my hand and the seal of said Court, this the 21st day of July A. D. 1916.

F. T. CONNERLY, *Clerk.*
[SEAL.] By H. L. CLAMP, *Deputy.*

(Endorsed:) Application No. 9285. I. & G. N. R. R. Co. vs. Anderson County. Copy of Judgment in Supreme Court. Application for Writ of Error Refused. Certified Copy. Filed July 28, 1916. E. T. Rosborough, Clerk Court of Civil Appeals, Sixth Judicial Dist. of Texas, By ——, Deputy.

1317 In the Supreme Court of the State of Texas.

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY, Plaintiff in Error,

vs.

ANDERSON COUNTY, et al., Defendants in Error.

Error to the Court of Civil Appeals of the Sixth Supreme Judicial District of the State of Texas.

Motion of Plaintiff in Error for Rehearing on Application for Writ of Error.

Now comes the plaintiff in error, the International & Great Northern Railway Company, and moves the Court to grant a rehearing of the application for writ of error herein, to set aside the order refusing said application, and to grant said application, for the reasons hereinafter set forth.

1. Because of the error of the Court of Civil Appeals complained of in the first assignment of error in the application for writ of error on page 52 thereof, in holding that two judges of that Court, namely, Chief Justice Wilson and Associate Justice Hodges, were not disqualified by reason of the fact that they were related within the third degree of consanguinity and affinity to citizens of Palestine, who, though not formal parties to the suit, were within legal contemplation parties thereto.

2. Because of the error of the Court of Civil Appeals, complained of in the second assignment of error in the application for writ of error on pages 55 and 56 thereof, in holding that the State District Court has jurisdiction to try this case, and that such jurisdiction was not exclusively in the United States District Court for the Norther- District of Texas, successor to the United States Cir-
1318 cuit Court for that District, because that court, in foreclosing the second mortgage of the International & Great Northern Railroad of 1881, by its decree of May, 1910, had the power to reserve, as it did, the exclusive jurisdiction to determine the validity

and priorities of any such burdens, liens, conditions, duties or servitudes impressed on any of the franchises or other property of the sold-out railroad, since a court making a foreclosure, especially of complicated properties, has the power to reserve to itself in the decree the exclusive power over litigation of such matters asserted under or in connection with the acts of the foreclosed debtor or its prdecessors in title, and to dispose of them by a supplemental bill instead of delaying the case to bring them in before the decree of foreclosure and sale. Such reservation of jurisdiction being as it were, a contract and warranty of the court foreclosing that the litigation of such matters shall be exclusively in the court of foreclosure, which reservation, when so made, is for the benefit of the purchaser, as is the International & Great Northern Railway Company of 1911, under the decree of foreclosure.

3. Because of the error of the Court of Civil Appeals, complained of in the third assignment of error in the application for writ of error on pages 73 and 74 thereof, in holding that the District Court of the State of Texas had jurisdiction hereof, and that the jurisdiction was not exclusively in the United States District Court for the Northern District of Texas, because the litigation in the State Court is in conflict with, and a denial of the right, title, privileges and immunities of the plaintiff in error as protected by the decree of the United States Circuit Court, by the exercise of powers conferred on it by the Constitution of the United States, by which decree it foreclosed the properties of the sold-out International & Great Northern Railroad, and as protected by Section 237 of the act of Congress of March '11 (33 Stats., 1156, and the Statutes of the United
1319 States, Section 709), in that it acquired the properties of the sold-out I. & G. N. R. R. in 1911, under the decree of the foreclosure of the United States Circuit Court for the Northern District of Texas, wherein it was provided that any such contracts as the alleged contracts could be denounced by the purchaser or its assigns, if they existed, and whereunder the plaintiff in error denounced these alleged contracts, if any, in accordance with the terms of the decree, which also reserved the litigation of these matters exclusively for the foreclosing court.

4. Because of the error of the Court of Civil Appeals, complained of in the fourth assignment of error in the application for writ of error on pages 74 and 75 thereof, in overruling and refusing to maintain the contention that no contract can be founded upon the employment of services to influence or "induce" voters to vote for a bond issue, or to induce or influence any public official to enter into any contract or engagement or the body of the voters to adopt any contracts submitted to their votes; it being immaterial whether or not there was a bad intent or a corrupt motive; the plaintiffs alleging and introducing a great mass in evidence over the objections of the defendant in support of their allegations that a contract could be supported upon a consideration of a bargain for the use of Judge Reagan's influence and speeches and services to influence or induce the voters of Anderson County to vote the bond issue, to wit, the bond issue of 1872, and it being submitted to the jury to determine

whether or not an agreement was made, based on such services of Judge Reagan, and whether or not Judge Reagan rendered such services as a consideration of the alleged contract sued on, to wit, made the speeches and induced the voters, the jury answering such questions affirmatively, it being the contention of the plaintiffs that such services in making the speeches "to induce the voters to vote the bond issue" could be the basis of a legally enforceable
1320 contract, and it being the contention of the defendant and plaintiff in error here that the law does not permit the inducing of voters by speeches or otherwise to be a consideration of a contract, but prohibits and denounces the same as contrary to public policy and as void.

5. Because of the error of the Court of Civil Appeals, complained of in the fifth assignment of error in the application for writ of error, on page 83 thereof, in failing and refusing to hold that the contract alleged by plaintiffs to have been made between Grow, representing the railroad, and Reagan, representing the people of Palestine, and adopted by Anderson County, could not be valid, but was void, because it involved an agreement to pass to a portion of the voters a value contingent upon a certain election being carried, especially when that value was a large one, to wit, as alleged, the large value of having the general offices, shops and roundhouses at Palestine forever, because any such element would be contrary to public policy, as well as the statute prohibiting the bribing of voters, but is void independently of such statutes.

6. Because of the error of the Court of Civil Appeals, complained of in the forty-fifty assignment of error in the application for writ of error, on page 193 thereof, in affirming the action of the trial court and by failing and refusing to set aside such action, wherein the trial court erred in overruling plaintiff in error's objection 1 to question 1 in the charge, that there were no evidence of a contract including the town, and that this alleged contract of 1872 was based merely on alleged parol conversations between Reagan and Grow which did not contain the elements of a contract, but were merely preliminary negotiations at the most, leading up to a proposition to be submitted to the voters of Anderson County, afterwards
1321 formulated in writing, and excluded the matters in litigation.

Because of the error of the Court of Civil Appeals, complained of in the forty-sixth assignment of error in the application for writ of error, on page 195 thereof, in failing and refusing to hold, as contended by plaintiff in error, that if the court did not err in refusing to classify any matters passing between Grow and Reagan (not in the written contract) as mere negotiations (it being presented above that the court did err in this matter), then that the court erred, subject to the above insistence, in not submitting to the jury, as requested, to determine whether or not these matters passing between Reagan and Grow were mere negotiations, rather than a contract.

8. Because of the error of the Court of Civil Appeals, complained of in the forty-seventh assignment of error in the application for writ of error, on page 196 thereof, in holding, in affirmance of the

trial court, that the plaintiff in error, as defendant below, was not entitled to charge the burden of proof upon the plaintiffs, to prove by a preponderance of the evidence each fact made essential to enable it to answer question 1, which related to the alleged Reagan-Grow-County three-party contract of 1872, in the affirmative.

Argument Under the 4th, 5th, 6th, 7th, and 8th Grounds of This Motion.

There are two vices in the alleged Reagan-Grow contract of 1872. In the first place, being intended to induce the voters of Anderson County, through the persuasion of an influential man, to vote, at an election to be called for the purpose, bonds payable by taxation on the property of the tax-payers of the County, in consideration of special benefits to be conferred upon the citizens of the City
1322 of Palestine, who constituted only a part of the population of the county, the contract is inhibited by that rule which declares to be against public policy contracts to influence elections, and is consequently illegal and void. In the next place, the contract between Reagan and Grow was, as alleged in the petition, that said Houston & Great Northern Railroad Company, acting by its duly authorized president, Galusha A. Grow, contracted and agreed, in Anderson County, Texas, with the citizens of the City of Palestine Texas, acting by and through Judge John H. Reagan, to extend its said line of railroad from the north boundary line of Houston County, to intersect the line of the International Railroad Company at Palestine, and to establish a depot within one-half mile of the court house at Palestine, and to commence running cars regularly thereto by the 1st day of July, 1873, and to thereupon locate and establish, and forever thereafter keep and maintain the general offices, machine shops and round houses of the Houston & Great Northern Railroad at the City of Palestine, for and in consideration of the promise and agreement then made, upon the part of the said Judge John H. Reagan, to make a thorough canvass of Anderson County, to induce the electors thereof to authorize, by their votes, the issuance of the interest bearing bonds of said county in the principal sum of $150,000, and, for and upon the further consideration that Anderson County, on authorization of its electors, in the manner prescribed by law, should issue and deliver to the Houston & Great Northern Railroad Company its interest bearing bonds in said principal sum of $150,000, upon the completion of said railroad to its intersection with the International Railroad at Palestine, and upon the establishment of a depot within a half mile of the court house, and upon the commencement of the running of cars regularly to such depot. Since it was contemplated that Anderson County should do the things alleged, as a part of the
1323 Reagan-Grow agreement, the contract was incomplete without Anderson County's becoming a party and doing those things as stipulated; and since Anderson County never became a party and never did what it was contemplated it should do, there

was never a perfected contract between Reagan and Grow. The questions, though relating to the same matter, are separate and distinct; and we shall accordingly give them separate consideration.

The first question, involving the illegality of the contract, is exhaustively discussed on pages 124 to 139 and on pages 142 to 145 of our printed brief filed in the Court of Civil Appeals,—these being bottom pages 340 to 355 and 358 to 361 of the volume bound in black which we have filed. This argument we shall not repeat, but we ask the reperusal of it by this Court; and we invite this Court then to read the argument of the other side, beginning with the last paragraph on page 42 and closing at the end of page 45 of their brief filed in the Court of Civil Appeals, in the light of the observations we shall now submit, believing that, upon such examination of the question, this Court will perceive that the other side has completely broken down in their attempts to answer our position that the contract was illegal. The first statement by the other side on this subject is that "The authorities cited by the appellant might apply if the agreement promised a consideration to Judge Reagan personally. The agreement promised no benefits to any one *same* public benefits, and it is settled in Texas that such an agreement is valid, not only by the decision in this case but by prior decisions." The claim that this court, when the injunction case was before it, passed on the question of the illegality of the Reagan-Grow contract is to ignore the unequivocal statement on the first page of the application for writ of error in that case in the following language: "Quite a number
1324 of questions, believed to be meritorious, were raised in the Court of Civil Appeals, but, in this application, this court will be troubled with only the two of them which most nearly concern this plaintiff in error. They are, first, whether or not plaintiff in error could properly be sued, upon the facts alleged, in Anderson County, upon the answer to which depends the power of the judge who acted in this case to make the order appealed from. Second, whether or not the plaintiff in error, having acquired the properties and franchises of the sold-out International & Great Northern Railroad Company, through a purchase under a valid foreclosure of a valid mortgage, and having been duly and legally organized to take and operate those properties, in accordance with the statutes of this State regulating that subject, is bound to perform the contracts of the sold-out company set up by defendants in error." And the claim, that this court passed upon the questions, based upon the quotation made on page 42 of the brief from the opinion of this court in that case, equally ignores the point that this court did not go out of the way to decide a question not presented, but evidently addressed itself to the questions before the court. Again, by asserting that the Reagan-Grow contract "promised no benefits to any one save public benefits," the meaning evidently was that the benefits were promised to the county, for, in the counter proposition contained in the last paragraph on page 38 of their brief, they refer to that contract in the words "all the benefits to be derived from the performance of the obligations of the Railroad Company inuring to the common benefit of said electors and of said county, with no scintilla of benefit to

Judge Reagan." Reading the whole paragraph, it is seen that the electors meant were those of the county. This position, if adhered to, is destructive of any consideration of the Reagan-Grow contract and supports our view elsewhere urged on that subject. But, of course, their theory that the Reagan-Grow contract rested upon a consideration, namely, a promise for a promise, the promise of
1325 Reagan being made in behalf of the citizens of Palestine, considered separately from the citizens of Anderson County, is incompatible with their position that the Reagan-Grow contract inured to the benefit of Anderson County. If, however, their contention, in defending the Reagan-Grow contract from the charge of illegality, that the benefit of that contract inured to the county, and not to the citizens of Palestine separately considered, is to be taken as the last word from them on the subject, we submit that, as to that contract, they are without standing in court. For a fuller discussion of this phase of the subject, we refer the court to pages 14 to 21 of our argument in reply to appellee's brief in the Court of Civil Appeals—the same being shown on bottom pages 604 to 611 of the bound volume on file. Recurring, however, to their concession that "The authorities cited by the appellant might apply if the agreement promised a consideration to Judge Reagan personally," let us consider that statement in connection with their concession, on page 46 of their brief, "that Flynn vs. Bank, 118 S. W., 848, could only apply to this record if there were pleading of proof of a consideration inuring to Judge Reagan otherwise than as a member of the county community," and in connection, also, with their assertion, at the same place, in referring to the cases of Liebke vs. Knapp, 79 No. 22, and to King vs. R. R. Co., 147 N. C. 263, that "Neither could possibly apply unless we had a suit by Judge Reagan to recover something for himself." In making these concessions they forgot that, in contracting with Grow, Judge Reagan acted as the representative of the citizens of Palestine and that they, as parties to the contract, are now seeking to enforce the contract made by Judge Reagan for their benefit. The conclusion is unavoidable that the citizens of Palestine are in the precise predicament that Judge Reagan would have been in if he had made the contract in behalf of himself individually and were now seeking its enforcement. There is no escape for them from the trap in which they have caught themselves.

Again, the other side are unfortunate in suggesting, on
1326 page 46 of their brief, that Liebke vs. Knapp, 79 No. 22, is nearer in point than King vs. R. R. Co., 147 N. C. 263. Did they stop to think that the essential difference between the cases was that in the Missouri case there was no contract to influence an election, whereas in the North Carolina case there was a contract to influence and election and that since in our case there was a contract to influence an election, the North Carolina case is directly applicable while the Missouri case is not? Did they fail to notice that in the last paragraph of the Missouri case is a diffenentiation from Fuller vs. Dame, 18 Pick. 472, which, though the feature of an election was not involved, strongly supports our po-

sition the *the* citizens of Palestine, by contracting for and obtaining the location of the general offices, machine shops and round houses in their city, secured an unlawful advantage over the people of the county, upon whom, without that special benefit, would be chargeable, equally with the people in the city, the payment of taxes necessary to meet the interest and principal of the bonds to be issued to the Railroad Company? So applicable to our case is what the Missouri court said on this point that we quote the following from the Missouri case, differentiating, but approving, the case of Fuller vs. Dame:

"This case in all its circumstances materially differs from those cases of which Fuller vs. Dame, 18 Pick. 472, is the type. In that case Fuller, the plaintiff and stockholder in a certain railway company, by reason of securing the location of the depot for that railway on certain flats, was to receive a direct personal and pecuniary benefit, a certain amount in money over and above that received by those with whom he was associated in that company. This of course would tend to warp his judgment and tend to make him exert an undue influence in securing for a private money consideration a particular location for the depot, and thus render that contract void as repugnant to public policy and injurious to the public interests. Here on the contrary the defendants did not seek to locate the bridge at a particular point, nor were they em-
1327 ployed to do so, nor were they to receive any superior individual advantages or any money consideration for so doing. All the stock they received was to be paid for and was paid for in money or money's worth, and this whether the enterprise failed or prospered."

It is true that the case of Richardson vs. County, 59 Neb. 400, referred to by us, is modified by the subsequent case of Stroemer vs. Van Orsdel, 103 N. W. 1053, but since each case related to the rendition of services by attorneys at law, the modification applies only to services of that kind, though a part of the services was the procurement of legislative action. Stroemer vs. Van Orsdell is based upon Trist vs. Child, 21 Wall., 441, and cases approving that decision, and Trist vs. Child not only approves Tool Co. vs. Norris, 2 Wall., 45, cited by us, but recognizes the rule for which we contend in this case. It is needless to say that Judge Reagan was not employed as an attorney at law, but that "he was to make a thorough canvass of Anderson County to induce the electors thereof." Counsel are mistaken when they say that Union El. R. Co. vs. Nixon, 65 N. E. 314, limited both the cases of Doane vs. Ry. Co., 160 Ill. 22, and Crichfield vs. Paving Co., 174 Ill. 466, cited by us. On the contrary, the Nixon case did not mention the Doane case, and it recognized the Crichfield case as authority for the proposition that an agreement to render services in influencing legislation is illegal, which, it may be remarked, was the only purpose for which we cited that case. In our brief and argument, as will have been noted by the court from examining the portion to which we above invited attention, there are several other cases cited by us sustaining our position to which the other side has not even attempted to reply.

The other side has cited Beham vs. Ghio, 75 Texas 90, as opposing our position. It is a little remarkable that they did not see that in that case there was nothing paid or offered to be paid to any individual or collection of individuals, but that the bond, which was in litigation between different signers in a suit for contribution, promised to pay, in a certain contingency, money
1328 to the county whose county seat was involved. As inquired in our reply brief, on bottom page 608 of bound volume, "Would appellees say that the bond would have been valid if the obligors had given it to one or more influential citizens of the county, promising to pay them $2,500.00 if they would exert their influence upon the voters to induce the location of the county seat at Texarkana, and should succeed in securing such location? Would they contend the promise of any consideration, however small, and whatever its character, for such purpose would be enforceable in the courts? That is the case we have here if there was any consideration to Reagan and his beneficiaries." The same observations apply to the quotation made from Roby vs. Carter, 25 S. W. 725, which merely approves Beham vs. Ghio.

The last authority cited by the other side on this subject is B. & O. S. W. Ry. Co. vs. Voight, 176 U. S. 505, in which the familiar proposition was asserted that public policy demands that men shall have the utmost liberty of contracting. As was said in the more recent case of C. B. & Q. Ry. Co. vs. McGuire, 219 U. S. 549, referring to several cases announcing the same doctrine as the Voight case—"But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. * * * Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions, imposed in the interest of the community." Referring then to various restraints which may be imposed by government upon the making of contracts, the court observes that "It * * * may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services or property." Many other authorities to the same effect might be cited.

1329 While referring to a subject not necessarily involved in the question under consideration, the citation by the other side of cases, including Tyler vs. St. L. S. W. Ry. Co., 99 Texas 501, establishing that the public policy of a State is found in its statutes, when the legislature has acted upon a subject, and in the decisions of the courts when the legislature has not spoken, is, in the use made of them, that is, to show that the general office statute of 1889 defines the public policy of this State, unjustifiable, for when the alleged general office contracts were made in 1872 and 1875 that statute had not been enacted. At that time, Article 4888 of Paschal's Digest, which prescribed "that such corporation shall, as soon as convenient after its organization, establish a principal office at some

point on the line of its road, and change the same at pleasure, giving public notice in some newspaper of such establishment and change," was in force looking to that statute as defining the public policy of the State, the change of policy by the subsequently passed statute of 1889 would not validate a contract in contravention of the policy of the State when entered into. The law upon this subject is declared in Deming vs. Yount, 50 L. R. A. 103, and in Puckett vs. Alexander, 3 L. R. A. 43. In the Denning case there was quoted with approval the following from Bishop on Contracts: "But if one agrees to do what is at the time unlawful, a subsequent act making the act lawful cannot give validity to the agreement, because it is void at the beginning." The Puckett case quotes approvingly the following from Wharton on Contracts: "A contract, void at the time of its inception, can not be validated by subsequent legislation. And, if it violates, when made, a statute, the repeal of the statute does not make it operative."

In respect to the counter proposition in the last paragraph, on page 47, of the brief of the other side, that it was the duty of the court "to enforce the statute and the duty imposed, regard-
1330 less of the validity or invalidity of the original agreement," we reproduce the following from page 20 of our reply brief in the Court of Civil Appeals—page 610 of bound volume: "How is any duty imposed by the statute unless the railroad company has 'contracted or agreed for a valuable consideration,' when the statute expressly so requires, and how could the court say there was an enforceable contract or agreement 'regardless of its validity or invalidity'? How can the law take cognizance of an agreement or contract that was rendered void by the law of the land enforcing its public policy? The proposition would be equally as admissible if the promise forming the consideration for that of the railway company had been the commission of crime."

We have taken the pains to review at length the positions and authorities of the other side, relied upon in opposition to our position, that the Reagan-Grow contract, if it was ever made, was illegal by virtue of being in contravention of public policy, for we are convinced that, since the authorities cited by us, to say the least of them, apparently sustain our position, unless able and ingenious co-nsel, who have overlooked nothing favorable to their side in this case, have succeeded in showing that those authorities should not govern in this case, they must be taken as decisive upon this question. That counsel have utterly failed to destroy or impair the force of those authorities, we confidently believe, and in support of this belief we plant ourselves upon the foregoing discussion, in connection with previous argument upon the same subject.

It is needless for us to say that we do not intend to impute conscious wrong to Judge Reagan and Mr. Grow in the transaction between them, but the innocense of their motives cannot prevent the contract into which they entered, as alleged in this case, from falling within the condemnation of illegality, by reason of its opposition to the salutary public policy upon which we have commented, unless it be assumed that the legality or illegality of a contract de-

signed to influence an election is dependent upon the char-
1331 acter and motives of the contracting parties, irrespective of the nature of the contract; but we apprehend that such a proposition is — manifestly untenable that it will not for a moment be entertained.

We approach now the other vice in the alleged Reagan Grow contract, namely that the transaction between them never rose to the dignity of a contract, by reason of the necessity of Anderson County's participation in the proposed undertaking and the absence of such participation. In other words, Grow's proposal necessitated that Anderson County should assent thereto, and such assent never having been given, a completed contract was never made. The County plainly, under the law then existing (Acts of 1871, p. 29; Paschal's Digest, Article 7329) permitting the voting of bonds in aid of the construction of railroads, could bind itself to the issuance of the bonds desired only upon compliance with the provisions of that law; and Anderson County never did commit itself in the manner required by the law or any other manner to an agreement embodying as one of its elements that Judge Reagan was to canvass the County to induce the voters to vote for the bond issue, by virtue of a contract between him and Grow for the benefit of the citizens of Palestine, and that in consideration of such services to be rendered by Judge Reagan, Grow agreed to the establishment and keeping and maintenance forever by the railroad company of its general offices, machine shops and roundhouses at the city of Palestine. On the contrary, it entered into a contract with the railroad company by which it agreed to the issuance of the bonds, in pursuance of an election held for the purpose, in consideration of the agreement of the railroad company to extend its lines of railroad from the north boundary line of Houston County to intersect the line of the International & Great Northern Railroad Company and to establish a depot within one half mile of the court house at Palestine and to commence running cars regularly thereto by the first day of July, 1873, without the remotest allusion to the general offices, machine shops and roundhouses (Statement of Fact, p. 132 to 147 and 189 to 192). Thus we have a case in which a tripartite contract was contemplated, the parties being the Houston and Great Northern Railroad Company, represented by Grow, the citizens of Palestine, represented by Judge Reagan and Anderson County,
1332 but since Anderson County never accepted or assented to the proposal of the railroad company the contract was never perfected. The case was plainly one in which the considerations for the acts or agreements of one party were the undertakings of the other, which is quite a common form of contract; and when a contract is made in that way the rule that parol evidence is admissible to show a different or additional consideration is not applicable. Coverdill vs. Seymore, 94 Texas, 8. That our views on this subject may be brought before the Court, we reproduce the following from our reply argument in the Court of Civil Appeals, pages 22 to 31, bottom pages of bound volume P. 612 to 621:

"The point here urged is that the court erred in holding, by its

ruling on demurrer, in the admission of evidence, in its charges and in the judgment, that any contract was alleged or provable, or proved, between Reagan and Grow.

"That there was a contract between the railroad company and Anderson County is conceded. That it was wholly in writing and of record, as the law required it to be, is likewise conceded. That parol evidence was not admissible to enlarge it, or in any way vary it, seems to be conceded. At any rate, the District Court instructed the jury that the record was the exclusive evidence of the contract of the county, and that it could furnish no basis for a judgment in favor of plaintiffs, and appellees have acquiesced in that view. That contract contains nothing of the kind asserted by plaintiffs as their only cause of action, and their only contention with respect to the Reagan-Grow transaction is that therein another contract was made between them which antedated that of the county, and that parol evidence was admissible to prove such contract.

"Let us see what they alleged, what they attempted to prove, and what the jury found. We shall use short forms of expression for the sake of clearness, as well as brevity.

They say that Grow proposed to Regan to do the things now contended for in consideration of the agreement of Regan to canvass the county to induce the votes to authorize the issuance of bonds,
1333 and upon the further consideration that the county, upon such authorization, would issue and deliver the bonds. (R. pp. 49 and 50.) The evidence objected to was, of course, offered to prove this allegation, and nothing more, and the jury found the facts alleged, and nothing more. Does this offer by Grow, and Reagan's acceptance of the part of it which proposed a canvas, merely constitute a contract between the two, which took effect then, and was binding therenceforth? If it be said that the point was not raised by demurrer because petition did not negative the whole contract (including the county), being in writing, we reply that the defect completely emerged on trial.

"We present that fundamental question.

"Of course, no one is going to contend that the existence of one contract in writing between two parties excludes proof of another contract between them. The rule is that the writing excludes evidence tending to add to, vary, alter or contradict the contract expressed in it, not that it excludes proof of other and different contracts between the same parties. It excludes proof of all prior negotiations and agreements concerning the contract reduced to writing, and likewise excludes proof of any other or different terms of that contract. This is as much as we need.

"Our proposition is that neither the pleading, the evidence nor the findings of the jury show any contract whatever between Reagan and Grow, and that the terms of their conversations, speeches, statements and letter cannot be added to the contract of the county, so as to become a part of it.

"Look at Grow's alleged promise, and Reagan's alleged promise. The consideration proposed by Grow for his promise, which he made express, so as to make the acceptance of it necessary to bind him, was

the canvass by Reagan, and the voting of the bonds by the voters, and the issuance and delivery thereof by the county. These were the terms of Grow's alleged proposal, and they must necessarily have been the terms of any contract of which that proposal con-
1334 stituted the obligation on his side. Hence there could be no binding contract until all were accepted. Reagan's acceptance was only of the part which proposed a canvass by him, and could have been nothing more. It was to be tri-partite—Grow for the railroad—Reagan for Palestine—and the county to assent for itself. He could not speak for the voters nor for the county. To say that this was a contract between Reagan and Grow does violence to the most elementary principles of the law of contract. All the terms of an offer must be accepted by all the parties whose acceptance is contemplated and by parties competent to accept. The form and substance of this proposal required that the county become a party by acceptance before any contract based on it could come into existence, since the doing of the things to be done by it was a part of the consideration exacted by Grow's offer. Sections 12 and 13 of the petition (R., 51), it is alleged that the agreement made between Reagan and Grow *were* stated to the county voters before the election, and that they did affirm the same, with careful avoidance of any allegation that these matters were in parol, in order to avoid the application of the demurrer. No promotion contract between Reagan and Grow alone was alleged. The vagueness of the petition as to whether or not these matters were in parol or writing has precluded any presentation of the point in a higher court on the ex parte petition. The rules of law upon this subject are so elementary that we shall not make much citation of authorities. As especially applicable, however, we quote the following from the opinion of Judge Taft in Strobridge Lithographing Co. v. Randall, 73 Fed. Rep., 621-622. Judge Taft first quotes from the opinion of Lord Wensleydale in Ridgeway v. Wharton, 6 H. L. Cas., 238, as follows:

'An agreement to be finally settled must comprise all the terms which the parties intend to introduce into the agreement. An agreement to enter into an agreement upon terms to be afterwards settled between the parties is a contradiction in terms:'

After which, Judge Taft says this:

'Whether correspondence with the purpose of entering into a contract is merely preliminary negotiation or the contract itself must be determined by the language used and the circumstances
1335 known to both parties, under which the communications in writing were had. If it is plain from the language used that some term which either party desires to be in the contract is not included, or definitively expressed in the correspondence relied upon, no contract is made. If it is plain from the language that either party wishes or contemplates that another person, not a party to the correspondence, shall be a party to the contract, a correspondence as to the terms of such a tripartite agreement between two cannot be a completed contract between the two. It is as essential that all the parties intended shall be bound as it is that all the terms intended should be definitely agreed upon.'

"Let us apply some test to see if there was a contract which bound Grow to do the things proposed, or bound Reagan to make the canvass. If Reagan had afterwards refused to make the canvass, could Grow have maintained an action against him, even for nominal damage? If Reagan had made the canvass, but the vote had been adverse, could Reagan or his beneficiaries have maintained an action of any character against Grow or the railroad company? Could the county, obviously intended to be a party to any contemplated contract, maintain an action upon this? The answers to these questions are so obvious that they sound almost foolish, and yet they seem to us to expose the fallacy in appellees' contention that a contract issued out of any or all the transactions between Reagan and Grow alone.

"Those negotiations did finally lead to a very definite contract between the railroad company and the county, but all the terms of that contract are in writing, and cannot be enlarged by proof of any prior negotiations, agreements, conversations or speeches. It is the only contract in existence today, unless what is called the renthouse contract be one, which question will be discussed in another place, but which includes this alleged contract, and therefore falls when this is exscinded.

"What precedes develops the significance of the objections to appellees' effort to establish in evidence a contract different to that which is of record. The tendency and effect of such effort were not to establish a contract separate from and independent
1336 of the county contract, but to add terms to it—to alter it—to vary it. A little reflection will sustain this. As just shown, Grow's alleged offer required action by Reagan and action by the county before it could be satisfied, for he was to receive a consideration from both separately. The county's action could only be taken by authority of and in accordance with the statutes referred to in our brief. The very 'proposition' which was to become the contract had to be stated to the voters in writing, and affirmed or disaffirmed. The railroad or other work which was to be the consideration to the county for its bond was stated as a part of the 'proposition.' Thus, and thus only, could a contract with the county be formed, and when formed, the record required to be made of it constituted the exclusive evidence of its terms. The court below so charged and appellees have acquiesced, and only contend that another contract had already been made. To that we have answered that that which they call a contract was none, because one of the terms of Grow's proposal demanded action which could only be taken by the county under a law requiring that the terms of the county's contract be put in writing and of record. When that action was taken, and that record made, a contract for the first time came into existence, and it was not a contract supporting plaintiff's case. Can they, by parol, introduce into that contract other terms because others were mentioned between Reagan and Grow? Such is not appellees' contention. When it is shown that no contract was concluded between Reagan and Grow, their contention is completely met. But let us answer any supposable con-

tention. If they should assert the affirmative of the question must put up, they would fly in the face of the authorities cited in our brief, which establish that the record required by law of such proceeding is the exclusive evidence of the terms of the contract, and that parol additions thereto can not be made. They would fly in the face of the rule of evidence existing in the absence of statute,
and forbidding the admission of parol evidence, adding
1337 terms to a contract reduced to writing. The several kinds
of cases instanced by appellees which do not fall within the rule are not this case. They propose to show that the company made other promises besides those expressed in the record as the consideration for the bonds. This inevitably results when it is found that there was no contract until the county acted. As well might they have undertaken, as the County of Anderson did undertake, in 1874, in the cause cited in our brief, to prove that the company agreed to build another line of road, or maintain and establish depots at other places than Palestine. Let us turn the question around. Would any court ever have listened to the railroad company if it had tried to prove that the county agreed to pay a larger sum, or to do other things than those shown of record? Would it have been allowed to show that it did not agree to do all that was stated in the record as the consideration on which were issued the bonds accepted by it? It may be said that Reagan and his beneficiaries were parties to the record, that they had a contract of their own which was no part of the one with the county, but not one of these things is true. As we have shown, there was no contract between Reagan and Grow, and it is equally true that Reagan and his beneficiaries were parties to the record through which the contract with the county was formed. The only contract ever in existence was that with the county, the previous transactions between Reagan and Grow leading only to it.

"It has not been, but may be, urged that the canvass by Reagan, and the action by the county completed a contract between Reagan and Grow, and put it into operation when the latter action was complete. To such a contention there are several answers. In the first place, the county was a party to the only contract that was made, and the law under which its action is taken did not allow a contract partly in parol and partly of record. To make Grow's proposal
to Reagan a part of the contract with the county, its terms
1338 must have been submitted to the voters and adopted by them.
The voters never voted upon a written proposition including the alleged undertaking on the part of the railroad company to establish its offices and shops at Palestine, and keep them there forever for the benefit of the citizens of Palestine. They never voted upon a proposition which embodied as a part of its consideration that Reagan was to canvass the county to induce them to issue these bonds, because he had made a contract with Grow for the benefit of the citizens of Palestine to do so. These things embodied in the proposition would have made a materially different contract from that which was formed by the vote actually taken and the record actually made. It cannot be said, therefore, that the con-

tract actually made with the county was any part of the transaction between Reagan and Grow.

"The principles governing contracts require that, in order for the county to have become a party to any contract proposed by Grow, if one was ever intended by him in what he said to Reagan, the very terms of the proposal must have been submitted to and accepted by it.

"Again, Reagan, Ozment and other representative citizens of Palestine became parties to the proceeding which eventuated the granting of the bonds, stating in writing what the railroad company was to do and what the county was asked to do. So that, if it were permissible to regard this proceeding as the carrying out of a prior agreement between Reagan and Grow, it was all put into the writing expressing what each was to do. Regan and his associates, who were the beneficiaries alleged to have been represented by him in his conversations with Grow, put to the voters in writing just what they were asked to do, and what the railroad company was to do, and the writing included no suggestion that anything further than was expressed was to be done by the company for the benefit of Palestine or the county.

"'There is no escaping the conclusion that Grow's proposal required that the county be a party to any proceeding under
1339 consideration, and that Reagan gave his consent to make the canvass on that assumption. No contract between them was possible with that requirement left open as a sine qua non. To show these were nothing more than negotiations preliminary to a contract with the county, we appeal to the opinion of Judge Taft before referred to, and the authorities cited by him. We ask the court to read that entire opinion, in the confidence that, in spite of all that has been said and found in the court below about this transaction between Reagan and Grow, it will convince the court that it was nothing but a negotiation (if it existed, as it did not) preparatory to obtaining a subsidy from the county, and lacking the first element of a contract. Such men as they understood what they were doing, and knew they were not concluding a contract impossible of formation in that way.

"The conclusion is that all the evidence tends to show, and all that the jury found amounts only to this: Reagan and Grow set in motion proceedings to obtain a vote of bonds by the county, which Reagan was to urge upon the voters, and which would speak for itself when carried through.

"We especially answer appellees' counter propositions as follows:

1. The record of the bond issue expressed the only contract which the pleadings and evidence together tended to show, and the testimony introduced was wrongly admitted to support a separate contract between Reagan, Grow and the county, as alleged, and to add terms to the only contract in existence,—that with the county.

2. There being no contract between the Houston & Great Northern Railroad Company and the citizens of Palestine alone alleged, and the evidence introduced not tending to show any, but showing only at most preparations to obtain a contract with the county,

the principle admitting parol evidence of a contract in parol which was the inducement to another distinct and separate one in writing has no application."

1340 9. Because of the error of the Court of Civil Appeals, complained of in the sixth assignment of error in the application for writ of error, one pages 94 and 85 thereof, in failing and refusing to hold that the alleged contract, being the alleged three-party contract alleged to have been made between the railroad, by Grow, the citizens of Palestine, by Reagan, and the county, was not susceptible of proof by parole evidence, or the evidence other than the record, of the election proceedings, because the act of April 12, 1871 (page 29 of Acts, Vol. 6, Gam. p. 931), required the contract for the bond issue to be in writing, and that there should be a written record thereof made by the County Court, and that that court should determine and settle whether or not the terms of the contract had been complied with, and the considerations rendered both ways; the extant contract and the decree of the County Court thereon being all introduced in evidence, and being complete of the whole transaction, whereby the representations and statements of the advocates of the bond issue in speeches or otherwise, or prior negotiations, or testimony to that point, could not be admitted in evidence, the written contract not including the general offices and the shops and roundhouses. The proposition now made being that when the law requires a contract with the voters to be in writing, and when the whole matter is complete on its face, no parole or outside consideration, or inducements, of promises, whether made in public speeches advocating the bond issue, or otherwise, can be proved.

10. Because of the error of the Court of Civil Appeals, complained of in the seventh assignment of error in the application for writ of error, on pages 90 and 91 thereof, in failing and refusing to hold that the written contract indisputably proved in this case, and complete, on stated considerations could not be varied, added to or changed by parole modifications, it having been submitted to the voters and adopted by them. The plaintiff in error now submits that such a writing as that involved in this case was not

1341 subject to the great changes, modifications, conditions and contradictions to grant thereon additional considerations to be rendered on one part, to wit, by the town, Judge Reagan's political services, as alleged, and on the other part, to be rendered by the railroad, the shops, roundhouses and general offices forever, all outside of the writing; and it is not contended that the great mass of testimony admitted in order to show these extraneous matters was erroneously admitted, and that the Court of Civil Appeals erred in maintaining that such extraneous matters, testimony to speeches, etc., were not erroneously admitted.

11. Because of the error of the Court of Civil Appeals, complained of in the eighth assignment of error in the application for writ of error in page 92 thereof, by failing and refusing to hold (and by holding the exact opposite) that when a contract is made and adopted by the vote of the people over forty years before the trial,

which contract was in writing, and duly passed upon, then that after such lapse of time, and indeed after a much shorter time, and not at all, it is not permissible to introduce in the evidence testimony to speeches concerning the bond issue, and testimony to agreements as alleged, adding to or changing such written contract, and inserting therein an additional party (in this case the City of Palestine), and additional alleged considerations, to wit, one way the supposed political services of Judge Reagan, and the other way the claimed agreement of the railroad to locate the shops and offices at Palestine forever, all outside of such written contract.

12. Because of the error of the Court of Civil Appeals, complained of in the ninth assignment of error in the application for writ of error, on pages 93 and 94 thereof, in failing and refusing to hold that the contract being fully formed at the time when Grow went to get the bonds from the county, and he then being either entitled to them or not being entitled to them, and that the railroad had performed all considerations incumbent upon it, promises which Grow may have then made to the County Court could not have been
1342 based upon any valuable consideration, and were of no importance, and because the contract could only be formed by the vote of the people.

13. Because of the error of the Court of Civil Appeals, complained of in the tenth assignment of error in the application for writ of error, on page 96 thereof, by failing and refusing to hold, as contended by the plaintiff in error, that Anderson County was estopped from litigation any claim in this case by the previous litigation between the Houston & Great Northern Railroad Company and the County of Anderson, and by reason of the fact indisputably proved that the matter herein involved had been adjudicated in that cause, instituted in 1874, and litigation through the Supreme Court, wherein Anderson County attempted to show that there were certain inducements and agreements ourside of the writings, to wit, the contract adopted by the voters and the investigation and settlement thereof by the County Court, the Supreme Court ruling that the matter was res adjudicato.

14. Because of the error of the Court of Civil Appeals, complained of in the eleventh assignment of error in the application for writ of error, on pages 98 and 99 thereof, in that it omitted the following determined and undisputed matter from its opinion, and in that it refused to insert the same in its opinion, as requested in the 21st Section of the motion for rehearing, to wit, that the County Court of Anderson County had in January, 1873, made an order and adjudged that the Houston & Great Northern Railroad Company had complied with its propositions to the county, and had done everything which it was required to do in order to obtain the bonds of $150,000.00, overruling the contention of Shattuck that it had not so complied.

15. Because of the error of the Court of Civil Appeals, complained of in the twelfth assignment of error in the application for writ of error, on pages 99 and 100 thereof, by failing and refusing to hold,

and by ruling to the contrary, to wit, that in its application
1343 to this case on the constructions claimed and asserted for it by plaintiffs, without which they cannot recover, Articles 6423-4-5 of the Revised Statutes of 1911, did not impair the obligation of the contract, and are not in violation of Sub-section 1, of Section 10, of Article 1, of the Constitution of the United States, to wit, of the contract obligation of the mortgage of the sold-out I. & G. N. R. R. made in 1881. The contention of the plaintiff in error is that such statute, upon the construction given, is unconstitutional and invalid in the application now disclosed for the first time, to wit, that it appears for the first time from the decree of foreclosure and evidence that the I. & G. N. R. R. Co. was sold out at a loss under a decree of foreclosure made in May 1910, of the mortgage termed the second mortgage, made in 1881, and that the plaintiff in error is the assignee and holder as purchaser of all rights and interest whatsoever accruing to the mortgagee, it now contending that the act of 1889, above mentioned, violates the contract evidenced by the mortgage, in attempting to make prior in law rights, if any, which were junior in time, by giving security by such subsequent act of 1889 by way of servitude, burden, or duty, and as claimed by plaintiffs, against property or some of the properties of the sold-out railroad, whether tangibles or intangibles.

16. Because of the error of the Court of Civil Appeals, complained of in the thirteenth assignment of error in the application for writ of error, on page 106 thereof, by failing and refusing to hold that R. S., 6423-4-5 of the Revised Statutes of Texas of 1911, as construed by plaintiffs, which construction was upheld by the Court of Civil Appeals, is unconstitutional and invalid on the facts of this case, in that, as was applied thereto, it is maintained that the alleged contracts, claimed to have been made in 1872 and 1875, are secured by said statute by its imposing a duty or lien, burden or servitude upon the property or properties, or some of them, tangible or intangible, or both, of the sold-out International & Great Northern Railroad Company, acquired by this defendant under foreclosure sale of May
10, 1910, of the mortgage of 1881, in that, as now asserted,
1344 it is claimed that this statute, by its terms, attempts to burden and add to the contracts by statutory exensions and obligations, going beyond the alleged contracts, whereby it appears when applied to the facts of this case, that such act of 1889, as construed, is unconstitutional and invalid, and violates Sub-section 1, of Section 10, of Article 1, of the Constitution of the United States, prohibiting any State from passing a law impairing the obligations of contracts, the plaintiffs claiming that their alleged personal contracts became so first secured and extended in 1889 by the force of that statute.

17. Because of the error of the Court of Civil Appeals, complained of in the fourteenth assignment of error in the application for writ of error, on page 108 thereof, by failing and refusing to hold that the act of 1889, known as the office-shops statute, being Articles 6423-4-5 of the Revised Statutes of Texas, is unconstitutional and invalid, and violative of Section 1, of Article XIV of the amendment to the Constitution of the United States, commonly called the Fourteenth

Amendment, as now construed, in that such statute imposed great penalties, and in that it is not applicable to the defendant, under the facts of this case, it having bought under the foreclosed mortgage of 1881, made prior to the statute, but as applied constitutes an attempt to abridge the privileges and immunities of the defendant, and deprive it of its property without due process of law, and to deny it the equal protection of the laws by penalizing it, and threatening to penalize it, at the rate of $5,000 per day, if it should resort to the court to resist this action and litigate its rights by refusing to obey such statute, invalid upon such application.

18. Because of the error of the Court of Civil Appeals complained of in the fifteenth assignment of error in the application for writ of error, on pages 109 and 110 thereof, by failing and refusing to hold that the act of 1889 (now R. A. 6423-4-5 of the Revised Statute of Texas of 1911) is unconstitutional and invalid as construed
1345 by that court and in its application to this case, because the same is violative of Section 1 of the 14th Amendment of the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the law, because, as the statute is applied to this case, and as construed it creates an undue interference with the business of the plaintiff in error, and with its duties to the public, to its stockholders, and to other persons, both in state and interstate commerce, wherein it attempts to interfere with the lawful discretion and power of the plaintiff in error, as construed and applied, to conduct its business within its own discretion within the limits of the law, and wherein it attempts by such subsequent statutes to place burdens, liens and additions onto and secure the alleged personal contracts of 1872 and 1875, as claimed by plaintiffs, thereby denying to defendant the equal protection of the law, and taking its property without due process of law by such illegal interference.

19. Because of the error of the Court of Civil Appeals, complained of in the sixteenth assignment of error in the application for writ of error, on pages 111 and 112 thereof, by failing and refusing to hold that the office-shops act of 1889, now carried into the Revised Statutes of 1911, Articles 6423-4-5, on its application to this case, and as construed by the Court of Civil Appeals, and applied, is unconstitutional and invalid because this act is, by its terms, applicable anly to chartered railroads, and not to individual receivers or other persons operating railroad carriers, or to other persons or corpoations whatsoever, in whatever business engaged, and so violates Section 1 of Article XIV, of the Amendments to the Constitution of the United States, being as now construed, and on the applications made, if such applications be correct, against a species or class not rightfully classified on any legal ground, and in that it places a burden on a species of class not placed on other persons or corporations not classified with it, thereby violating the provision of the Constitution of the United States, and denying to the plaintiff in error "the equal pro-
1346 tection of the laws", and abridging its privileges and immunities, and depriving it of its property without due process of law.

20. Because of the error of the Court of Civil Appeals, complained of in the seventeenth assignment of error in the application for writ of error, on pages 113 and 114 thereof, by failing and refusing to hold that the act of 1889, being Articles 6423-4-5 of the Revised Statutes of Texas of 1911, in its applications to this case and as construed and enforced by that court, on the claim that it secures the alleged personal contracts of 1872 and 1875 on which the plaintiffs sue, is unconstitutional and invalid, and contrary to the Constitution of the State of Texas:

(*a*) Because the same assesses a penalty of an amount prohibited, being excessive and in conflict with Section 13 of Article 1 of the Constitution of Texas:

(*b*) Because the statute as construed and applied is retroactive in its application to this case, it being now asserted that by it purely personal alleged contracts of 1872 and 1875 were in 1889 first secured, all in conflict with Section 16 of Article 1 of the Constitution of Texas:

(*c*) Because the plaintiffs seek a recovery in violation of the obligations and terms of the alleged contracts on which they sue, and of the mortgage contract of the sold-out railroad, made in 1881, all in violation of Section 16 of Article 1 of the Constitution of Texas:

(*d*) Because, as construed and applied, the plaintiffs deny to the plaintiff in error the equal protection of the law, and violate the due process of law, in interfering with the just discretion of the plaintiff in error to manage its properties within the limits of the law, all in violation of Section 19 of Article 1 of the Constitution of the State of Texas.

21. Because of the error of the Court of Civil Appeals, complained of in the eighteenth assignment of error in the application for writ of error, on pages 115 and 116 thereof, by refusing to hold that there was no ground, and by holding that the trial court did not err in submitting it as an issuable fact to the jury to determine whether
1347 or not Grow and Hoxie were authorized, or either of them, to make the alleged contracts sued on, Grow, as alleged, representing the H. & G. N., and Hoxie, as alleged, the I. & G. N.; and the court, in this connection, erred in refusing to sustain the contention of the plaintiff in error that there was no evidence whatever to show ratification of said contracts, or either of them, but that, on the contrary, evidence upon these issues showed and tended overwhelmingly to show that there had been no ratification or authorization of such contracts by the Board of Directors of any railroad involved, it being conceded that the ratification or authorization would have to be by the board.

22. Because of the error of the Court of Civil Appeals, complained of in the nineteenth assignment of error in the application for writ of error, on pages 133 and 134 thereof, in failing and refusing to hold, as contended by the plaintiff in error, that the authorization or ratification of the alleged contracts sued on, on which the plaintiffs depend, if ever made, had to be made by the Board of Directors, acting as a body, and that it is not sufficient that a majority of all the board, not acting as a body may authorize or ratify, it being

essential that the board should act as a body, with the opportunity for consultation, the plaintiff in error contending that it was entitled to have the jury so charged, and the trial court refusing this charge, and the Court of Civil Appeals upholding the trial court.

23. Because of the error of the Court of Civil Appeals, complained of in the twentieth assignment of error in the application for writ of error, on page 136 thereof, by failing and refusing to hold that since the H. & G. N. R. R. and the I. & G. N. R. R. had the legal right to establish and maintain their general offices, machine shops and roundhouses at Palestine, without any contract, the fact that they did establish them there was not evidence that these companies, or either of them, *and* authorized or ratified any contract binding them to do so.

24. Because of the error of the Court of Civil Appeals, complained of in the twenty-first assignment of error in the application for writ of error, on pages 137 and 138 thereof, by failing and re-
1348 fusing to hold that the establishment and maintenance of the offices and shops at Palestine was not in itself evidence of authorization and ratification, and therefore it was error of the court to assume that such matters might be such evidence in connection with other facts, rather than to make the question depend upon such other facts, if any there were, and that there was no such evidence.

25. Because of the error of the Court of Civil Appeals, complained of in the twenty-second assignment of error in the application for writ of error, on pages 138 and 139 thereof, in holding that the foreclosure sales in 1879 (whereby all properties, corporate rights, privileges and franchises of the International Railroad Company, of the Houston & Great Northern Railroad Company, and of the International & Great Northern Railroad Company, their successor, were sold under decrees of foreclosure by the United States Circuit Court for the Western District of Texas, to John S. Kennedy and Samuel Sloan, the sales having been confirmed by that court and the deeds for all of said property, corporate rights, privileges and franchises having been executed by the Master designated by the court to said Kennedy and Sloan as purchasers), did not have the effect to vest in the purchasers at said sales the title to said properties, corporate rights, privileges and franchises of the International Railroad Company, or the Houston & Great Northern Railroad Company, and of the International & Great Northern Railroad Company, their successor, free from liability for the debts and other merely personal obligations of the International & Great Northern Railroad Company, the Houston and Great Northern Railroad Company, and the International & Great Northern Railroad Company; and in failing and refusing to hold that the fact that Kennedy and Sloan, after purchasing said properties, corporate rights, privileges and franchises, executed a conveyance thereof to the International & Great Northern Railroad Company, and that the fact that the stockholders were mostly the same persons as they were prior to said sales did not have the effect of reviving or restoring the liability of said com-
1349 panies or any of them for their debts and other purely personal obligations.

26. Because of the error of the Court of Civil Appeals, complained of in the twenty-third assignment of error in the application for writ of error, on pages 143 and 144 thereof, in holding, against the contention of plaintiff in error, that the foreclosure sales of 1879 and the proceedings thereunder described in the last ground, did not vest in the purchasers at such foreclosures the franchises and rights both to do and to be of the sold-out railroads, as well as their other properties, and the franchise to be, of the sold-out I. & G. N. Railroad;

Because, under Article 4912 of Paschal's Digest, being Article 4260 of R. S. of 1879, the purchasers and their assigns of the sold-out railway were relieved of any necessity to take out a new charter, but might adopt the charter of the old sold-out railroad and operate under it free of all alleged contracts claimed in this case, if any there were, there being at that time no provision for chartering a railroad to own the sold-out properties of another railroad, the object and effect of the statute being to eliminate all unsecured obligations and personal contracts, and to subject the franchise to be a corporation to the foreclosure sales, whereby the act of 1889, known as the office-shops act (R. S., 6423-4-5 of 1911) is as construed and applied unconstitutional and invalid:

(*a*) Because it would be in violation of Section 1 of Article I of the Constitution of the United States, prohibiting the passage of a law violating the obligation of contracts for such statute to revive and secure personal contracts eliminated as to the franchise to be, and operating franchises, and all property, as well as a personal obligation, by the decrees and foreclosure and sales thereunder;

(*b*) Because to revive and secure such contracts would violate Section 16, of Article I, of the Constitution of the State of Texas, prohibiting the passage and retroactive laws.

27. Because of the error of the Court of Civil Appeals, complained of in the twenty-fourth assignment of error in the
1350 application for writ of error, on page 145 thereof, wherein the court stated in its opinion, with reference to the foreclosure sales of 1879, and proceedings thereunder, and the defense made, that "under these pleadings the question of a bona fide sale to any third person becomes issuable. The facts and circumstances warrant the inference of fact, which, in support of the court's judgment, we must assume that the court found that there was not a bona fide judicial sale; hence, in such finding of fact the legal effect of the sale and deeds to the trustees would not discharge admitted corporate obligations." (Page 20 of opinion.)

Because this theory is first advanced in the opinion of the court, and because no such issue was submitted to the jury, and it was not for the trial judge to find such issue of fact; and because he did not find it. Whereby, the Court of Civil Appeals has made an entire unsupported finding, both in the evidence and in proceedings in the trial court, to sustain the propositions that the plaintiff in error can recover on the act of 1889 in connection with the alleged contracts of 1872 and 1875, when such alleged contracts, purely personal (at least before 1889), had been eliminated absolutely from all relation to the I. & G. N. Railroad Company or its prop-

erties by such foreclosure proceedings of 1879, the Court of Civil Appeals having found a fact never raised in the evidence nor submitted to the jury, and having found the same directly against the decrees of the United States Circuit Court of the Western District of Texas of 1879, undoubtedly made in good faith, but the good faith of which was not in issue.

28. Because of the error of the Court of Civil Appeals, complained of in the twenty-fifty assignment of error in the application for writ of error, on page 146 thereof, in that the court ruled against the contention of plaintiff in error that the office-shops statute of 1889 (R. S., 1911, Arts. 6423-4-5), at most, purports to require the general offices, shops and roundhouses of a railroad coming within its provisions to be maintained permanently at the place where they have been contracted to be kept, the word "permanently" not meaning forever, but meaning only for a less period,
1351 completely complied with (if there was any obligation) by keeping these institutions in Palestine, as to the shops from in 1875 to the present time, and as to the general offices from in 1875 to in 1881, and from 1888 to in 1911, the court, to the contrary maintaining that permanently means "perpetually", or forever, and "perpetually" enjoining their removal from Palestine, whereby the most essential word of the statute is changed; said finding being injurious to the plaintiff in error, and leading to an improper judgment, because it is apparent that the "permanently" of the statute has been complied with, were there even a cause of action.

29. Because of the error of the Court of Civil Appeals, complained of in the twenty-sixth assignment of error in the application for writ of error, on pages 147 and 148 thereof, in that the court refused to maintain that the alleged contracts sued on are to be measured and determined by the laws and statutes existing at the time of their creation, and that the adding of more extensive obligations thereto is violative of sub-section 1, of Section 10, of Article I, of the Constitution of the United States, prohibiting any State from passing any law impairing the obligation of any contract, whereby Articles 6423-4-5 of the Revised Statutes of Texas of 1911, commonly known as the office-shop act of 1889, are invalid in its applications hereto, and as construed and enforced herein, because by such construction these alleged personal contract- of 1872 and 1875 were claimed to be secured in rem, or made to inhere, or be a duty on, or be a servitude upon the properties of the defendant, thereby adding to the obligations of such alleged contracts, and violating the same, and because, as contended, this act extended and re-defined the terms "general offices", as understood under the laws existing in 1872 and 1875, whereby numerous obligations were added to the definition given by those laws to general offices and numerous persons included and added thereto, with the residence of themselves and families at Palestine, and whereby the Constitution of the United States, as pointed out, is violated, and the same provision in the Constitution of Texas.

1352 30. Because of the error of the Court of Civil Appeals, complained of in the twenty-seventh assignment of error in the application for writ of error, on pages 149 and 150 thereof, wherein it refused to hold that the alleged contracts sued on, of dates 1872 and 1875, being alleged to be forever and to create an obligation for performance forever, and to be secured by the Office-Shops Act of 1889 (R. S. of Texas of 1911, Articles 6423-4-5) forever, are invalid and void, and such statute in the application made thereof hereto as securing the same, is in its applications hereto invalid and unconstitutional, if it bears the construction that the word "permanently" therein means "forever" or "perpetually," as contended by the plaintiffs and secured in their decree. Because then the constitution of the State of Texas is violated, which prohibits perpetuities, and thereby the indefinite restraint on alienation and the indefinite tying up of property or the securing of any *of any* obligation or contract by a servitude, duty or burden, whereby the contract is to be performed forever or perpetually, thus violating Section 26, of Article I, of the Constitution of Texas.

31. Because of the error of the Court of Civil Appeals, complained of in the twenty-eighth assignment of error in the application for writ of error, on page 152 thereof, by refusing to hold that, if the alleged contracts were contracts at all, and that if the alleged rent house contract of 1875 (not stating how long the rent houses were to be rented; and not so plead) was an agreement, then it was an agreement for performance during an indeterminate time and was subject to be terminated at the option of either party, as by the defendant refusing further to perform in this case.

32. Because of the error of the Court of Civil Appeals, complained of in the twenty-ninth assignment of error in the application for writ of error, on page 152 thereof, in refusing to hold that the alleged rent house contract, stated to be of the date of 1875, is within the statute of frauds, the evidence showing that there was no such contract in writing and the effort being to show the existence of this alleged contract by parol, and it not being performable on either side within a year; it being plead that a consideration to the I. & G. N.

1353 R. R. was the agreement by the people of Palestine, through Ozment and Wright, that if the railroad kept the alleged contract of 1872, the people of Palestine, as a further consideration, would construct and furnish rent houses to the railway employes at reasonable rentals; it not being plead or proved that the houses were to be rented for any specific time, but if there be any implication from the pleading that the houses were to be rented for any definite time, then they were to be rented forever; and it being plead that the shops and offices were to be maintained forever at Palestine, whereby it would result that there could not be performance on either side within a year on this theory that if performance in renting the houses was for an indefinite time, there was no contract, being presented above and below.

33. Because of the error of the Court of Civil Appeals, complained of in the thirtieth assignment of error in the application for writ of error, on pages 156 and 157 thereof, by refusing and failing to hold

that the alleged rent house contract of 1875 alleged as having been made between Hoxie, representing the I. & G. N. R. R., and Wright and Ozment, representing the citizens of Palestine, was not a valid contract, because the consideration of renting the houses alleged was no consideration, it not being plead or proved that the houses were to be rented for any specified time; whereby the consideration of the renting of the houses did not exist, but if there be any implication from the pleading that the houses were to be rented for any definite time, then they were to be rented forever and the alleged agreement was within the statute of frauds as set out above; but now assuming the only other alternative that they were not to be rented forever, then no time was stated and there was no obligation to rent the houses for definite time; and on this alternative theory the alleged agreement would be no contract since there would be no consideration, because when the consideration is to be performance on one side or the other, and when no time for extent of the performance is given, then it resting in the option of the obligor to discontinue at any time, there is no consideration and no contract.

1354 *Argument under the 31st, 32nd, and 33rd Grounds of This Motion.*

This contract alleged to have been made about the first of the year 1875 between the International & Gre-t Northern Railroad Company, acting by its general superintendent H. M. Hoxie, and the citizens of the City of Palestine, among whom was George A. Wright and J. A. Ozment, falls short of being an enforceable obligation by virtue of the fact that, depending for its consideration upon mutual promises, it lacks the element of an undertaking, on the part of the citizens of Palestine, who treated, through their representatives, with Hoxie, to rent the houses which they agreed to erect for any specified length of time to the officers and employes of the railroad company and their families, for whose occupancy the houses were to be provided. The law is so fundamental that, to support a contract upon the basis of mutual promises, each party must be bound to do something, that the proposition does not require the citation of authorities. However, as a starting point in the brief discussion we shall make of that subject, we refer to the case of Oil & Pipe Line Co. v. Teel, 95 Texas, 586. In that case the court observed: "A naked agreement by which one promises to convey to another an interest in land in consideration of money to be paid or acts to be performed by such other, but which does not bind the other to pay or perform the consideration, as the case may be, cannot be enforced. In such case there is a want of mutuality in the agreement. The one party promises to do something—the other does not promise absolutely to do anything; hence there is no consideration to support a contract and it is void." A number of cases to the same effect are given in our brief in the Court of Civil Appeals on page 309—same bottom page 525 of the bound volume. Did, then, the citizens of Palestine, assuming that they promised, as the petition alleges, to "at once con-

struct and complete, or cause to be constructed and completed, at their own cost and expense, any and all houses at Palestine, Texas, which might be demanded by the International & Great
1355 Northern Railroad Company in accordance with such plans or specifications or directions as might be furnished by the Company through its officers for occupancy at reasonable rentals by employes of said Company and their families and especially by said officers of said company, their families and clerks," make a binding and enforceable promise? To obtain an understanding of this matter so as to properly answer the question put, let us consider briefly what Hoxie, in his interview with Wright and Ozment, desired, and what they agreed to do to meet his desire. After stating that Hoxie said, "We want to come right now. We want to know if you have any houses for our men that they could rent, or could you build such houses as are necessary, and how long will it take you to do so if we come right away, as we want to come now," the witness, Wright, proceeded to show, in substance, that it was agreed by himself and Ozment to build the houses needed, giving the names of some persons for whose occupancy the houses were to be built; that it was agreed that the best houses should be for the heads of the departments and that houses were to be supplied for thirty-five or forty men, some not so expensive; all to be comfortable; and that Hoxie agreed to furnish the plans and specifications and that Ozment told Hoxie that he (Ozment) would want to get about ten per cent on the investment in the houses and that he thinks that Hoxie or Hays, one of them, said that that was about half as much as they were paying in Houston. (S. of F., pages 166-169.) Again, as shown near the end of page 170, (S. of F.) the question was asked of Wright, "And when were those houses commenced to be occupied by employes and officers of that Company?", to which he replied, "Just about as fast as we would get them completed they would put men in them." Ozment testified that he was at this meeting with Hoxie in the beginning of 1875; that Hoxie said that he was anxious to carry out the agreement and contract with Judge Reagan with reference to establishing the general offices in Palestine, "but that the road had to have houses and they would expect the people of Palestine to provide comfortable homes for the officers of the road as well as all of the employes"; and that the matter was discussed and the char-
1356 acter of houses agreed upon and that Hoxie did not ask for any special number of houses but said "he would want comfortable houses and we built according to that." (S. of F., pages 227 & 228.) The allegation of the petition which we have quoted unmistakably indicates the inseparability of the construction of the houses from their occupancy at reasonable rentals by employes and officers of the Company and their families. If a separation of the members of the allegation should be attempted so as to leave standing that part which relates to the construction of the houses without regard to their being rented to officers and employes of the Company, we should have the remarkable condition of the citizens of Palestine agreeing to build houses for no purpose and to no end. If Hoxie demanded that and nothing more, and the citizens of Palestine agreed

to that and nothing more, both sides committed themselves to a foolish and fruitless enterprise. But Hoxie made no such demand, and the citizens of Palestine did not agree to any such demand. If the allegation of the petition needs any interpretation, its meaning is illuminated by the references we have made to the testimony of Wright and Ozment. It is by them made as clear as demonstration that what Hoxie desired was homes for the officers and employes of the Company with their families. The building of the houses was manifestly merely a means to that end. The closest scrutiny will fail to discover that Wright and Ozment made any express agreement to rent the houses which were to be constructed, or any of them, to any person or persons for any specified length of time. Accordingly, as to the vital feature of the negotiation between them and Hoxie, there was lacking the necessary element of an agreement on their part to rent the houses for a specified length of time. It would not have been sufficient for them to have agreed expressly to rent the houses without stipulating for a definite period of time. The authorities upon this subject are clear and unmistakable, as shown on pages 309-316 of our brief in the Court of Civil Appeals—same being bottom pages 525-532 of the bound volume. Without repeating what is there set forth, we invite attention to some of the expressions in El. & R. R. Co. v. Scott, 72 Texas 70. On page 75 appears the following:

1357 "We must take the contract as alleged in the petition to be the contract on which appellee must recover, if at all, and looking to that there can be no doubt that whether appellee should serve appellant, and the term of such service, depended upon his own will. It is very generally if not uniformly held when the term of service is left to the discretion of either party or the term left indefinite or determinable by either party, that either party may put an end to it at will and so without cause."

On the next page it is stated that "if when appellee sought to enter the service of appellant he had fixed the period for which he would serve, then there would have been a complete contract, certain in its terms, by which both parties would have been bound." Making application of this view, the court, in Hicke v. Kiam, 83 S. W. 716, in which an offer was made of permanent employment without fixing any definite term, held, referring to the Scott case, that "unless the employe fixes the period of his services at the time he presents himself for work, there is no contract that the law will enforce." Again, referring to the Scott case, the court, in Railway Co. v. Morris, 69 S. W. 102, observes:—

"So long as the term for which appellee was to have the section house was indefinite, no rule existed by which the damages suffered by him on account of his discharge could be measured. The term of the contract could be made certain only by action on the part of appellee, and as he never elected to fix the term he has shown no right to recover."

A good statement of the law on this subject is found in L. & N. R. R. Co. v. Orfutt, 99 Kentucky, 427, in which the court said:—

"The well settled rule with reference to the character of hiring

that is set up in the petition and amended petition is that when
term of service is left discretionary with either party or when
not definite as to time, or when it is for a definite time provi
both parties are satisfied, in either event either party has the ri
to terminate it at any time and no cause therefor need be alle
or proven."

This case expressly approves the Scott case. Examination of
authorities cited in our brief will show that this principle is fir
established by decisions involving many phases of the quest
Applying the principle to our case, there is not the slightest do
that indulging every inference that can legitimately be drawn, th
was no promise on the part of the citizens of Palestine in deal
with Hoxie to rent the houses for any definite period
1358 time; and it is not pretended that any time was ever fixed
them for the occupancy of the houses erected in pursua
of the arrangement with Hoxie.

The only possible view according to which it can be conten
that the citizens of Palestine promised to rent the houses for w
might be regarded as a definite time is, that, since the Railr
Company was bound forever to carry out its undertaking the im
cation arises that the houses were to be rented to the officers and
ployes of the Railroad Company forever. From maintaining t
position, however, of course the other side would shrink, inasm
as it involves them in the trouble of seeking to enforce a cont
obnoxious to Sections 4 and 5 of the statute of frauds, the first
hibiting the lease of real estate for a longer period than one year,
the second inhibiting any agreement which is not to be perfor
within the space of one year from the making thereof unless
either case the agreement is in writing. While a contract tha
capable of being performed within one year does not fall wit
the condemnation of either of those sections, yet a contract to
forever is obviously condemned.

We believe that with respect to the alleged rent house cont
the other side is impaled on one or the other of the horns
dilemma, either of which situations necessitates their defeat in
case. If the promise they made to Hoxie was not for any defi
length of time, the alleged contract resting upon that promise as
consideration, falls to the ground. If, on the other hand, the hou
were to be rented forever, and thereby definiteness was given
the promise, then it comes within the inhibitions of the statute
frauds and the alleged contract must for that reason fail. Plain
the doctrine of performance on one side would in that condit
have no application to this case, since, if the Railroad Comp
was bound to keep the offices, shops and roundhouses in Pales
and the citizens of Palestine were bound to forever rent the hou
to the officers and employes of the Railroad Company, it could
be asserted that either side was to perform its obligations within
year.

1359 Though a contract which is capable of being perfor
within one year from the date of its formation is not wit
the statute of frauds, yet that statement of the rule does not incl

the entire law applicable to the subject. Thus, in Cyc. Vol. 20, page 199 C., we find this statement:—

"In general a verbal agreement to do some particular act which fixes no definite or contingent time for its performance but which, in view of the understanding of the parties and of its subject matter, is capable of full performance within one year after the making thereof, is not controlled by the statute. The fact, however, that by a mere possibility a contemplated act may be performed within a year will not of itself suffice to withdraw a case from the operation of the statute if it clearly appears from the terms of the contract or from its nature that it was not the intention or understanding of the parties that it should be performed within that time."

An exhaustive discussion of this subject is found in White vs. Pitts, 102 Maine, 240. In that case the court quotes approvingly the following from Browne on the Statute of Frauds, Section 281:—

"Where the manifest intent and understanding of the parties as gathered from the words used and the circumstances existing at the time are that the contract shall not be executed within the year, the mere fact that it is possible that the thing to be done within the year will not prevent the statute from applying. Such an accomplishment must be an execution of the contract according to the understanding of the parties."

Recurring to the evidence upon which we commented in connection with the proposition that the negotiation between Hoxie and the citizens of Palestine contemplated the renting of houses as an essential feature, we ask whether any person would, with seriousness, contend that the parties did not contemplate the occupancy of the houses at least for a series of years by the officers and employes of the company? The fact, as testified to by Wright, that in the interview with Hoxie Ozment told him he would want to get about ten per cent on the investment in the houses is exceedingly significant. It is hardly necessary to say that the ten per cent meant that much return per annum; and certainly the expenditure of several thousand dollars in the erection of houses was not made with any idea that the return would be received only one year. Can there, therefore, be any doubt that the intent and understanding of the parties existing at the time of the making of the arrangement was
1360 that the renting of the houses should not be completed within one year's time?

In Cyc. Vol. 20, page 206 (9), we find that following strong statement:—

"If from the nature and terms of the contract it is manifest that the parties intended to enter into a permanent arrangement or that they did not contemplate the complete performance within a year, the contract is within the statute, although no time for performance is specified."

34. Because of the error of the Court of Civil Appeals, complained of in the thirty-first assignment of error in the application for writ of error, on pages 158 and 159 thereof, by failing and refusing to hold that: Since the plaintiffs' reply upon the Office-Shops Act of 1889 (R. S. of 1911, Art. 6423-4-5) without which they cannot

recover, on ground that Hoxie and Grow and the I. & G. N. R. R. and H. & G. N., along with the County of Anderson, had contracted to keep the general offices at Palestine, Texas, forever, then that the act provides that the railroad company shall keep its general offices at the place designated in its charter and prohibits the enforcement of any contract in contradiction to the place for the general offices designated in its charter; it being shown without dispute that the charter of the H. & G. N. R. R. located its general offices in the City of Houston, and the charter of the International authorized it to consolidate with any other railroad and did not locate its general offices, except on its lines, and that the International and the H. & G. N. consolidated, coalescing their charters, to form the International & Great Northern Railroad, assuming and being bound to assume the duties, obligations and requirements of the charter of the Houston & Great Northern and moving their general offices to Houston, Texas, whereby such consolidation of the charters located the general offices of the consolidated railroad at Houston, Texas; and whereby the act of 1889 relied on by the plaintiffs, does not enforce any contract, if any there was, to locate the general offices at Palestine, but on the contrary prohibits the enforcement of any such contract, if any there was.

1361 35. Because of the error of the Court of Civil Appeals, complained of in the thirty-second assignment of error in the application for writ of error, on page 162 thereof, wherein it refused to hold that all right of action, if any, was barred by the statute of two years' limitation on account of the general offices and shops, or either, not being moved to Palestine within two years after the making of the alleged Reagan-Grow contract of 1872, and the railroad became obligated to perform, if they were so obligated, it being shown in the evidence as to the offices, without dispute, that they remained in Houston until in 1875 for more than two years after the alleged three party contract of 1872 was alleged to have been made and to have been completely performed on the part of Palestine and the county by furnishing Judge Reagan's political services and speeches to induce the voters of the county to vote the bond issue, and by their voting the bonds and delivering the same, and that the shops were not brought to Palestine for over two years; whereby the statute of two years' limitation (R., 5687, Sec. 4) applied.

36. Because of the error of the Court of Civil Appeals, complained of in the thirty-third assignment of error in the application for writ of error, on pages 164 and 165 thereof, by failing to hold that, if the evidence did not absolutely show that limitation of two years had run absolutely, it undoubtedly raised the issue of whether or not limitation had run as to the general offices, or under the testimony that the general offices had been moved to St. Louis in 1881 and remained there until 1888. The suit was brought in 1912, and the defendant was entitled, at the least, to have it submitted to the jury to determine whether or not the removal to St. Louis and the stay there was a breach of the contract.

37. Because of the error of the Court of Civil Appeals, com-

plained of in the thirty-fourth assignment of error in the application for writ of error, on pages 167 and 168 thereof, wherein it refused to hold that if the two years' statute of limitation was not applicable, then at least the four years' statute of limitation, being the Omnibus Statute, was applicable, and refusing the charge as requested in special issue No. 9, contended by the defendant.

38. Because of the error of the Court of Civil Appeals,
1362 complained of in the thirty-fifth assignment of error, in the application for writ of error, on page 168 thereof, in that the court refused to maintain the proposition that it being at least raised in the evidence whether or not any right of action as to the general offices was barred, the Office-Shops Act of 1889 (R., 6423-4-5), passed after the accrual of the bar, would be retroactive and unconstitutional when construed to remove such bar.

39. Because of the error of the Court of Civil Appeals, complained of in the thirty-sixth assignment of error in the application for writ of error, on page 169 thereof, wherein it refused to hold that, by giving effect to the alleged contracts alleged by the plaintiffs and by deciding that by the operation of the general office statute of 1889 (R. S., 6423-4-5) plaintiff in error is forever bound to keep and maintain its general offices, machine shops and roundhouses at Palestine, that thereby there is no violation of subsection 3, of Section 8, of Article I, of the Constitution of the United States, conferring upon Congress the power to regulate commerce among States, the consequence of the ruling of the court upon this subject being to deprive plaintiff in error of the power to so regulate its affairs as best to serve the interests involved in interstate commerce, and to place a perpetual burden upon such commerce, this interference not being a matter of indirect police regulation, but being an attempt to regulate, not of a legal nature, and an attempt to bind down at Palestine the residences of the executives of the railroad and its other means of operating in interstate commerce as to the shops, etc., whereby the field exclusively reserved for Congress by the Constitution of the United States is attempted to be invaded.

40. Because of the error of the Court of Civil Appeals, complained of in the thirty-seventh assignment of error in the application for writ of error, on page 172 thereof, in that it refused to hold that the trial court erred in refusing to give question 7, requested, by the defendant, which was requested, not yielding contention that as a matter of law to place the shops and offices at Palestine forever would be a burden upon interstate commerce and subject to the same the defendant had a right to have it submitted to the jury whether or not the placing of the general offices
1363 in Palestine forever, binding them down there forever, would be a burden upon interstate commerce, in violation of Sub-section 3, of Section 8, of Article I, of the Constitution of the United States; for if it were, then as to the general offices, the act of 1889 could not apply, since the Legislature cannot burden, regulate and tie down interstate commerce forever.

41. Because of the error of the Court of Civil Appeals, complained of in the thirty-eighth assignment of error in the application for writ of error, on page 174 thereof, in that the court failed and refused to maintain that the trial court erred, for the reason that the foreclosure of the mortgage of 1881 upon the properties of the International & Great Northern Railroad, under which foreclosure plaintiff in error bought and takes all of its rights, was valid and had the effect to vest the complete title of all such properties, including all the franchises to do, as well as the physical properties in the plaintiff in error, and that at most defendants in error were left with the right to redeem from such foreclosure, which they have not offered to do, the law of mortgage foreclosure being that all persons subsequently entitled, who were omitted from the foreclosure proceedings, have no right to claim that the foreclosure proceedings are void as to them, but only and at most are entitled to redeem the mortgage and to redeem from such foreclosure, which the defendants have not offered to do in this case. In this case, as the plaintiffs would have had to pay over $12,000,000 to redeem from the foreclosure proceedings, it becomes unimportant, since they could not redeem, and their equity, if any, was not worth that sum.

42. Because of the error of the Court of Civil Appeals, complained of in the thirty-ninth assignment of error, in the application for writ of error, on pages 176 and 177 thereof, by failing and refusing to hold that the trial court erred in refusing to give plaintiff in error's preemptory instruction No. 1, because the trustee and bondholders under the mortgage of 1881 took their lien without any notice of the contracts alleged by defendant in error, and also at a time when said contracts could not have affected the lien of the mortgage upon the property or title of the purchaser
1364 thereunder at foreclosure sale, but were purely personal obligations of the corporation which made them, if ever made, for which reason plaintiff in error purchasing under the foreclosure of said mortgage of 1881 and succeeding to all the rights of the trustee and bondholders therein, acquired title freed from the operation of such contracts and from the operation of the general office statute passed subsequent to the attaching of the mortgage lien, thereby entitling the plaintiff in error to be protected under the provision of the Constitution of the State of Texas prohibiting the passage of any retroactive law, or any law impairing the obligation of contracts, and under Sub-section 1, of Section 10, of Article I of the Constitution of the United States prohibiting any State from passing any law impairing the obligation of contracts, and under that part of Section 1, of the Fourteenth Amendment of the Constitution of the United States, providing that no State shall pass any law depriving any person of life, liberty or property without due process of law.

43. Because of the error of the Court of Civil Appeals, complained of in the fortieth assignment of error in the application for writ of error, on pages 177 and 178 thereof, by failing and refusing to hold that the trial court erred in admitting in evidence

the certain newspaper article published in the "Daily Visitor," a Palestine newspaper, of date May 16, 1899, and signed by Judge Reagan; because, first, he was not under oath or subject to cross-examination, and because, second, the article was confusing and therefore prejudicial, and because, third, it was hearsay, and because, fourth, it related to matter with which Judge Reagan had — concerned and was a principal party, according to the allegation of the defendants in error, and contained self-serving declarations written in 1899, not in explanation of letters introduced by plaintiff in error without objection, written in 1872, and because fifth, said article was inadmissible, being, as it was, a mere political article, stating conclusions, and prejudicial to plaintiff in error.

1365 *Argument under the 43rd Ground of This Motion.*

That the letter of Judge Reagan was hearsay is clearly undeniable. Without controverting its character as hearsay, the other side has sought nevertheless to defend its admissibility in this case. Their views on this subject are shown in their brief in the Court of Civil Appeals, on pages 250-274. They say that the letter was admissible to supplement the testimony of the witness Stedman who contradicted the witness Howard, Howard having said that he never heard of any executive officer or director of the H. & G. N. or the International or the I. & G. N. in any way mention or refer to the alleged contracts sued on in this case, and Stedman having stated that it was his impression that he had acquainted Howard with the Reagan letter and that he felt sure Howard was acquainted with the letter. In answer to this contention we reply, first, that no predicate was laid to contradict Howard. In the next place, the letter did not contradict Howard, since all that Howard said was that "he never heard any executive officer or director of the H. & G. N. of the International or the I. & G. N. Railroads in any way mention or refer to the alleged contracts sued on in this case." The letter plainly did not indicate that Howard had received any such information. In the next place it was certainly not legitimate to supplement the testimony of Stedman by a detailed statement relating to one of the most important issues in this case when such statement was undoubtedly hearsay, was made by an adverse party, and was a self-serving declaration. Again, the point as to which it is claimed the letter contradicted Howard was in no sense material to the case. Closely related to the position that the Reagan letter was admissible to supplement the testimony of Stedman, in contradiction of Howard, is the position that the letter was admissible in the was of rebuttal. For the same reasons for which the letter should not be received to aid in the contradiction of Howard, it should not be received for the purpose of rebuttal. The cases cited by the other side to support their proposition, that the evidence was competent in rebuttal,
1366 show that evidence of a primary nature, not otherwise admissible, may be rendered admissible by the introduction by the opposing party of evidence on the issue to which the rebutting evi-

dence relates. But no case is cited, nor, we venture to affirm, can any well considered case—if, indeed any kind of case—be found to show that the rule of evidence, requiring the introduction of the best evidence, can be dispensed with for the purpose of rebuttal, so as to justify the admission of hearsay, or the proof of the contents of written instruments without producing the original when obtainable, or any other matter presupposing the existence of better evidence, or so as to justify an ex parte self-serving declaration of an adversely interested party.

It is speciously urged that the jury, finding that Howard was mistaken in his statement that he had not heard of the matter in question until 1911, might have concluded that he was also mistaken in the statement that he had not heard of it during the '70s, the period to which the only material inquiry was addressed. But this distorts the use of the evidence, which is merely contradicting or impeaching evidence. Such evidence is not affirmative evidence or any fact—merely goes to the credibility of the witness. The so-called contradiction, therefore, did not tend to prove anything except the facts stated in the letter, and it was for that purpose that it was desired.

The further contention of the other side that the Reagan letter was admissible as part of the correspondence between Reagan and the Railroad Company is manifestly unsound for the reason, in the first place, that the letters of Reagan to the Company were written in 1872 and 1874 (S. of F., pages 319-323), from twenty-five to twenty-seven years before his newspaper letter was written in 1899; and for the further reason that the letters were not to the same parties, since those of 1872 and 1874 were, two of them, written to the president of the Railroad Company and the third to its general manager, whereas the letter of 1899 was written to a newspaper at Palestine. The authorities, therefore, cited by the other side on this question are utterly inapplicable.

1367 The further contention of the other side that the Reagan letter was admissible to show notice to the Railroad Company through Howard as director and especially through Trice, its general manager and vice-president, acting for the president in his absence, is plainly untenable. When this letter was brought to the attention of Howard and Trice, the rights of the parties under the alleged Reagan-Grow contract had been fixed for more than a quarter of a century, and notice at that time was utterly immaterial. But the contention is that upon being advised of the Reagan letter the Company was placed under the duty of expressing its acquiescence or repudiation of the alleged contract. What, we inquire, was the Company then called on to do? Did it have to move back to Houston or some other place because then, for the first time, it learned of an unfounded claim against it? Was it called upon to publish a letter in the newspaper to refute Judge Reagan's statements, not addressed to it but to the public on questions different from those now litigated as defined in appellees' brief? If, however, the mere fact that notice was brought to the Company of the contract by the writing of the Reagan letter was proveable, it certainly was not ad-

missible to introduce the detailed, hearsay, self-serving declarations of Reagan upon one of the most important issues in the case in order to establish the general fact of notice. It is remarkable that the other side should attach so much importance to the question of notice to the Company as to try to get before the jury that detailed statement when they claim to have shown by abundant evidence that the contract was in its inception authorized and that at the time of its inception all the facts where known to the Railroad Company.

We are coolly told, however, that if we desire the effect of the Reagan letter to be limited we should have requested an appropriate instruction for that purpose. In other words, we are told that we should have committed ourselves to the admissibility of the Reagan letter for one purpose at least and have therefore let the letter go before the jury and create an impression that could not be effaced by any admonition of the trial judge, when our position was,
1368 and is, that the letter was wholly inadmissible for any purpose. We do not question the soundness of the authorities that hold that, if evidence is admissible for one purpose and not for others, the party desiring its restriction to the purpose for which it is admissible should protect himself against its use for other purposes by a special request to the court. But that rule, notwithstanding the practical danger of the misuse of testimony admitted, is one of necessity. It of course has no application to a case such as this, in which the letter was not admissible at all, even though it should be conceded that the general fact of the writing of the letter might be proveable; but, as already indicated, we insist that even that general fact was not proveable in this case.

We come now to the consideration of the position of the other side that the declarations contained in Judge Reagan's letter were admissible because they expressed the community opinion concerning ancient matters of general interest and came from a deceased member of the community who had all the requisite means of knowledge, and were made before any controversy arose. In support of this contention the other side has, on pages 268 to 272 of its brief in the Court of Civil Appeals, quoted lengthily from Elliott on Evidence. It will be observed that in stating, in Section 386, the reasons for the admissibility of this class of evidence Elliott gives as the third reason "The necessity of the case." What is meant by "the necessity of the case"? Upon this subject the authorities are meagre, but there are some statements in some of the cases that appear to furnish an answer to this question. Thus, in Gallagher v. Market Street R. Co., 6 Pac. 869, the court, construing the provision of the Civil Code of California making "historical works, books of science or *act*, and published maps or charts when made by persons indifferent between the parties prima facie evidence of facts of general notoriety and interest," after stating that the intention of the Legislature by codifying the common law rule was to extend rather than to restrict that rule, made use of the following language:

"What are 'facts of general notoriety and interest'? We think the terms stand for facts of a public nature either at home or abroad not

existing in the memory of men, as contra-distinguished from
1369 facts of a private nature existing within the knowledge of liv-
ing men and as to which they may be examined as wit-
nesses."

And in McKinney v. Bliss, 21 New York 217, the court, in commenting upon the admissibility of hearsay or reputation in general, observed:

"Of too ancient date to be proved by eye witnesses, and not of a character to be made a matter of public record, unless it could be proved by tradition there would seem to be no mode in which it could be established. For it is a universal rule, founded in necessity, that the best evidence of which the nature of the case admits is always receivable; hence, had a proper foundation been laid for the proof in this case I should have thought it admissible."

This language clearly implies that when evidence, which would ordinarily *by* secondary, is the best that can be procured, it becomes admissible. Thus, if there should be a written instrument evidencing a transaction and its loss should be established, proof of its contents could be made by persons cognizant thereof because there would be no better evidence. So, if there are living witnesses, as there were in this case, by whom the matters detailed by Judge Reagan could be proven, his hearsay declarations were not the best evidence of which the nature of the case admits, but the best evidence was that of the living witnesses who were offered. In harmony with these views is the following language used by Elliott at the end of Section 386:

"Again, from the nature of the case there is a lack of better evidence. For often the rights and liabilities are of ancient and obscure origin and are also very infrequently acted upon, so that direct proof would often be possible, and thus, from the necessity of the case, this evidence is admitted."

In quoting several section- from Elliott on Evidence to sustain the introduction of Judge Reagan's declaration because of the public or general interest involved, the other side stopped before they reached Section 395, which is absolutely fatal to their position and which is in the following language:

"Sec. 395.—Particular Facts.—The subject of proof by declara-
"tions of this sort must be the public matter itself, and not some par-
"ticular fact which is evidence of the public matter. The reason
"given for this is that particular facts of a private nature may be
"misrepresented or may have been connected with other facts,
1370 "which, if known, their effect might be limited or explained.
"What is meant is that anyone may be permitted to state
"what he has heard from persons respecting the reputation of the
"right; but not to state facts of the exercise of it which the dead per-
"sons said they had seen."

One of the cases cited as supporting the text is South West School District vs. Williams, 48 Conn. 504, which is a most illuminating exposition of the true rule. The question of the time of the erection of a school being in issue, a witness was asked: "Did your mother or great-grandmother tell you when the school house was built—be-

fore or after the death of Joseph Webster?" Upon objection, the witness was not permitted to answer the question. Passing upon this ruling, the Supreme Court said:—

"The objection was not to the fact—which is conceded to have "been material—but only to the mode of providing it, namely, by "the declarations of the witness's mother and great-grandmother. "In support of the claim that the evidence was admissible the de- "fendant invoke the benefit of an exception to the general rule "excluding hearsay evidence upon the ground that the matter in "question was of public and general interest. As included within "this exception the authorities mention boundaries of counties, "towns, and other territorial divisions, rights of common, claims or "highways and ferries, and in this and some other States, the "boundaries of lands of individuals. The fallacy on the part of "the defendants seems to be in assuming that because a school house "is a public building for a public purpose, the precise date of its "erection must also be matter of public or general interest to be "proved by traditionary evidence; and therefore one of the defend- "ants attempts, by repeating the unsworn statement of the deceased "mother or grandmother as to a date, to change this public matter "of a school house into her own private property. And this well "illustrates the danger of extending the exception so as to embrace "particular facts and dates. In this case there was doubtless other "and better evidence to be found in the records of the school district "or from living witnesses. But however this may have been, a "reference to the reason for admitting traditionary evidence in "public matters will show that particular dates like this ought
"not to be included. The law does not dispense with the
1371 "sanction of an oath and the test of cross-exaimnation as a
"prerequisite to the admission of verbal testimony, unless it "discovers in the nature of the case some other sanction or test "deemed equivalent for ascertaining the truth. The matters in- "cluded in the class under consideration are such that many per- "sons are deemed cognizant of them and interested in their truch, "so that there is neither the ability nor the temptation to misrepre- "sent that exists in other cases; and the matters are presumably "the subject of frequent discussion and criticism, which accom- "plishes in a manner the purpose of a cross-examination, while "the persons whose declarations are offered in evidence must have "been in a situation to know the truth. After passing such an "ordeal, it is reasonably safe to accept the result as established fact. "But if the fact to be proved is a particular date, though connected "incidentally with a public matter, it is easy to see that it could "not stand out as a salient fact for contemporaneous criticism and "discussion so as to furnish any guaranty for its correctness, so that "the general rule excluding hearsay applies in full force. The "human memory is proverbially treacherous in regard to very "recent dates, and little reliance can be placed on the sworn testi- "mony of living witnesses in such matters, unless they are able to "associate the date given with some more striking fact."

The court supports its statement of the law by reference to a

number of cases, other than those involving dates, where evidence of particular facts and not of general reputation was offered and held to be properly excluded.

The law as laid down in Section 395 of Elliott, and in the Connecticut case from which we have quoted, is absolutely conclusive against the admissibility of the detailed statement of Judge Reagan in this case, which was introduced to prove a private contract between the citizens of Palestine, represented by him, and the Railroad Company represented by Grow.

1372 That part of Section 388 of Elliott quoted by the other side,—"but if a private interest is involved with a matter of public interest the reputation respecting the public interest is admissible"—is elucidated by the next sentence: "And thus, where the location of a private boundary depends upon a public boundary the latter may be shown by a proof of common or general reputation." Among the authorities cited by Elliott on this subject is Muflaney vs. Duffy, 145 Ill., 559, where proof by reputation of a public boundary was held admissible in a controversy concerning the location of a private boundary, the boundaries being coincident. Of course that was a very different question from one in which the location of general offices and shops depends upon a private contract and the litigation is over that contract. It is to be observed in this connection that, as shown by the case of South West School*d* District vs. Williams, above cited, while declarations as to where boundaries existed were admissible, evidence of what persons, whose declarations were offered said as to where houses stood, not being a matter of general reputation, but of particular fact, should not be received; and likewise that a declaration that a particular object, such as a spring, was on the land of one of the parties should not, for the same reason, be received.

We do not concede that the matters relating to the establishment of the offices and shops of the Railroad Company in this case were of public or general interest, but if they were of that nature, under the authorities cited the declarations of Judge Reagan as to particular facts were not admissible. At any rate, this suit brought to enforce private rights under contracts was one in which, clearly, private interest predominated, and accordingly the following statement taken from Cyc. Vol. 16, page 1236 (3) is applicable:—

"Declarations of deceased persons on subjects of quasi-public interest in which private interest predominates, such as the existence of a modus or the public nature or a way, are to be rejected."

1373 The objection that the newspaper article written by Judge Reagan contained self-serving declarations of the writer, he being a principal party to the transactions related by him, has been reserved for consideration at this place, since it has especial application to the contention of the other side that the declarations are admissible under the exception which allows the declarations of deceased persons concerning matters of public or general interest, to which we have just been given consideration. The case of Byers vs. Wallace, 87 Texas 503, is, we submit, strong authority in sup-

port of our position that the declarations should have been rejected because of their self-serving nature.

In the case one of the questions involved was the admissibility of the declarations of a deceased member of a family upon the matter of pedigree, and, upon that question, the court held that, where the effect of such declarations is to make the declarant an heir of a deceased person, they are obnoxious to the fatal objection of being self-serving declarations and consequently inadmissible. If in a matter of pedigree, selfserving declarations must be excluded, no reason is perceived why they should not equally be excluded where the matter to which they pertain is one of public or general interest. But we are not left to our unsupported view on that subject, for in Byers vs. Wallace, self-serving declarations where pedigree is involved are placed in the same category with self-serving declarations where the public or general interest is involved, as appears from the following extract taken from that case:—

"All of the authorities cited above sustain the text of Mr. Phillips, p. 228, which is as follows: 'It has been thought to be some safeguard sufficient to warrant the admissibility of the evidence, upon points where no better evidence can commonly be expected, that the declarant could derive no advantage from his own statements, and that there was at the time no existing cause to induce him to depart from the truth.' This is in substance stated upon pages 202 and 203 of the same author. In matters of public interest, such as rights of common and the like, declarations and admitted from disinterested persons only. Greenl. on Ev., sev. 145. And in matters of boundary between private individuals declarations of deceased persons are admitted if not interested when the declarations were made, or the declarations were not such as would directly benefit the declarant. Stroud vs. Springfield, 28 Texas 666. In pedigree, matters of public interest, and ancient boundaries, the law excludes declarations of all persons made post litem motam, because it presumes that even the interest one may feel in the success of his friend might bias the statement and deprive it of value as a statement impartially made."

1374 44. Because of the error of the Court of Civil Appeals, complained of in the forty-first assignment of error in the application for writ of error, on page 180 thereof, by failing and refusing to hold that the trial court erred in refusing peremptory instruction No. 1, requested by the plaintiff in error, for the reason that the evidence did not show nor tend to show that Judge Reagan, in the transaction with Grow, was representing the citizens of Palestine as distinguished from the citizens of Anderson County, which was a necessary fact to sustain the action of defendants in error on the alleged contracts between Reagan and Grow.

45. Because of the error of the Court of Civil Appeals, complained of in the forty-second assignment of error in the application for writ of error, on page 187 thereof, in upholding the ruling of the trial court, and failing to hold that such ruling was an error, and in failing and refusing to hold as contended by the plaintiff in error, that the trial court erred in refusing plaintiff in error's special charge 2,

instructing the jury to leave out of consideration the alleged contract alleged to have been first formed by Grow and Reagan, since there was no evidence or justification of submission of the question to the jury whether or not Judge Reagan bargained for the location of the shops and offices for the people of Palestine in consideration of his political influence, that is, advocacy of the bond issue.

46. Because of the error of the Court of Civil Appeals, complained of in the forty-third assignment of error, in the application for writ of error, on page 188 thereof, in that the court refused to make a finding of fact as to which there was no dispute in the evidence, and which, if the court had found, would as a matter of law, when put with the other proved facts, have made it impossible for plaintiffs to prevail in this case; in that the court failed and refused, as specified and requested by the plaintiff in error in the 83rd ground of its motion for rehearing, to make a finding of the fact that there was no element in either the alleged contract of 1872, alleged to have
1375 been formulated by Reagan and Grow and adopted by the county, or the alleged contract of 1875, alleged to have been made between Hoxie for the railroad and the citizens of Palestine, involving the other alleged contract of 1872, to the effect that Judge Reagan should advocate a county bond issue to the railroad company before the voters, and should make speeches in consideration thereof; it being essential upon the theory of defendants in error that the alleged contracts should contain that feature as an element, and it having been submitted to the jury to determine whether or not they did contain that feature, and whether or not Judge Reagan made the speeches, and the jury having answered affirmatively, and there being no evidence that Judge Reagan agreed for the people of the City of Palestine that his efforts and public advocacy of the bond issue should be a consideration for the contract of the railroad company.

47. Because of the error of the Court of Civil Appeals, complained of in the forty-fourth assignment of error in the application for writ of error, on page 190 thereof, in that the court affirmed the finding of the trial court that there was evidence to support the existence of the alleged contract between Hoxie and the citizens of Palestine, claimed to have been made in 1875, since there was no evidence whatever justifying the theory that any such contract existed and the court erred in supporting the refusal of the trial court to give special charge 4, requested by the defendant, withdrawing from the jury the consideration of the alleged rent house contract.

48. Because of the error of the Court of Civil Appeals, complained of in the forty-eighth assignment of error in the application for writ of error, on pages 197 and 198 thereof, in that it affirmed the action of the trial court in refusing to submit to the jury question 6, requested by plaintiff in error, subject to its prior objections and exceptions and request; whereby, it was sought to have the jury find, subject to the same, whether or not Wright and Ozment and
1376 others, with reference to the alleged rent house contract stated as of 1875, bound themselves to rent the houses referred to to officers and employes of the I. & G. N. R. R. Co., and if they did,

for how long; because there would be no consideration to the railroad unless the citizens of Palestine were bound to lease, and for a definite time.

49. Because of the error of the Court of Civil Appeals, complained of in the forty-ninth assignment of error in the application for writ *or* error, on page 199 thereof, by holding that the trial court did not err in its position that the record of the County Court of Anderson County, showing the written contract submitted to the voters, its approval by them, and the proceedings of the County Court herein, was not the exclusive evidence of the contract between the County of Anderson and the railroad company; and in refusing to hold that it furnished no basis for recovery by defendants in error, and that, therefore, the promises, if any, made by Grow and others, during the canvass preceding the election, or afterwards, when the bonds were issued and delivered to Grow, constituted no contract with the County of Anderson or anyone else, and that the jury could not base a verdict upon any contract thus claimed to have been made between the County of Anderson and the railroad company.

50. Because of the error of the Court of Civil Appeals, complained of in the fiftieth assignment of error in the application for writ of error, on page 200 thereof, by holding that the trial court did not err in maintaining that there was evidence to show that in the transaction between Reagan and Grow, as alleged and testified to, the former was acting for the citizens of Palestine; whereas, there was no such evidence, but, on the contrary, the evidence showed affirmatively that he was acting for the citizens of Anderson County at large, and not for the citizens of Palestine, a portion of the county, as differentiated from the whole county.

51. Because of the error of the Court of Civil Appeals, com-
1377 plained of in the fifty-first assignment of error, in the application for writ of error, on page 207 thereof, in failing to correct the error of the trial court, which error of the trial court was in failing to uphold the contention of the plaintiff in error that the trial court erred in its judgment in failing to confine and restrict the judgment and command in its decree to the shops and roundhouses at Palestine, and in refusing and failing to state that the decree did not apply to other shops and roundhouses, and did not require them to close or go out of operation, there being no g-ound in the pleading or in the evidence for the judgment as formulated by the trial court and as affirmed by the Court of Civil Appeals in this particular. This position is made without waiving the contenton that there was no ground for the judgment whatsoever.

52. Because of the error of the Court of Civil Appeals, complained of in the fifty-second assignment of error, in the application for writ of error, on page 208 thereof, in that it affirmed the trial court, and *pra*ticularly as now stated, and failed and refused to hold that there was no foundation either in the issues found by the jury or in the evidence for the recovery by Anderson County, in favor of which as well as the other defendants in error judgment was entered, and because the consideration for which the bonds were issued was evi-

denced by a contract in writing, made with the county, fully proved and not including the matters claimed by the plaintiffs herein.

53. Because of the error of the Court of Civil Appeals, complained of in the fifty-third assignment of error, in the application for writ of error, on page 209 thereof, wherein it held, on page 8 of its opinion, and elsewhere generally, against the contention of plaintiff in error, that under the laws under which the charter of the plaintiff in error was taken out, it could not name the place for its general offices and principal place of business, and that the statute commonly
1378 known as the office-shops statute of 1889 applied to this case, and as against the plaintiff in error, although it never entered into any contract therein mentioned.

54. Because of the error of the Court of Civil Appeals, complained of in the fifty-fourth assignment of error in the application for writ of error, on pages 210 and 211 thereof, wherein it held differently from the prior decision of the Supreme Court in this case upon the question of law as to the operation of the general office statute of 1889, the same being Articles 6423-4-5 of the Revised Statutes of 1911. The Supreme Court held that the effect of that statute, in connection with alleged contracts for the location of the general offices, shops and roundhouses and franchises to do of the sold-out I. & G. N. R. R. (acquired by the plaintiff in error under the foreclosure sale of the United States Court of 1910, foreclosing the lien and mortgage of the I. & G. N. R. R. of June 15, 1881), was to create a burden, or servitude, upon all or some of said property or franchises, operating as a qualification of said franchises and as an incumbrance upon said property or a part thereof, and on said franchises, and a servitude upon the shops, roundhouses and general offices. Whereas, the Court of Civil Appeals of the Sixth Judicial District, in its decision and opinion (now on review) held that this statute did not operate to create a burden, lien, claim or right or any right in rem upon any of said property or franchises, said different holding of the Court of Civil Appeals is plainly upon a question of law, and arises upon the same issue as passed upon by the Supreme Court. In making this contention the plaintiff in error does not yield its other and prior contentions herein, and its contention that such statute, under the facts of this case, never did give any security for such contracts, and was personal merely, and therefore has no application to it. But it does now point out the conflict and maintain that the Court of Civil Appeals is in conflict with this Court, and is plainly in error in being in such conflict.

1379 *Argument in Support of the 52nd Ground of this Motion.*

How the trial court could render judgment in favor of Anderson County we cannot understand. As shown on page 537 of the record, the Court expressly instructed the jury that the record of the election proceedings in which the voters of Anderson County voted in favor of the issuance of bonds to the railroad company is the exclusive evidence of the contract between the County of Ander-

son and the railroad company and that the declarations or promises alleged to have been made by Grow or others during the canvass preceding the election or afterwards, when the bonds were delivered to Grow, concerning the location of the general offices, roundhouses and machine shops constituted no contract with the County of Anderson, and such promises of Grow, if any, could only be considered in connection with all other evidence in determining whether the contract alleged to have been made by Grow with Reagan acting for the citizens of Palestine had in fact therefore been made. That charge necessarily eliminated Anderson County from the case. In their brief, on page 276, the appellees stated that the judgment in favor of Anderson County is based on the contract with the citizens of Palestine, and also stated that inclusion of the county in the judgment, if error at all, was harmless. On this question we here reproduce what is said in our reply to the appellees' brief in the Court of Civil Appeals, on pages 103 and 104, the same being pages 693 and 694 of the bound volume:

"Appellees' defense of the judgment in favor of Anderson County "is another instance of their continual shifting of positions. (Reply "brief, page 376; our brief, page 369.) They now contend that "they never alleged any contract made by Reagan and the citizens "of Palestine for the benefit of the county. That they attempted "to allege a contract — Reagan for the benefit of the citizens of "Palestine; but if they meant to state a contract with the county
"at all it was through the supposed operation of Grow's
1380 "speeches and promises during the canvass and when the
"bonds were delivered, on his part, and the grant of the "bonds on the county's part. All that fell when *when* the record "was produced, and the trial court so held, but still gave judgment "in favor of the county, without pleading, evidence or finding of "the jury in its favor. Appellees now say that the county was the "beneficiary of the contract which they claimed to have alleged and "established in favor of the city and its citizens. Comment is un- "necessary.

"They also assert that the error is harmless. Of just such a "contention the late lamented Chief Justice Gaines said, in Elliot "v. Ferguson, 101 Texas, 320;—

'The courts below seem to have proceeded upon the assumption that if any of the plaintiffs were entitled to an injunction it was immaterial whether all were entitled or not. But it is not true that a defendant may be subject to a judgment in favor of a plaintiff, who shows no right of action, merely because other plaintiffs show such a right. The charge requested required that which those given did not require, viz., that each plaintiff make out his cause of action. As against those who had not succeeded in doing so, if there were any such, the defendants were entitled to a judgment denying the injunction and for costs incurred by such plaintiffs. The denial of this right cannot be treated as immaterial. It is a right which belongs to every defendant to object to a judgment in favor of a plaintiff who has shown no right to sue him. The fact that A may show such probability of injury to himself as to entitle

him to sue affords no grounds for an action by B, who shows no such injury. For the error in refusing the requested charge the judgment must be reversed.' "

That the judgment in favor of the county, which it manifestly was not entitled to recover, may operate prejudicially to the railway company is readily seen when it is considered that, if a settlement or adjustment should be made between the citizens of Palestine and the company so as to relieve the company of the injunction in their favor, the company would still be tied by the injunction in favor of the county. To such embarrassment and peril the company ought not to be exposed.

We ask the consideration of this court of all the grounds stated in this Motion, and we ask especial consideration of the arguments which are inserted in support of some of the grounds. The court will find that not only are additional authorities cited in those arguments but that some views which we deem of importance and which were not previously presented have been submitted. We believe we have succeeded in showing that the alleged Reagan-Grow contract is not enforceable, and that we have also shown that the
1381 alleged rent house contract with Hoxie is not enforceable.

It may be here observed that if the Reagan-Grow contract fails the rent house contract must go with it, since, under the petition and evidence of the witnesses Wright and Ozment the rent house contract depends upon the Reagan-Grow contract. We have already indicated that there is no basis for a judgment in favor of the county. Hence the case of the plaintiff has failed as to all of the matters relied upon for a recovery.

The plaintiff in error states that A. G. Greenwood, Campbell, Sewell & Strickland, and Thomas B. Greenwood, all of whom reside in the City of Palestine, in the County of Anderson, in the State of Texas, and John C. Box, who resides in the city of Jacksonville, in the County of Cherokee, in the State of Texas, and Perkins & Perkins and John B. Guinn, who reside in the city of Rusk, in the County of Cherokee, in the State of Texas, are the counsel and attorneys of record of the defendants in error, and they pray that, as the law directs, certified copies of this Motion, accompanied by precept, be issued by the Clerk of this Court and transmitted to the proper officers for service upon said counsel and attorneys of record, and they will ever pray.

(Signed) WILSON, DABNEY & KING,
ANDREWS, BALE & STREEMAN,
N. B. MORRIS,
F. A. WILLIAMS,
N. A. STEDMAN,
Attorneys for Plaintiff in Error.

1382 (Endorsed:) Motion No. 3679. In the Supreme Court of the State of Texas. International & Great Northern Rail-

way Co., Plaintiff in Error, vs. Anderson County et al., Defendants in Error. Motion of Plaintiff in Error for Rehearing on Application for Writ of Error. Filed in Supreme Court Ap'l 20, 1916. F. T. Connerly, Clerk, by H. L. Clamp, Deputy.

Clerk's Office, Supreme Court.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the foregoing sixty-eight (68) pages contain a true and correct copy of the Motion of Plaintiff in Error for Rehearing on Application for Writ of Error in App. No. 9285, International & Great Norther- Railway Compant vs. Anderson County, et al., filed in the Supreme Court April 20th, 1916, and overruled by said court June 24th, 1916.

Witness my hand and the seal of said court, this the 21st day of July, A. D. 1916.

[SEAL.]

F. T. CONNERLY, *Clerk*,
By M. F. VINING, *Deputy*.

(Endorsed:) Motion No. 3679. In the Supreme Court of the State of Texas. International & Great Northern Railway Co., Plaintiff in Error, vs. Anderson County et al., Defendants in Error. Motion of Plaintiff in Error for Rehearing on Application for Writ of Error. Filed in Supreme Court, April 20, 1916, F. T. Connerly, Clerk, by H. L. Clamp, deputy. Filed July 28, 1916. E. T. Rosborough, Clerk Court of Civil Appeals, Sixth Supreme Judicial District of Texas.

1383

Supreme Court, Austin.

Order of Court.

June 24, 1916.

Mo. No. 3679.

I. & G. N. R. R. COMPANY
vs.
ANDERSON COUNTY.

From Cherokee County, Sixth District.

For Rehearing of App. No. 9285.

Overruled.

Clerk's Office, Supreme Court.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above is a true and correct copy of the order of court entered in the minutes of June 24th, 1916, overruling Motion for Rehearing of App. No. 9285, I. & G. N. R. R. Co. vs. Anderson County.

Witness my hand and the seal of said court, this the 21st day of July, A. D. 1916.

[L. S.] F. T. CONNERLY, *Clerk*,
By H. L. CLAMP, *Deputy*.

Endorsed: International & Great Northern R. R. Co. vs. Anderson County et al. Order overruling motion for rehearing in Supreme Court. Filed July 28th, 1916. E. T. Rosborough, Clerk Court of Civil Appeals, Sixth Supreme Judicial District of Texas.

1384 In the Supreme Court of the United States.

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
ANDERSON COUNTY et al., Defendant- in Error.

Petition for Allowance of Writ of Error.

To any Justice of the Supreme Court of the United States or to the Chief Justice of the Court of Civil Appeals in and for the Sixth Supreme Judicial District of the State of Texas:

Your petitioners, International & Great Northern Railway Company, and Mrs. Lizzie S. McAshan, independent Executrix of the will of J. E. McAshan, deceased, and sole legatee and devisee thereof, and B. D. Harris, respectfully show to the court:

That on the 11th day of January, 1915, the Court of Civil Appeals in and for the Sixth Supreme Judicial District, in a cause therein pending in which Anderson County, City of Palestine, George A. Wright, J. W. Ozment, A. L. Bowers, John R. Hearne, Z. L. Robinson, E. W. Link, R. C. Sewell, John M. Colley and P. H. Hughes were appellees, and your petitioner, the International & Great Northern Railway, was appellant, affirmed a judgment of the District Court of Cherokee County, Texas, in favor of said appellees as plaintiffs in said District Court against your petitioner International & Great Northern Railway Company as defendant in said District Court; and rendered judgment against it, as principal, and against J. E. McAshan and B. D. Harris, as sureties, on the cost and supersedeas bond, for costs. J. E. McAshan died testate and his will has been probated. By it he devised and bequeathed all of his estate to Mrs. L. S. McAshan, his wife, and named her independent executrix thereof, without bond. Certified copies of this will, the decree of probate, and of letters to the Executrix, are submitted herewith.

1385 That in conformity to the practice of the State of Texas, your petitioner, International & Great Northern Railway Company, after the affirmance of the judgment of the District Court of Cherokee County by the Court of Civil Appeals, filed a motion for rehearing in the Court of Civil Appeals and that upon the overruling of said motion for a rehearing by the Court of Civil Appeals

your petitioner, the Railway Company, in conformity to the practice of the State of Texas, applied to the Supreme Court of the State of Texas for a writ of error to said Court of Civil Appeals to review and correct the errors committed in the District Court and in the Court of Civil Appeals in said cause and that the Supreme Court, exercising its discretionary power, denied said application for a writ of error and that afterward, on the 24th day of June, 1916, the Supreme Court of the State of Texas overruled a motion for rehearing filed by your petitioner, the Railway Company, which motion was directed against its refusal of a writ of error; and that, thereupon, by virtue of the laws of the State of Texas, the judgment of the District Court of Cherokee County as affirmed by the Court of Civil Appeals became a finality and at once enforcible;

That the Court of Civil Appeals, for the Sixth Supreme Judicial District of the State of Texas, is the highest court of the State of Texas in which a decision in this suit could be had and is the court having final custody of the record in this cause;

That petitioners were and are aggrieved, because in said judgment of affirmance by the Court of Civil Appeals and in the proceedings had prior thereto in the cause, certain errors were committed to the prejudice of petitioners; in that there was in the suit drawn in question the validity of statutes of, or an authority exercised under, the State of Texas on the ground of their repugnance to the Constitution and laws of the United States, and the decision was in favor of their validity; and in that titles, rights, privileges and immunities were claimed under the Constitution and statutes of and authorities exercised under the United States by petitioner, the Railway Company, and the decision in said suit was against the rights, titles, privileges and immuities especially set up and claimed by
1386 petitioner under such Constitution and statutes and authority, as will more fully appear by reference to the assignment of errors filed herewith, and prayed to be taken as a part of this petition; all of which defenses, rights, titles, privileges and immunities of petitioner, the Railway Company, under the Constitution and laws of the United States and authority exercised in pursuance thereof, were made at the proper time and presented and preserved at each and every step of the proceedings herein, as will more fully appear in the record of this cause;

That your petitioners desire to avail themeselves of the law and practice, in such cases made and provided, by a writ of error from the Supreme Court of the United States to the Court of Civil Appeals in and for the Sixth Supreme Judicial District of the State of Texas.

Wherefore, Petitioners pray that a writ of error may be allowed and issued to the Court of Civil Appeals in and for the Sixth Supreme Judicial District of the State of Texas for the removal of this cause into the Supreme Court of the United States, to the end that the errors in the judgment of the Court of Civil Appeals and the proceedings in this cause may be duly corrected, and full and speedy justice be done to the parties aforesaid, in this behalf, and that the transcript of the record, proceedings and papers in this cause,

duly authenticated, may be sent to the Supreme Court of the United States.

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY, *Petitioner,*
MRS. L. E. McASHAN,
Sole Legatee and Divisee of J. E. McAshan, Deceased, and Independent Executrix of the Will of J. E. McAshan, Petitioner.
B. D. HARRIS, *Petitioner,*
By F. A. WILLIAMS,
N. A. STEDMAN,
H. M. GERWOOD,
WILSON, DABNEY AND KING,
FRANK ANDREWS,
Attorneys.

The above and foregoing petition for writ of error presented and said writ of error allowed, the same to operate as a supersedeas on the giving by petitioners of bond in the sum of Twenty
1387 Thousand Dollars, this the 26th day of July A. D. 1916.

S. P. WILLSON,
Chief Justice of Court of Civil Appeals,
Sixth Supreme Judicial District of Texas.

Endorsed: International & Great Northern Railway Company, Plaintiff in Error vs. Anderson County et al., Defendant in Error. Petition for allowance of writ of error. Filed July 28th, 1916. E. T. Rosborough, Clerk Court of Civil Appeals, Sixth Supreme Judicial District of Texas.

Will.

1602 FANNIN ST., HOUSTON, TEXAS, Jan'y 16, 1915.

This is my last will and testament and I hereby revoke all others. I hereby give, and bequeath to my beloved wife, Lizzie S. McAshan all the property real, personal and mixed that I may own at my death. I hereby nominate and appoint my said wife, Lizzie S. McAshan my sole independent executrix and direct that no bond of any character be required of her as executrix. I furthermore direct that no proceedings of any character be held in any court concerning my estate save only the probate of this will and the filing of an inventory of my estate.

J. E. McASHAN.

Filed Apr. 24, 1916. Geo. Jones, Clerk County Court, Harris Co., Texas, by W. B. Archer, Deputy.

Decree.

#7202.

Decree.

Estate of J. E. McAshan, Dec'd.

On this 6th day of July 1916, came on to be heard the application of Mrs. Lizzie S. McAshan, for the probate of the last will and testament of J. E. McAshan, deceased. And it appearing to the court that due notice had been given of said application in the manner and for the length of time required by law: And
1388 from the evidence it appearing to the court that the Testator, at the time he executed the will, was at least twenty one years of age, that he was of sound mind, and that he is now dead, and that said will was executed by the Testator, with the formalities and solemnities, and under the circumstances required by law to make it a valid will, and that said testator was, at the time of his death, a resident citizen of Harris County, Texas, and that he had never revoked said will: It is therefore considered by the court, and so ordered, adjudged and decreed, that said will be admitted to probate as the last will and testament of J. E. McAshan, deceased, and the Clerk is hereby ordered to record said will, together with the application for its probate, and the testimony of the witnesses introduced, for the purpose of establishing said will. And it appearing from said will that Mrs. Lizzie S. McAshan is named as Executrix of said will without bond, and that the Testator, provided that no action be taken in this court further than the probate of said will and the filing of an inventory, appraisement and list of claims of his estate.

It is further ordered by the court that P. J. Evershade, and R. H. Hanna, and C. F. Schuwlz, resident citizens of Harris County, Texas, be and are hereby appointed as appraisers of said estate.

It is further ordered that Letters Testamentary issue to the said Mrs. Lizzie S. McAshan, as executrix of said will, upon her taking the oath required by law; and that upon the return of an inventory, appraisement and list of claims of said estate, and the payment of the cost of court, this estate be dropped from the docket.

W. H. WARD,
County Judge.

THE STATE OF TEXAS,
County of Harris:

I, Geo. Jones, Clerk County Court Harris County, Texas, do hereby certify that the above and foregoing is a true and correct copy of Last Will and Testament and Decree Probating same, in the Matter of the Estate of J. E. McAshan, deceased, Numbered 7202 on docket of said court, as the same appears from the orig-

inal on file in said court, and of record in Vol. 42 page 403 Probate Minutes of Harris County, Texas.

1389 Witness my hand and seal of office, at Houston, Texas, this the 25th day of July, A. D. 1916.

[L. S.] GEO. JONES,
Clerk County Court, Harris County, Texas,
By D. L. GLEASON, *Deputy.*

Endorsed: No. 7202. Estate of J. E. McAshan, deceased. Certified copy of Last Will and Decree Probating same. Filed July 28th, 1916. E. T. Rosborough, Clerk Court of Civil Appeals, Sixth Supreme Judicial District of Texas.

In the County Court.

THE STATE OF TEXAS,
County of Harris:

I, Geo. Jones, Clerk of the County Court of Harris County, Texas, do hereby certify that on the 6th day of July, 1916, Lizzie S. McAshan was duly appointed by said Court Executrix without bond of the last will of J. E. McAshan, deceased, and that she qualified as such on the 19th day of July, 1916, as law requires.

Witness my hand and seal of office, at Houston, Texas, this 25th day of July, 1916.

[L. S.] GEO. JONES,
Clerk County Court, Harris County, Texas,
By D. L. DEASON, *Deputy.*

Endorsed: No. 7202. Estate of J. E. McAshan, deceased. Letters of Testamentary. Filed July 28th, 1916. E. T. Rosborough, Clerk Court of Civil Appeals, Sixth Supreme Judicial District of Texas.

1390 In the Supreme Court of the United States.

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
ANDERSON COUNTY et al., Defendants in Error.

Bond on Writ of Error.

Know all men by these presents: That we, International & Great Northern Railway Company, Mrs. Lizzie S. McAshan, sole legatee and devisee of J. E. McAshan, deceased, and independent executrix of his probated will, and B. D. Harris, as principals, and United States Fidelity & Guaranty Co. as surety, are held and firmly bound unto Anderson County, City of Palestine, George A. Wright, J. W. Ozment, A. L. Bowers, John R. Hearne, Z. L. Robinson, E. W. Link, R. C. Sewell, John M. Cooley, and P. H. Hughes in the full and just sum of $20,000.00 (twenty thousand and no/100), to be paid to the said Anderson County, City of Palestine, George A. Wright,

J. W. Ozment, A. L. Bowers, John R. Hearne, Z. L. Robinson, E. W. Link, R. C. Sewell, John M. Cooley and P. H. Hughes, for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Whereas, in the above entitled cause, the Court of Civil Appeals in and for the Sixth Supreme Judicial District of the State of Texas rendered its judgment on the 11th day of January, 1915, affirming the judgment of the District Court of Cherokee County, Texas, in favor of said Anderson County, City of Palestine, Gworge A. Wright, J. W. Ozment, A. L. Bowers, John R. Hearne, Z. L. Robinson, E. W. Link, R. C. Sewell, John M. Cooley and P. H. Hughes against said International & Great Northern Railway Company, and
1391 rendered judgment against it as principal and J. E. McAshan and B. D. Harris, as sureties, and the principals hereof having obtained a writ of error, and filed a copy thereof in the Clerk's office of the Court of Civil Appeals in and for the Sixth Supreme Judicial District of the State of Texas to reverse the judgment in the aforesaid suit, and a citation directed to Anderson County, City of Palestine, George A. Wright, J. W. Ozment, A. L. Bowers, John R. Hearne, Z. L. Robinson, E. W. Link, R. C. Sewell, John M. Cooley and P. H. Hughes citing and admonishing them to be and appear at the Supreme Court of the United States at Washington within thirty days from the date thereof:

Now the condition of the above obligation is such that if the International & Great Northern Railway Company and the other principals hereof shall prosecute this writ of error to effect and answer all damages and costs, if they fail to make their plea good, then the above obligation to be void, else to remain in full force and effect.

Witness our hands, this the 25th day of July, 1916.

THE INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY, *Principal,*
LIZZIE S. McASHAN,
Sole Devisee and Legatee of the Will of J. E. McAshan, Deceased, and Independent Executrix of His will, Principal,
B. D. HARRIS, *Principal,*
By F. A. WILLIAMS,
N. A. STEDMAN,
H. M. GARWOOD,
FRANK ANDREWS,
WILSON, DABNEY & KING,
Their Attorneys.

Writ to operate as supersedeas.

UNITED STATES FIDELITY & GUARANTY CO.,
By JOHN F. SCOTT,
Its Attorney in Fact. [L. S.]

Approved by
S. P. WILLSON,
Chief Justice of the Court of Civil Appeals of the Sixth Supreme Judicial District of Texas.

1392 THE STATE OF TEXAS,
County of Texas:

I, John F. Scott, do solemnly swear that I am attorney in fact of the United States Fidelity and Guaranty Co., Surety herein, and that it is worth in its own right at least the sum of One Million dollars ($1,000,000.00) and after payment of all its debts of every description, whether individual or security debts, and after satisfying all encumbrances on its property which are known to me; that I reside in Harris County, State of Texas.

JOHN F. SCOTT.

Sworn to and subscribed before me, this 25th day of July 1916.

[L. S.] L. TEMME,
Notary Public in and for Harris County, State of Texas.

Endorsed: International & Great Northern Railway Company, Plaintiff in Error vs. Anderson County et al. Defendants in Error. Bond on Writ of Error. Filed July 28th, 1916. E. T. Rosborough, Clerk Court of Civil Appeals, Sixth Supreme Judicial District of Texas.

UNITED STATES OF AMERICA, *ss:*

To Anderson County, City of Palestine, George A. Wright, J. W. Ozment, A. L. Bowers, John R. Hearne, Z. L. Robinson, E. W. Link, R. C. Sewell, John M. Colley, and P. H. Hughes, Greetings:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Court of Civil Appeals in and for the Sixth Supreme Judicial District of the State of Texas, wherein the international & Great Northern Railway Company and Mrs. Lizzie S. McAshan, sole devisee and legatee, and independent executrix of the will of J. E. McAshan, and B. D. Harris are plaintiffs
1393 in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this 26th day of July in the year of our Lord, One Thousand Nine Hundred and Sixteen.

S. P. WILLSON,
Chief Justice of the Court of Civil Appeals of the Sixth Supreme Judicial District of Texas.

Attest with the seal of the Court of the United States 26th day of July, A. D. 1916.

[L. S.] J. R. BLADES,
Clerk of the District Court of the United States for the Eastern District of Texas.
By B. D. STUART, *Deputy.*

Endorsed: International & Great Northern Railway Company, Plaintiff in Error vs. Anderson County et al, Defendant in Error. Citation in Error. Filed 28 day of July 1916, J. R. Blades, Clerk, by B. D. Stuart, Deputy. Filed Jul. 28, 1916, E. T. Rosborough, Clerk Court of Civil Appeals, Sixth Supreme Judicial District of Texas.

1394 UNITED STATES OF AMERICA, *ss*:

To Anderson County, City of Palestine, George A. Wright, J. W. Ozment, A. L. Bowers, John R. Hearne, Z. L. Robinson, E. W. Link, R. C. Sewell, John M. Colley, and P. H. Hughes, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Court of Civil Appeals in and for the Sixth Supreme Judicial District of the State of Texas, wherein the International & Great Northern Railway Company and Mrs. Lizzie S. McAshan, sole devisee and legatee, and independent executrix of the will of J. E. McAshan and B. D. Harris are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this 26th day of July in the year of our Lord, One Thousand, Nine Hundred and Sixteen.

S. P. WILLSON,
Chief Justice of the Court of Civil Appeals of the Sixth Supreme Judicial District of Texas.

Attest with the seal of the Court of the United States 26th day of July A. D. 1916.

[L. S.]

J. R. BLADES,
Clerk of the District Court of the United States for the Eastern District of Texas,
By B. D. STUART, *Deputy.*

1395 In the District Court of the United States for the Eastern District of Texas, at Texarkana.

I, J. R. Blades, Clerk of the District Court of the United ——, for the Eastern District of Texas, at Texarkana, in the Fifth Circuit and District aforesaid, do hereby certify the foregoing to be a true and correct copy of the Citation in cause No. 1351 on the Docket of the Court of Civil Appeals of the Sixth Supreme Judicial District of the State of Texas, entitled International and Great Northern Railway Company, versus Anderson County et al. as the same now appears on file in my office.

To certify which, witness my hand and the seal of said Court, at Texarkana, in said District, this the 28th day of July, A. D. 1916.

[L. S.] J. R. BLADES,
Clerk U. S. District Court, E. D. T.,
By B. D. STUART, *Deputy.*

We, the undersigned, to-wit: A. G. Greenwood, Campbell, Sewell & Strickland and Thos. B. Greenwood, attorneys for the defendants in error in this case and the above mentioned defendants in error, to-wit: Anderson County by E. V. Swift its County Judge, the City of Palestine by Geo. A. Wright, its Mayor, Geo. A. Wright, J. W. Ozment, A. L. Bowers, John R. Hearne, Z. L. Robinson, E. W. Link, R. C. Sewell, Jno. M. Colley and P. H. Hughes, do hereby accept service of the citation in this cause, of which the above is a certified copy, and do hereby waive the issue and service of such citation upon us.

Witness our hands this — day of August, A. D. 1916. We also accept notice of the lodging with the Clerk of the Court of Civil Appeals of the Sixth Supreme Judicial District of Texas of a copy of the writ of error in this case on our behalf.

CAMPBELL, SEWELL & STRICKLAND,
A. G. GREENWOOD,
THOS. B. GREENWOOD.
Attorneys for Defendants in Error.

ANDERSON COUNTY,
By E. V. SWIFT, *Its County Judge.*
1396 CITY OF PALESTINE,
By GEO. A. WRIGHT, *Its Mayor.*
GEO. A. WRIGHT.
R. C. SEWELL.
A. L. BOWERS.
J. W. OZMENT.
P. H. HUGHES.
Z. L. ROBINSON.
JOHN R. HEARNE.
E. W. LINK &
JNO. M. COLLEY.
By THOS. B. GREENWOOD, *Their Attorney.*

Endorsed: International & Great Northern Railway Company, Plaintiff in Error, vs. Anderson County, et al., Defendants in Error. Citation in Error. Filed Jul- 31. 1916. E. T. Rosborough, Clerk Court of Civil Appeals, Sixth Supreme Judicial Dist. of Texas.

1397 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Justices of the Court of Civil Appeals in and for the Sixth Supreme Judicial District of the State of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said Court of Civil Appeals

in and for the Sixth Supreme Judicial District of the State of Texas before you, being the highest court of the State of Texas in which a decision could be had in the said suit between the International & Great Northern Railway Company, one of the plaintiffs in error, and Anderson County, City of Palestine, George A. Wright, J. W. Ozment, A. L. Bowers, John R. Hearne, Z. L. Robinson, E. W. Link, R. C. Sewell, John M. Colley and P. H. Hughes, defendants in error; wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under the State, on ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of their validity; or wherein a title, right, privilege or immunity was claimed under the constitution or a treaty or statute or commission held or authority exercised under the United States, and the decision was against the title, right, privilege or immunity especially set up or claimed under such Constitution, treaty, Statute, commission or authority; a manifest error hath happened to the great damage of said International & Great Northern Railway Company, and J. E. McAshan, Deceased, and to Mrs. L. S. McAshan, the sole devisee and legatee of the probated will of J. E. McAshan, and independent executrix thereof, and to B. D. Harris; J. E. McAshan and B. D. Harris having been sureties on the appeal bond of the International & Great Northern Railway Company, on appeal from the trial court; as by their complaint appears; we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the
1398 parties aforesaid in this behalf; do command you, if judgment be therein given, that then and under your seal distinctly and openly you send the records and proceedings, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in said Supreme Court at Washington within thirty days from the date hereof; that the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, *which* of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, this 26th day of July, in the year of our Lord, One Thousand, Nine Hundred and Sixteen.

[L. S.]

J. R. BLADES,
Clerk of the District Court of the United States
for the Eastern District of Texas,
By B. D. STUART, *Deputy.*

Writ to operate as a supersedeas on giving bond in the sum of ($20,000.) Twenty Thousand Dollars.

Allowed by
S. P. WILLSON,
Chief Justice of the Court of Civil Appeals for
the Sixth Supreme Judicial District of Texas.

Endorsed: International & Great Northern Railway Company, Plaintiff in Error, vs. Anderson County et al., Defendants in Error. Writ of Error. Filed 28 day of July, 1916. J. R. Blades, Clerk, by B. D. Stuart, Deputy. Filed Jul- 28, 1916. E. T. Rosborough, Clerk Court of Civil Appeals, Sixth Supreme Judicial Dist. of Texas.

1399 In the Supreme Court of the United States.

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY, Plaintiff in Error,
versus
ANDERSON COUNTY et al., Defendant- in Error.

Assignments of Error.

Now comes the Plaintiffs in Error, the International & Great Northern Railway Company, et al. and show that in the above mentioned cause the Court of Civil Appeals in and for the Sixth Supreme Judicial District of the State of Texas erred to the grievous injury and wrong of the Plaintiff- in Errors and to their prejudice and against their rights in the following particulars, all as apparent upon the record:

I.

The Court of Civil Appeals erred in holding that the District Court of the State of Texas had jurisdiction to try this case, and in holding that the jurisdiction did not exist exclusively in the United States District Court for the Northern District of Texas, the successor to the United States Circuit Court for that District;

Because the United States Circuit Court for the Northern District of Texas foreclosed the second mortgage of the International & Great Northern Railway Company, executed in 1881, by its decree of May, 1910;

And because that court, so foreclosing this mortgage had the power to reserve, as it did, the exclusive jurisdiction to determine the validity and priorities of any burdens, liens, conditions, duties or servitudes imposed on the franchises or other property of the sold out railroad;

And because that court and all courts making a foreclosure, especially of complicated properties, has the power to reserve to itself, in the decree, the exclusive power over litigation of such matters asserted under or in connection with the acts of the foreclosed
1400 debtor or its predecessor in title, and the power to reserve to itself the disposition of them in supplemental litigations instead of delaying the case to bring all these matters in before the decree of foreclosure and sale thereunder;

And because such reservation of jurisdiction is as it were, a contract and warranty of the court foreclosing, that the litigation of such matters shall be exclusively in the court of foreclosure;

And because this reservation was made in the decree of foreclos-

ure referred to, covering all the matters in this litigation, and being so made is for the benefit of the purchaser at the foreclosure sale under the decree of forclosure, which was the International & Great Northern Railway Company, the plaintiff.

II.

The Court of Civil Appeals erred in holding that the District Court of the State of Texas had jurisdiction of this case and in holding that the jurisdiction was not exclusively in the United States District Court for the Northern District of Texas, successor to the United States Circuit Court, for that District; and in denying the right, title, interest, privileges and immunities, of plaintiff in error established by said court;

Because the litigation in the State Court is in conflict with and a denial of the right, title, privileges and immunities of the Plaintiff in Error as protected by the decree of the United States Court for the Northern District of Texas, entered in the exercise of powers conferred on that court by the Constitution of the United States; that court by its decree foreclosing the properties of the International & Great Northern Railroad now owned by the International & Great Northern Railway Company; and as protected by Section 237 of the Act of Congress of March 3, 1911 (33 Stats. 1156) reenacting Art. 709 of the Revised Statutes of the United States;

And because the International & Great Northern Railway Company acquired the properties of the sold out International & Great Northern Railroad Company in 1911 by sale under the decree of foreclosure of the United States Circuit Court for the Northern
1401 District of Texas, wherein it was provided that any such contracts as the alleged contracts herein, asserted and affirmed by the Court of Civil Appeals, could be denounced by the purchaser of the property or its assigns, if any such alleged contracts existed;

And because the Plaintiff in Error purchasing the property under the decree of foreclosure denounced these alleged contracts, if they existed, in accordance with the terms of the decree;

And beause this decree reserved the litigation of the matters herein exclusively for the foreclosing court.

Whereby, the Plaintiff in Error was denied all of its rights, titles, privileges and immunities under the decree of foreclosure of the United States Circuit Court for the Northern District of Texas, and presents that the decree and judgment of the Court of Civil Appeals is in conflict therewith, and draws the same in question.

1402

III.

The Court of Civil Appeals erred in refusing to hold that Articles 6423-6424-6425 of the Revised Statutes of the State of Texas, as construed and applied by that court in this case, did impair the obligation of the contract evidenced by the mortgage of 1881, made by the International & Great Northern Railroad Company, and in holding that such articles are not in violation of sub-section 1 of Section 10 of Article 1 of the Constitution of the United States;

Because the alleged contracts herein involved and upon which the decree stands were claimed to be made in 1872 and 1875;

Because the Mortgage of 1881 mortgaged all of the properties then owned or thereafter to be acquired of the International & Great Northern Railroad Company and its charter. This mortgage was foreclosed in 1910, and all of the properties of the International & Great Northern Railroad Company, including all of its franchises and its charter, being all covered by this mortgage, were sold out at a loss to the mortgagees;

And because the plaintiff in error as purchaser under that foreclosure sale is the assignee of all the rights and interests whatsoever a loss to the mortgagees;

And because the plaintiffs below and defendants in error here and the Court of Civil Appeals maintain that the act of 1889 (Revised Statutes of the State of Texas 6423-6424-6425) makes prior in law rights, if any, which were junior in time to said mortgage by giving security for the alleged contracts of 1872 and 1875 by the Act of 1889 (Revised Statutes of Texas 6423-6424-6425) by way of a servitude, burden or duty against the properties of the sold out railroad, and by extending the terms of the contracts, if any.

Whereby it is presented that by such subsequent act (as construed and as enforced by the Court of Civil Appeals) the obligation of the contract evidenced by the mortgage of 1881 is violated.

1403 IV.

The Court of Civil Appeals erred in affirming the judgment of the trial court and in (as a means to that affirmance) failing and refusing to hold that Revised Statutes 6423-6424-6425 of the State of Texas of 1911, first enacted in 1889, is unconstitutional and invalid as applied in this case by that court;

Because the plaintiffs sued herein on certain alleged contracts alleged to have been made in 1872 and 1875, long before the enactment of the statute relied on;

And because such alleged contracts were when made in 1872 and 1875, admittedly personal;

And because they are now maintained to be secured by the Act of 1889 by such Act imposing a duty, lien, burden or servitude upon the properties of the sold out International & Great Northern Railroad Company, acquired by the Plaintiff in Error under foreclosure sale of the mortgage of 1881;

And because it is now maintained by the Court of Civil Appeals that the statute of 1889 did burden, add to, extend, and define the alleged contracts of 1872 and 1875;

Whereby it appears that such Act of 1889 as construed and applied in this case is unconstitutional and invalid, and violates subsection 1 of Section 10 of Article 1 of the Constitution of the United States prohibiting a State from passing a law impairing the obligations of contracts; the contention of the plaintiffs below and defendants in error here being that their alleged contracts of 1872 and 1875 were first secured and extended by the Act of 1889, so that they

thereby became secured against and a burden upon the property, and perpetual obligations upon all persons subsequently purchasing, owning or operating the same.

1404

V.

The Court of Civil Appeals erred in holding that the Act of 1889, now Articles 6423-4-5 of the Revised Statutes of Texas of 1911 is not unconstitutional and void as construed and applied by that Court, and as necessarily construed and applied in affirming the decree of the trial court;

Because this Act is violative of Section 1 of the 14th Amendment to the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property without due process of law or deny to any person within its jurisdiction the equal protection of the law;

And because this statute, as applied in this case, and as resulting in the decree in this case, requiring the plaintiff in error to keep and maintain perpetually and forever its general offices as defined in the statute and its shops at Palestine, creates an undue interference with the business of the plaintiff and with its duties to the public; to its stockholders and to other persons; and an undue interference with its exercise of those duties and of its powers to exercise the same, in State and Interstate Commerce;

Wherein the statute attempts to interfere with the lawful discretion and power of the Plaintiff in Error (as it is construed and applied in this case), to conduct its business within its own discretion within the limits of law;

And wherein it is now attempted by this statute of 1889, subsequent to the alleged contracts of 1872 and 1875, and in security of the same and enlargement thereof to place burdens, lien and obligations upon the properties and upon the Plaintiff in Error;

Thereby denying to the Plaintiff in Error the equal protection of the law and taking its property without due process of law by this illegal interference and command that it shall forever and perpetually (without regard to exigencies which may arise and its duties and powers) maintain its general offices and shops and round houses at Palestine, Texas.

1405

VI.

The Court of Civil Appeals erred in refusing to hold that the foreclosure sales of all of the properties of the International & Great Northern Railroad Company made in the United States Circuit Court and by its authority in 1879, under decrees made by it, foreclosing four mortgages (including mortgages of date prior to the alleged contracts of 1872 and 1875) did not vest in the purchasers at such foreclosure sales and their assigns and the Plaintiff in Error, the franchises and rights both to do and to be of the sold out railroads and of the sold out International & Great Northern Railroad, then sold out, and all the properties and the charter and charters then owned by

the International & Great Northern Railroad Company; free of every obligation of the alleged contracts herein sued on and established as of 1872 and 1875, and claimed to have been secured and extended by the Act of 1889;

Because under Article 4912 of Paschal's Digest of the Laws of Texas enacted by the Legislature of Texas on December 19th, 1857; anterior to all of the transactions herein involved, and carried into Articles 4260 of the Revised Statutes of Texas of 1879; the purchasers at the foreclosure sales of 1879 by the force of this statute as well as by the terms of the foreclosing mortgage, and independently of the same, and their assigns, because the owners of all of the properties of the sold out railroad and of all of its charters and charter, and franchises to be, free of all obligations of the sold out railroad and the constituents out of which it had been consolidated, being under this statute relieved of any obligation to take out a new charter and not taking out any new charter, for which at that time there was no provision, i. e., that a new charter should be taken out to operate the properties of the sold out road, the object of R. S. 4260 of Revised Statutes of 1879 of Texas, (Article 4260 the same as Article 4912 of Paschal's Digest) being to free the railroad and the properties of every obligation and contract and to foreclose the charter or charters and carry them forward as the property of the purchasers at foreclosure;

And because all of the properties whatsoever of the International & Great Northern Railroad were sold out and foreclosed by
1406 and under the decrees entered in 1879;

And because the Court of Civil Appeals in affirming the decree of the trial court has violated Sub-section 1, Section 10 of Article 1 of the Constitution of the United States prohibiting the passage of a law violating the obligation of a contract, in that said court has construed such statute to revive and to secure and extend personal contracts eliminated as to the franchise to be and as to all of the properties by the foreclosure proceedings of 1879 and the sale thereunder directed and had by the United States Circuit Court for the Western District *District* of Texas;

And because the four mortgage contracts foreclosed in 1879 were executed subsequent to the statute of Dec. 19, 1857, and with the benefit of it, and their obligations could not be violated by the subsequent statute of 1889, as enforced and construed by the Court of Civil Appeals.

And because such foreclosure sales having been had the International & Great Northern Railroad Company in 1881 mortgaged all of its franchises and charter and properties then in its possession or thereafter to be acquired, which mortgage was foreclosed in 1910 in the United States Circuit Court for the Norther- District of Texas, under which foreclosure and sale thereunder the plaintiff in error holds;

Therefore the Court of Civil Appeals in applying the subsequent Act of 1889 has violated the obligation of the mortgage contract of 1881, made by a corporation freed by the foreclosure proceedings of

1879 of all the obligations, if any, of the alleged contracts herein sued on of 1872 and 1875;

And because the Court of Civil Appeals in affirming the decree of the trial court has applied the statute of 1889 in violation of the decrees of foreclosure and sales thereunder and decrees of approval made by the United States Circuit Court in 1879 and the decree of the United States Circuit Court of the Northern District of Texas made in 1910 foreclosing the mortgage of 1881;

And because the court erred in holding that in this collateral proceeding the good faith of the decrees of foreclosure of the United States Circuit Court made in 1879 and the decrees of that court confirming the sales made under the decrees of foreclosure, could
1407 be drawn in issue and the good faith thereof questioned; whereby there has been a denial of the rights, titles, privileges and immunities of the Plaintiff in Error holding under the foreclosure and decrees of 1879 and the foreclosure and decrees of 1910-1911 of the United States Circuit Courts and a denial of its rights, titles and privileges and immunities founded on such decrees, lawfully entered in the exercise of the powers conferred on those courts by the Constitution of the United States and as protected by Section 237 of the Act of March 3, 1911 (133 Stats. 1156), reenacting Section 709 of the Revised Statutes of the United States.

1408

VII.

The Court of Civil Appeals erred in affirming the decree of the trial court and in holding, as a necessary predicate to the affirmance of such decree, that the alleged contracts of 1872-1875, upon which the decree stands are binding upon the Plaintiff in Error by force of the Act of 1889, now carried into Art. 6423-4-5 of the Revised Statutes of Texas of 1911, and are binding upon its properties as obligations thereon, and as a condition of the operation of the same in the business of a common rail carrier;

Because in 1879, before the passage of the Act of 1889, in the Circuit Court of the United States for the Western District of Texas, these alleged contracts upon which the decree against the Plaintiffs in Error stands of 1872 and 1875, had been wholly set aside as personal obligations if they ever existed, or ever were personal obligations as against the International & Great Northern Railroad Company, and had become wholly extinguished and unenforcible;

And because, by reason of the facts hereinbelow stated, to now revive and enforce, the same would violate the obligations of the alleged contracts sued on, and of the contracts evidenced by the court mortgages prior to 1879, and the two mortgages prior to the first of the alleged contracts of 1872, and of the contract evidenced by the mortgage of 1881, and would draw in question, contradict and impeach the rights, titles, privileges and immunities of the Plaintiff in Error under and by right of the decrees of the United States Circuit Courts, and violate the equal protection of the law to which the Plaintiff in Error is entitled; and would deprive the Plaintiff in Error of its property without due process of law, all by reason of the

facts now stated, and all of which are without contradiction in the evidence.

(1) The Houston & Great Northern Railroad was incorporated by the statute of the State of Texas in 1866.

(2) The International Railroad was incorporated by the statute of the State of Texas in 1870.

(3) The Legislative charters of these two Roads authorized them to consolidate with any railroad, and their consolidation was completed by agreement in September, 1873, at which time the consolidated Railroad under these consolidated legislative charters,
1409 took the name of the International & Great Northern Railroad.

(4) The International & Great Northern Railroad operating under these consolidated charters, consolidated by agreement of the two roads and continued to exist until sold out under mortgage foreclosure of 1879, below set out, whereby its charter and charters passed to the purchasers thereat; and the properties were again sold out under the mortgage of 1881, which was foreclosed by decree of the United States Circuit Court for the Northern District of Texas, in May 1910, and sale made thereunder, of all of its properties in 1911 to the Plaintiff in Error. The International & Great Northern Railway Company, incorporated in 1911; and the International & Great Northern Railroad Company became extinct by such sale and foreclosure in 1910-11 and finally went out of action at that time.

(5) The alleged contracts sued on and which are carried into the decree herein affirmed are alleged to have been executed by the Houston & Great Northern Railroad Company in March and May 1872, and by the consolidated International & Great Northern Railroad Company about June 1875.

(6) The Houston & Great Northern Railroad Company, on the 15th of February, 1872, executed a mortgage to secure bonds for the principal amount of $4,084,000 conveying to Taylor and Dodge, Trustees, to secure the same, all of its properties then owned or to be owned, including all of its franchises and rights. At the suit of Taylor and Dodge, No. 137 in Equity, in the United States Circuit Court for the Western District of Texas, on April 15, 1879, as against the defendants the Houston & Great Northern Railroad Company and the International & Great Northern Railroad Company, a decree of foreclosure was entered of this mortgage, and all of the properties were adjudged to be sold and were duly sold, and the report of sale confirmed by the Court on August 4, 1879, and the properties included in the mortgage conveyed by direction of the court to Kennedy and Sloan, Trustees, the purchasers thereof in consideration of $500,000 in gold. The above mortgage was executed before the date of any of the agreements or alleged contracts herein involved.

1410 (7) On the 15th of January, 1874, the International Railroad executed a mortgage to Barnes and Pearsall as Trustees and on the same day the Houston & Great Northern Railroad Company executed its mortgage to Barnes and Pearsall as Trustees, (both being then in fact consolidated into the International & Great North-

ern Railroad Company) the first mortgage being to secure the principal amount of $2,448,000 and the second mortgage being to secure the principal amount of $3,062,000.00. Barnes and Pearsall as Trustees, sued the International & Great Northern Railroad Company for foreclosure of these mortgages, and by decree of the United States Circuit Court for the Western District of Texas dated August 4, 1879, they were foreclosed and all of the properties thereby covered directed to be sold. These mortgages covered all of the properties owned or to be owned, and all of the franchises whatsoever of the railroads, and thereafter the properties were duly sold and the report of sale confirmed by the court on October 14, 1879, and the properties conveyed by the Master in compliance with these decrees to the purchasers Kennedy and Sloan, Trustees. These mortgages covered all of the properties owned or to be owned by either corporation, and all of the franchises.

(8) On the 1st of April, 1871, the International Railroad executed a mortgage to Stewart & Osborn, Trustees, conveying to them all of the property owned or to be owned and all of the franchises, including the charter, to secure the bonded indebtedness of the principal amount of $4,224,000 which mortgage at the suit of Stewart & Osborn vs. International Railroad and the International & Great Northern Railroad et al., 138 Equity, was foreclosed by the *by the* United States Circuit Court for the Western Circuit of Texas, by decree entered in Equity No. 138 April 15, 1879, and the properties ordered to be sold and the properties having been sold for $500,000 the sale was confirmed and the Special Master under these decrees made a conveyance to the purchasers Kennedy and Sloan, Trustees, of date October 1879, conveying all the properties sold.

(9) Kennedy and Sloan, Trustees, the purchasers of all of the properties, i. e. all of the properties of the Railroad foreclosed as above, being all of its properties; executed a deed of convey-
1411 ance, after the consummation of all of the above recited matters, dated November, 1879, wherein they conveyed all of the properties bought, to the International & Great Northern Railroad Company.

(10) Under the laws of the State of Texas then existing and under the provisions of Articles 4912 of Paschal's Digest, and Article 4260 of the Revised Statutes of Texas of 1879, the purchasers and their assigns of any sold out railways were relieved of taking out a new charter, but were authorized to adopt the charter or charters of the sold out Railroad or Railroads, and operate the properties under it, which charter was in effect by this statute (existing at and before the execution of the mortgages and the creation of the charters involved), subjected to the mortgage; there being then no provision for the creation of a new railroad charter to operate the properties of a sold out railroad, and the effect of the statute being to eliminate all unsecured obligations and personal contracts as against the sold out railroad, and as against its charter and to make the purchasers of the sold out railroad owners and corporators of the charter or charters of the sold out railroad, and to constitute these charters a

new, separate and independent corporation, free of all of such obligations, if any, as are sued on herein.

(11) In 1881 the International & Great Northern Railroad Company as thus reconstituted, executed its mortgage, duly authorized by its stockholders and directors, which was foreclosed in the United States Circuit Court for the Northern District of Texas, in 1910 and sale had thereunder and approved in 1911; by which mortgage it was contracted and agreed that all of the then properties of the International & Great Northern Railroad Company then owned or to be owned, and its charters were mortgaged to secure a bond issue for the principal amount of $10,391,000. Under this last foreclosure the International & Great Northern Railway Company purchased and acquired all of the properties mortgaged, which included all of the properties of the railroad owned and to be owned, including its charter and franchise to be.

(12) In 1889 the Legislature passed the Statute known as the General Office and Shops Statute, now Art-. 6423-4-5, of the 1412 Revised Statutes of 1911; construed by the Court of Civil Appeals, in affirming the decree of the trial court, to have secured the alleged contracts of 1872 and 1875, and to give security to those contracts prior in law, though the security was created subsequent in time, to the contracts evidenced by four mortgages foreclosed in 1879, and though two of these mortgages were prior in time to the earliest of the alleged contracts herein involved.

The Plaintiff in Error, the International & Great Northern Railway Company, is assignee of and entitled to all of the rights protected by the four mortgage contracts foreclosed in 1879, and of the purchasers at such foreclosure eliminating the alleged contracts sued on, and to all of the rights of the reconstituted International & Great Northern Railroad Company as reconstituted under and by these foreclosures and sales, and as free of the alleged contracts sued on; and to all of the rights of the mortgagees of the mortgage contract of 1881 made by the International & Great Northern Railroad Company which had been freed from the alleged contracts sued on.

Wherefore, the Plaintiff in Error represents that the decree of affirmance of the Court of Civil Appeals affirming the decree of the trial court violates Sub-section 1 of Section 10 of Art. 1 of the Constitution of the United States forbidding any State to pass a law in violation of the obligations of a contract; in that the obligations of the alleged contracts of 1872-1875 and the five mortgage contracts are all added to, modified and changed, by the effect given to the Act of 1879;

And wherefore the Plaintiff in Error presents that it is protected by the respective decrees of the United States courts above set out entered in the exercise of powers conferred on those courts by the Constitution of the United States, and that it acquired the properties of the sold out International & Great Northern Railroad Company under these decrees.

And wherefore, the Plaintiff in Error invokes its right, title and immunities conferred on it by such decrees and derived under them

and Section 237 of the Act of March 3, 1911 of Congress (33
1413 Statutes, 1156) re-enacting Section 709 of the Revised Statutes of the United States.

Wherefore, the Plaintiff in Error invokes Section 1 of the 14th amendment to the Constitution of the United States as having been violated by the decree (of the Court of Civil Appeals affirming the decree of the trial court, whereby, unless relief will be given, it will be denied the equal protection of the laws and deprived of its property without due process of law;

And wherefore, the Plaintiff in Error also invokes the decrees of the various United States Courts set out above, still in full force and effect, and attempted to be collaterally impeached and set aside by the decrees of the Court of Civil Appeals.

1414

VIII.

The Court of Civil Appeals erred by failing to hold that the trial court erred in refusing to give the Plaintiff in Error's requested peremptory instruction 1;

Because the trustee and bondholders under the mortgage of 1881 took their liens without any notice, as shown in the evidence, and without proof of any notice of the alleged contracts set up by the Defendants in Error, as of date 1872 and 1875; being then only personal contracts unsecured; if contracts at all;

And because the Plaintiff in Error purchased under the foreclosure of the mortgage of 1881 and succeeded to all of the rights of the trustee and bondholders therein, and thereby acquired title free from the operation of such alleged contracrs and of the statute of 1889 (Revised Statutes of Texas of 1911 Articles 6423-4-5) passed subsequent to the attaching of the mortgage lien of the Mortgage contract of 1881;

And because to enforce the statute of 1889 (as it has been enforced in this case and must be enforced to support the decree of the trial court), violates Sub-section 1 of Section 10 of Article 1 of the Constitution of the United States, prohibiting any state from passing a law impairing the obligations of contracts;

And because the action of the Court of Civil Appeals in affirming the decree of the trial court is violative of Section 1 of the 14th Amendment to the Constitution of the United States, providing that no state shall pass any law depriving any person of life, liberty or property without due process of law; in that by such legislative enactment in 1889, as construed, the rights of the bondholders and the mortgagees lawfully contracted in 1881 (and of whom the Plaintiff in Error is assignee as purchaser under foreclosure) are limited and impaired.

1415

IX.

The Court of Civil Appeals erred in affirming the decree of the trial court and in refusing to maintain that the alleged contracts sued on of date of 1872 and 1875 are to be measured and determined by

the laws and statutes existing at the time of their creation, and in refusing to maintain that the adding of more extensive obligations thereto by the subsequent act of 1889, as construed and applied by the court, is violative of sub-section 1 of Section 10 of Article 1 of the Constitution of the United States prohibiting any state from passing any law impairing the obligation of a contract;

Because the Act of 1889, Articles 6423-4-5 of the Revised Statutes of 1911, commonly known as the Office-Shops Act (by the construction of the Court necessary in order to maintain the decree of the trial court) modified, extended and secured the alleged personal contracts of 1872 and 1875 herein involved and enforced in the decree, by securing them in rem or making them inhere in or be a duty on or a servitude upon or run with the properties now owned by the defendant and by adding to the obligations, if any, of such alleged contracts, and violating the same and extending and re-defining the term "General Offices" as understood under the laws and customs existing in 1872 and 1875, and by adding numerous obligations and re-defining and stating contracts for the parties such as they never made for themselves, and by attempting to make a new and more extended contract for the parties, if any there ever were, over and beyond those alleged to have been made in 1872 and 1875.

1416 X.

The Court of Civil Appeals erred in affirming the decree of the trial court and erred in holding (as a necessary means to such affirmance), that by the operation of the general offices and shops statute of 1889 (R. S. 6423-4-5) Plaintiff in Error is forever bound to keep and maintain its general offices, machine shops and roundhouses at Palestine, and erred in holding that the statute so construed creates an obligation running with the properties of the road forever;

Because the statute so construed is in violation of and in conflict with Sub-section 3 of Section 8 of Article 1 of the Constitution of the United States conferring upon Congress the power to regulate commerce among the states with foreig*h* nations and the Indian Tribes;

And because the consequence of this ruling was to deprive plaintiff in error of the power to so regulate its affairs as best to serve the interests involved in Interstate and Foreign Commerce; and to place a perpetual burden upon such commerce;

And because this interference (by this statute so construed and enforced), is not a matter of mere indirect police regulation, but is an attempt to regulate in an illegal manner and an attempt to bind down at Palestine forever the general offices as defined in the statute, and shops and roundhouses forever; thus illegally interfering with the direct means of operating this large railroad in interstate and foreign commerce, and thus illegally interfering forever with terminals and the ability of the Plaintiff in Error to comply with the Hours of Service Law and the other acts of Congress; whereby the field exclusively reserved for Congress by the Constitution of the

United States is invaded, and whereby the acts of Congress are invaded;

And because it was proved that not less than one-half of the carriage of persons and property made by this large railroad was in interstate and foreign commerce.

1417 XII.

The Court of Civil Appeals erred in sustaining the action of the trial court wherein the trial court refused to submit as a special issue to the jury (requested subject to other positions taken) whether or not to require the International & Great Northern Railway Company to forever maintain its general offices at Palestine would place a burden upon interstate commerce, as requested in special issue 7 presented by the Railway Company and refused;

Because the Plaintiff in Error, under Sub-section 3 of Section 8 of Article 1 of the Constitution of the United States and the laws of the United States enacted in pursuance thereof, had the right to have this issue of fact determined by the jury subject to its contentions previously taken that this was a matter of law, and not yielding such contentions; that is, had the right to have the jury determine whether or not the requirements that Plaintiff in Error should forever maintain its general offices and the offices of each of the persons mentioned in the Act of 1889 (R. S. of Texas 6423-4-5) at Palestine would be a restraint of, and burden upon interstate commerce.

1418 XIII.

The Court of Civil Appeals erred in failing and refusing to hold that the Act of 1889, known as the Office-Shops Act, carried into Articles 6423-4-5 of the Revised Statutes of Texas, is unconstitutional and invalid and violative of Section 1 of Article XIV of the Amendments to the Constitution of the United States, and erred in affirming the decree of the trial court, based on this statute;

Because the statute imposes penalties, for its violation of $5,000 per day;

And because such statute on its face, by reason of these great penalties, constitutes an attempt to abridge the privileges and immunities of the plaintiff in error and to deprive it of its property without due process of law and denies to it the equal protection of the laws by penalizing it and threatening to penalize it at the rate of $5,000 per day, in the aggregate millions of dollars, if it should resort to the courts to resist such an action as this, as it does; or if it should refuse to obey and observe such statute;

And because the Act of 1889 above mentioned has been construed to change and modify the obligations of the contracts, if any, made in 1872 and 1875;

And because the Plaintiff in Error has refused to comply with said Act of 1889 as construed and as applied by the Court of Civil Appeals to the alleged contracts of 1872 and 1875;

Whereby it is apparent that the Act is unconstitutional and is

void; and that upon grounds, other than that of the extreme penalties, it is unconstitutional, and that at least its constitutionality is doubtful on such other grounds.

Wherefore, it is now presented that this act is unconstitutional and void by reason of the excessive and great penalties therein contained.

1419 XIV.

The Court of Civil Appeals erred in not holding and in refusing to hold that the so-called Office-Shops Act of the Legislature of Texas of 1889, now carried into the Revised Statutes of Texas as Articles 6423-4-5, is unconstitutional and void;

Because this act is by its terms applicable only to chartered railroads and is not applicable to individuals, receivers or other persons operating rail carriers; or to other persons or corporations in any business engaged; and so violates Section 1 of Article 14 of the Amendment to the Constitution of the United States as being directed against a species or class not rightfully classified on any legal ground; And because the act as construed places a burden on a species or class, to-wit: on chartered railroads alone, not placed on other persons or corporations not classified with it; Thereby violating the provision of the Constitution of the United States invoked, and denying to the plaintiff in error the equal protection of the law and abridging its privileges and immunities and depriving it of its property without due process of law.

1420 XV.

The Court of Civil Appeals erred in affirming the decree of the trial court and in giving effect to the act of 1889 (Revised Statutes of Texas of 1911, Arts. 6423-4-7) as construed by it in violation of sub-section 1 of Section 10 of Article 1 of the Constitution of the United States prohibiting any State from passing any law impairing the obligations of contracts;

Because the undisputed evidence shows that the International & Great Northern Railroad Company made its mortgage contract in 1881, mortgaging all of its properties and right to be a corporation, and that bonds were issued thereunder of the par value of $10,391,000 principal, and being unpaid were foreclosed in the United States Circuit Court for the Northern District of Texas in 1910, and all of the properties of the International & Great Northern Railroad Company were sold for an amount insufficient to satisfy said bonds, the purchaser at the foreclosure sale being the International & Great Northern Railway Company chartered in 1911 and the plaintiff in error herein;

And because at the time the mortgage was executed in 1881, the purchasers at foreclosure sale had under the laws of Texas the right to take all of the properties and franchises and to operate the same, including the undisputed right to locate the general offices and machine shops of the Railway Company at such points as the owners of the property might desire; this privilege being mortgaged by the

International & Great Northern Railroad Company in 1881 and sold under the foreclosure sale, and eight years subsequent to the execution of the mortgage the statute of 1889 was passed;

And because the undisputed facts show that the mortgage was issued and the bonds sold in 1881 without any notice of the alleged contracts of 1872-1875 relied on herein.

Wherefore, it follows that at the sale of said properties under the mortgage contract of 1881, the purchaser acquired the right
1421 under the laws of Texas to locate the general offices at any place on its line desired by the owners of the property, which right they have executed by locating their general offices in Houston, Texas;

Wherefore, the denial of this right denies to the plaintiff in error, the purchaser, a valuable right mortgaged and sold under the contract of 1881, and is in violation of the constitution of the United States in that behalf.

1422

XVI.

The Court of Civil Appeals erred in affirming the decree of the trial court, and erred in refusing to rule that the alleged contracts sued on of 1872 and 1875 were not contracts in violation of the 14th Amendment to the Constitution of the United States and Section 1 thereof;

Because there is an entire absence in the record and statement of facts of any pleading or evidence or finding of the jury legally sufficient to form or support a contract;

And because there is entire absence of evidence in the record on which any contract could lawfully rest;

And because there is no pleading of the same or proof of the same or finding of the jury in support of the same;

And because the alleged contracts were grounded upon and involved in whole or in part, unlawful consideration or considerations in violation of public policy, and were nonenforcible;

And because the alleged contracts sued on were grounded upon and involved as stated illegal consideration, to-wit, the barter of political influence and therefore were in violation of public policy and non-enforcible.

Wherefore, there has been denied to plaintiff in error the due process of law, and the decree of the Court of Civil Appeals affirming the decree of the trial court is in violation of Section 1 of the 14th Amendment to the Constitution of the United States, providing that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

1423

XVII.

The Court of Civil Appeals erred in affirming the decree of the trial court and thereby denied to plaintiff in error the equal protection of the law and due process of law;

Because the Supreme Court of Texas has indubitably declared as a rule of property in Texas that a contract on the part of a railroad corporation for the location of its general offices and machine shops at a given point is not valid unless authorized or ratified by the board of directors as such of the railroad company;

And because there is an entire absence of any evidence showing or tending to show that the Board of Directors of the Plaintiff in Error or of the Houston & Great Northern Railroad Company or of the International Railroad Company or of the International & Great Northern Railroad Company, predecessors in title to the plaintiff in error, ever at any time authorized or ratified any character of contract for the location of the general office or machine shops or roundhouses, or any or all of them of either company, at Palestine, Texas;

And because, insofar as purely negative facts may be proved, it affirmatively appears from the evidence that no such action by either board of directors was ever taken;

Wherefore, the decree of the Court of Civil Appeals affirming the decree of the trial court, based upon alleged contracts not approved by the proper action of any Board of Directors, is a denial to plaintiff in error of the equal protection of the law guaranteed to it by the 14th Amendment to the Constitution of the United States, this decree enforcing against plaintiff in error alleged contracts not so authorized or ratified;

Because the courts of Texas have refused to enforce such alleged contracts against other corporations and persons within the jurisdiction of the State of Texas, thus taking the properties, rights, privileges and immunities of the plaintiff in error and withholding from it its rights, privileges and immunities guaranteed to it and to other persons and corporations within the jurisdiction of the State of Texas in denial to it of the equal protection of the law.

1424 XVIII.

The Court of Civil Appeals erred in affirming the decree of the District Court and have denied to plaintiff in error by this action the equal protection of the law and due process of the law in violation of Section 1 of the 14th Amendment to the Constitution of the United States;

Because the statutes of the State of Texas, in force now and at the time when limitation accrued, provide that causes of action of the character declared upon in this suit shall be barred within two years and within four years from the date of the breach of the alleged contracts sued on, if valid;

And because the uncontradicted evidence in this case shows that if the alleged contracts sued on were ever in fact made, then that the same had been breached by the Houston & Great Northern Railroad Company and by the International & Great Northern Railroad Company, the predecessors in title to the plaintiff in error, for more than two years and for more than four years prior to the institution of this suit;

And because under decisions of the ultimate court and courts of Texas it has been established as a rule of property that limitation having accrued against all such contracts as these, the same shall be enforced as a defense or defenses in all cases within the jurisdiction of this State for the protection of all persons entitled thereto, except the plaintiff in error in this cause.

Wherefore, it follows that the enforcement of the statutes of limitation in favor of all persons entitled to the privileges and immunities granted by such statutes and denial of their enforcement for the protection of the plaintiff in error and the preservation of its properties, rights, privileges and immunities, is a denial to plaintiff in error of its properties, rights, privileges and immunities guaranteed to it under the Constitution of the United States and is a denial to the Plaintiff in Error of the equal protection of the law guaranteed to it by Section 1 of the 14th Amendment to the Constitution of the United States.

1425

XIX.

The Court of Civil Appeals erred in imposing upon the title to the property bought by plaintiff in error at the foreclosure sale of 1911 before stated under process of the United States Circuit Court for the Northern District of Texas and under the laws of the United States a burden, servitude, duty or lien not existing thereon under the laws of Texas at the time of such process, such imposition being accomplished by a clearly erroneous construction and application of the Office-shops statute of Texas of 1889 before referred to which, by its own terms, applied only to railroad companies making the contracts referred to in it and to others with which they might consolidate; and the Court of Civil Appeals thereby imported into said statutes provisions affecting the title aforesaid which did not exist at the time of, or prior to the purchase by plaintiff in error, thereby denying the completeness of its title under the foreclosure aforesaid and under the laws of the United States.

Wherefore plaintiffs in error pray that the said judgment of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas be reversed and that this cause be remanded for such other and further orders and proceedings as law and justice may require.

1426

XX.

Mrs. L. S. McAshan, sole devisee and legatee under the will of J. E. McAshan, deceased, and independent executrix under said will, and B. D. Harris, adopt, affirm and concur in the above and foregoing assignments of error and each of them, and make said assignments their own. The said J. E. McAshan, deceased, and the said B. D. Harris being sureties upon the appeal bond of plaintiff in error and upon the supersedeas bond of the plaintiff in error from the Court to the Court of Civil Appeals and the Court of Civil Appeals having rendered a judgment against the said J. E. McAshan and B. D. Harris as such sureties for the costs of Court in said cause, wherefore the said Mrs. L. S. McAshan, the sole surviving legal

representative of the said J. E. McAshan, and the said B. D. Harris, join in the foregoing assignments of error.

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY,
Mrs. L. S. McASHAN,
Sole Legatee and Devisee of J. E. McAshan, Deceased, and Independent Executrix of the Will of J. E. McAshan;
B. D. HARRIS,
Petitioners,
By F. A. WILLIAMS,
N. A. STEDMAN,
H. M. GARWOOD,
FRANK ANDREWS,
WILSON, DABNEY & KING,
Attorneys for Petitioners.

Endorsed: International & Great Northern Railway Company, Plaintiff in Error, vs. Anderson County et al., Defendants in Error. Assignments of Error. Filed July 28th, 1916. E. T. Rosborough, Clerk Court of Civil Appeals, Sixth Supreme Judicial District of Texas.

1427 In the Supreme Court of the United States.

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
ANDERSON COUNTY et al., Defendants in Error.

Prayer for Reversal.

Now come the International & Great Northern Railway Company, Mrs. Lizzie S. McAshan, sole legatee and devisee of J. E. McAshan, deceased, and independant executrix of his probated will, and B. D. Harris, Plaintiffs in Error, and pray for a reversal of the judgment of the Court of Civil Appeals in and for the Sixth Supreme Judicial District of the State of Texas rendered on the 11th day of January, 1915, and affirming the judgment of the District Court of Cherokee County, Texas, in favor of Anderson County, City of Palestine, George A. Wright, J. W. Ozment, A. L. Bowers, John R. Hearne, Z. L. Robinson, E. W. Link, R. C. Sewell, John M. Colley, and P. H. Hughes, as Plaintiffs, against the International & Great Northern Railway Company as defendants; these petitioners having applied for and obtained a writ of error to review and correct said judgment of the Court of Civil Appeals.

F. A. WILLIAMS,
N. A. STEADMAN,
H. M. GARWOOD,
FRANK ANDREWS,
WILSON, DABNEY & KING,
Attorneys for Plaintiffs in Error, International & Great Northern Ry. Co. et al.

1428 Indorsed: In the Supreme Court of the United States. International & Great Northern Ry. Co., Plaintiff in Error, vs. Anderson County et al., Defendants in Error. Prayer for Reversal. Filed Jul- 28, 1916. E. T. Rosborough, Clerk Court of Civil Appeals, Sixth Supreme Judicial Dist. of Texas.

THE STATE OF TEXAS,
County of Bowie:

I, E. T. Rosborough, Clerk of Court of Civil Appeals for Sixth Supreme Judicial District of Texas, do hereby certify that foregoing 112 pages from one to 112 inclusive are true and correct copies of copies certified to by the Clerk of the Supreme Court of Texas of a Decree Refusing Application for Writ of Error, Motion for Rehearing, Decree overruling Motion for Rehearing. And also of Petition for Writ of Error to Supreme Court of United States signed by S. P. Willson, Chief Justice of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, Will of McAshan; Probate thereof and Letters to his wife, Supersedeas Bond, Citation, Copy of Citation showing acceptance of service, Writ of Error, Assignments of Error and Prayer for Reversal, all of which were filed in my office on the 28th day of July, 1916, in above styled and numbered cause.

Witness my hand and seal of said Court this 2nd day of August, 1916.

[Seal Court of Civil Appeals of the State of Texas.]

E. T. ROSBOROUGH,
Clerk Court of Civil Appeals for Sixth Supreme Judicial District of Texas.

1429 STATE OF TEXAS,
County of Bowie, ss:

No. 1351 on Docket of Court of Civil Appeals of the Sixth Supreme Judicial District of Texas.

INTERNATIONAL & GREAT NORTHERN R'Y CO.
vs.
ANDERSON COUNTY et al.

I, E. T. Rosborough, Clerk of said Court, do hereby certify that the foregoing 112 pages, from one to 112 inclusive, composing this Volume 5 of this transcript, is a true, complete and correct copy of all the proceedings had in the Supreme Court of Texas, including the Motion for Rehearing therein, upon the Refusal of the Application for a Writ of Error; and of all proceedings and documents whatsoever, filed in this Court in connection with the petition for a writ of error from the Supreme Court of the United States and the granting thereof. And I do hereby further certify that this transcript of the record, as included in Volumes 1, 2, 3, 4 and 5 thereof is a true,

correct and complete transcript of all the proceedings, judgments, and decrees whatsoever in the said case, within this Court or in the Supreme Court of Texas; and of all documents whatsoever filed therein except the briefs; and all of said volumes 1, 2, 3, 4 and 5 are under the seal of this Court, and are attached together under said seal—and all precede this certificate—volumes 1, 2, 3 and 4 being separately certified by me.

Witness my hand and seal of said Court, this 2nd day of August, 1916.

[Seal Court of Civil Appeals of the State of Texas.]

E. T. ROSBOROUGH,
Clerk Court of Civil Appeals for Sixth Supreme Judicial District of Texas.

Endorsed on cover: File No. 25,442. Texas Court of Civil Appeals, 6th Supreme Judicial District. Term No. 612. International & Great Northern Railway Company et al., plaintiffs in error, vs. Anderson County, City of Palestine, George A. Wright et al. Filed August 14th, 1916. File No. 25,442.

IN THE

SUPREME COURT

OF THE UNITED STATES

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY,

Plaintiff in Error,

vs.

ANDERSON COUNTY ET AL.,

Defendants in Error.

(No. 243) OCTOBER TERM, 1916

BRIEF FOR PLAINTIFF IN ERROR

By

WILLIAM A. SOMERVILLE,
WILLIAM, DAVIES & KING,
HALE, BOOTH, PERRY & GARWOOD,
ANDREWS, KURTH, BURGES & LOCKE,

Attorneys for Plaintiff in Error.

P. A. WILLIAMS,
W. A. SOMERVILLE,
SIDNEY R. DAVIES,
H. M. GARWOOD,
FRANK ANDREWS,

Of Counsel.

INDEX OF SUBJECT-MATTER

	PAGE
Abbreviations used	1
Concise Statement of Case	2
Questions raised and presented, and the manner of raising same:	
Question 1	11
Question 2	15
Question 3	16
Question 4	18
Question 5	19
Question 6	21
Question 7	23
Question 8	25
Question 9	26
Question 10	27
Question 11	28
Question 12	30
Question 13	31
Question 14	35
Specifications of Error:	
Specification 1	38
Specification 2	40
Specification 3	41
Specification 4	42
Specification 5	43
Specification 6	44
Specification 7	47
Specification 8	54
Specification 9	55
Specification 10	56
Specification 12	58
Specification 13	58
Specification 14	59
Specification 15	60
Specification 16	62
Specification 17	63
Specification 18	64
Specification 19	65

BRIEF OF THE ARGUMENT

PAGE

(1) The United States Circuit Court for the Northern District of Texas had exclusive jurisdiction, reserved in the foreclosure decree of May, 1910, under which the properties were sold out, and the State Court had no jurisdiction 66

(2) This litigation is in conflict with the right, title, privileges and immunities protected by the decrees of the U. S. Circuit Court for the Western District of Texas entered on foreclosures of four mortgages in 1879, and by the decree of the U. S. Circuit Court for the Northern District of Texas, entered on foreclosure in May, 1910 67

(3) The State Court had no power (as declared by it, and on which it bases its decision) in this collateral proceeding, to declare the three decrees of the U. S. Circuit Court of the Western District of Texas entered in 1879, not to be *bona fide,* and to be fraudulent 74

(4) Discussion of the above legal propositions 66- 96

(5) The mortgage of the I. & G. N. Railroad Company of 1881 was foreclosed, and the properties sold out in 1910, and it included within its terms all charter rights, and on foreclosure sale all the properties were bought in by Nicodemus, and transferred to the I. & G. N. Railway Company, chartered in August, 1911. Therefore, the Office-Shops Act of 1889, herein relied on as giving security for the alleged contracts of 1872-1875, could not secure and enlarge the alleged contracts, without violating the obligation of the mortgage contract of 1881; which has been violated by the decree now

under review, in conflict with Subdivision 1, of Section 10, of Article 1, of the Constitution of the U. S., prohibiting any State from passing a law violating the obligation of a contract—Secs. (*a*), (*b*), (*c*), (*d*) and (*e*)..... 96-100

(6) The Office-Shops Statute of 1889, herein relied on (and supported by the decree under review as extending and securing the alleged contracts sued on of 1872-1875), as construed and herein enforced, is in conflict with Subdivision 1, of Section 10, of Art. 1, of the Constitution of the U. S., prohibiting any State from passing a law violating the obligation of a contract; in that the purely personal alleged contracts of 1872-1875 sued on are extended and secured, and their obligations changed by that statute—Sec. (*f*) 100-101

(7) The Office-Shops Statute of 1889, as construed and enforced herein, cannot be justified as a legitimate exercise of the police power of the State—Secs. (*g*), (*h*) and (*i*) 101

(8) Discussion of propositions 5, 6 and 7, above..101-153

(9) Additional discussion of the police power, commencing 202

(10) Under the provisions of the law existing in 1879, and anterior to that time, and at the time of the foreclosure of four mortgages in 1879 by the U. S. Circuit Court for the Western District of Texas, and the selling out of the property thereunder, not only tangibles were sold, but also there were mortgaged, foreclosed and sold, in accordance with existing laws, all of the charters of the I. & G. N. Railroad Company, whereby the alleged contracts herein sued on alleged to have been created in 1872-1875 (then personal, and personal at the time of the foreclosure of 1879), were by the fore-

closures and sales eliminated as against the new railroad, and could not by the Office-Shops Act of 1889, herein relied on, be extended and secured against the properties of the railroad without violation of the obligations of the foreclosed mortgage contracts in contradiction to Subdivision 1, of Section 10, of Art. 1, of the Constitution of the United States, and without denial of the rights, titles, privileges and immunities secured by the decrees of the U. S. Court, and after the lapse of 35 years those decrees could not, in the State Court, be declared fraudulent, if there had been evidence of fraud; but there was none 153-155

(11) Discussion of the foregoing proposition 155-181

(12) The Office-Shops Act of 1889, as herein construed, and applied to extend and to secure as extended, the alleged contracts of 1872-1875, sued on, by a perpetual lien and servitude, deprives plaintiff in error of its property without due process of law, and violates Section 1, of Article XIV, of the Amendments to the Constitution of the U. S. 181-182

(13) Discussion of the last proposition 182-207

(14) The Act of 1889, known as the Office-Shops Act, as herein construed and applied to compel the plaintiff in error (a large interstate rail carrier) to forever maintain its machine shops, roundhouses and general offices at Palestine, places a burden upon interstate commerce, in violation of paragraph 4, Section 8, Art. 1, of the Constitution of the United States 207

(15) Discussion of the last proposition 207-221

APPENDIX, CONTAINING COPIES OF STATE STATUTES

PAGE

General Office Act of 1853 223

General Office and Sale Act of 1857, authorizing the acquisition of charters of sold-out railroads on sale, and constituting the physicals, other intangibles and said charters "an entire thing," to "be sold as such," and passing the charters to the purchasing company 224

Revised Statutes of Texas of 1895, 4549-4550, amending the last referred-to Act, and amended by the Act of September 1st, 1910 (R. S. or 1879, 4260) 236

Act of September 1st, 1910, commonly known as the I. & G. N. Act, amending the Act last referred to 232

Act of 1889, first Act authorizing issue of new charter for the purpose of owning and operating sold-out railroad 227

Office-Shops Act of 1889 229

INDEX OF CASES

	PAGE
Acres v. Moyne, 59 Tex., 623	175-179
Anderson County v. H. & G. N. R'y, 52 Tex., 229	75-187
Atlantic Coast Lines v. Goldsboro, 232 U. S., 549	143
Boise Water Co. v. Boise City, 230 U. S., 84	145-148
Baltimore P. R. Co. v. Fifth Baptist Church, 108 U. S., 317	176
Blair v. Williams, 14 Ky., 34	130
Cooper v. Stimson, 5 Minn., 522	93
Calhoun v. Railway, 4 Fed. Cases, 1045-1047	94
C. B. & Q. R'y v. Nebraska, 170 U. S., 57	145-146-149
C. B. & Q. R'y v. Chicago, 166 U. S., 226	135-182-204
Coppage v. Kansas, 236 U. S., 1	136
Central Trust Co. v. St. L. A. & T. R'y, 59 Fed., 385	70- 87
Critchfield v. Company, 174 Ill., 466	197
Dobbins v. Los Angeles, 195 U. S., 223	134
Deitzsch v. Huidekoper, 103 U. S., 494	87
Douglas v. Kentucky, 168 U. S., 488	113
Detroit United R'y v. Michigan, 242 U. S., 238	113
Doane v. Railway, 160 Ill., 22	197
Donovan v. Pa. R'y Co., 199 U. S., 279	202
Dower v. Richards, 151 U. S., 658	205
Edwards v. Kearzy, 96 U. S., 595	145
Flynn v. Bank, 118 S. W., 848	197
Grand Trunk W. R'y Co. v. South Bend, 227 U. S., 544	143-149
Gunn v. Barry, 15 Wall., 610	144
Goetz, Re, 71 Hun., 272	94
Green v. Biddle, 8 Wheaton, 84	129
G. C. & S. F. R'y Co. v. Morris, 67 Tex., 692	124-173
G. C. & S. F. R'y Co. v. Newell, 73 Tex., 334	124-173
H. & T. C. R'y Co. v. Texas, 177 U. S., 166	182
Hoard v. C. & O. R'y Co., 123 U. S., 222	108-201
H. & T. C. R'y Co. v. Shirley, 54 Tex., 125	124-178-179
Houlton v. Nicholl, 93 Wis., 393	197
Home Tel. & Tel. Co. v. Los Angeles, 227 U. S., 278	205
I. & G. N. R'y Co. v. Anderson County, 150 S. W., 239	107

I. & G. N. R'y Co. v. Anderson County et al., 106 Tex., 60; 156 S. W., 498 67-68-108-111-112-114-176
I. & G. N. R'y Co. v. Anderson County et al., 174 S. W., 316 69-70-73-74-95-111-161
I. C. C. v. C. G. W. R'y Co., 209 U. S., 118 202
Jessup v. Railway, 44 Fed., 664 ..... 70- 85
Julian v. Trust Co., 193 U. S., 93 ..... 82- 84
June v. Fairmont, 215 U. S., 249 83
Kern v. Huidekoper, 103 U. S., 485 87
K. C. M. & O. R'y v. Sweetwater, 104 Tex., 329 28-83-188
King v. Railroad, 147 N. E., 263; 60 S. E., 1133 197
K. C. S. R'y Co. v. Albers Comm. Co., 223 U. S., 591 205
K. C. S. R'y Co. v. Quigley, 181 Fed., 203 217
Lapsley v. Brachears, 14 Ky., 47 130
Louisville Trust Co. v. Louisville R'y Co., 174 U. S., 674 164
Lang v. Choctow R'y, 160 Fed., 355 86
Lawton v. Steele, 152 U. S., 133 135
Lake Shore & Michigan Sou. R'y v. Smith, 173 U. S., 684 137
Loan Association v. Topeka, 20 Wall., 655 138
Louisville Gas Co. v. Citizens Gas Co., 115 U. S., 683 205
Munn v. Illinois, 94 U. S., 113 139
Mo. Pac. R'y Co. v. Nebraska, 217 U. S., 196 137
Mulicker v. N. G. & H. R'y Co., 197 U. S., 544 182
M. K. & T. R'y Co. v. Faulkner, 88 Tex., 651 188
Mayben v. Rosser, 103 Pac., 676 94
McCracken v. Hayward, 2 How., 608 106
McCulloch v. Virginia, 172 U. S., 102 113
Mills v. Mills, 40 N. Y., 543 197
Mackey v. Dillon, 4 How., 421 205
Metropolitan Trust Co. v. C. S. & H. R'y, 95 Fed., 18 218
New Orleans Gaslight Co. v. Louisiana Light Co., 115 U. S., 650 145-149
N. Y. & N. E. R. R. Co. v. Bristol, 151 U. S., 556 145-146
Northern Pacific R'y Co. v. Boyd, 228 U. S., 482 74-162-163-172
Northern Pacific R'y Co. v. Wall, 241 U. S., 87 107

Northern Pacific R'y v. Duluth, 208 U. S., 583 130-143-147
Owensboro v. Cumberland Tel. Co., 230 U. S., 58 145-148
Old Colony Trust Co. v. Omaha, 230 U. S., 100 145-149
Palmer v. Texas Waters Pierce Oil Co., 212 U. S., 125 88
Planters Bank v. Sharp, 6 How., 327 129
People v. Rome W. & O. R. Co., 8 N. E., 369 72-121
Providence Tool Co. v. Norris, 2 Wall., 45 197
Root v. Woolworth, 150 U. S., 401 87
Richardson v. County, 59 Neb., 400 197
St. Paul Gaslight Co. v. St. Paul, 181 U. S., 143 182
S. L., etc., Co. v. Company, 148 Fed., 450 86
St. L. S. W. R'y Co. of Tex. v. Griffin, 106 Tex., 477 139
Sou. Kansas R'y Co. of Tex. v. Logue, 139 S. W., 11 188
Stanley v. Schwalby, 162 U. S., 255 205
Saunders v. Shaw, 37 Sup. Court Reporter, 638 205
Seaboard Air Line R'y v. Blackwell, 37 Sup. Ct. Reporter, 640 219
Texas Southern R'y Co. v. Harle, 101 Tex., 170 125-179-180
Toledo D. & B. R'y v. Hamilton, 134 U. S., 299 144
Texas & Pacific R'y v. Marshall, 136 U. S., 393 197-200-218
U. S. v. Commonwealth Title & Trust Co., 193 U. S., 651 128
U. S. v. Trinidad Coal Co., 137 U. S., 161 176
Utah v. Salt Co., 98 Pac., 549 94
Vicksburg v. Vicksburg Water Co., 202 U. S., 453 128
Von Hoffman v. City of Quincy, 4 Wall., 535 107
Virginia, Ex Parte, 100 U. S., 347 204
Wabash R'y v. College, 208 U. S., 38 70-82-84-88
Walla Walla v. Walla Walla Water Co., 172 U. S., 1 145-146-149
Wilcox v. Puryear, 12 Ky. Law Reports, 566 197
Woodward v. Central R'y of Vt., 168 N. E., 1051 203
Yeatman v. King, 2 N. D., 422; 33 Am. St. Rep., 797 138

IN THE

SUPREME COURT

OF THE UNITED STATES

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY,
Plaintiff in Error.

vs.

ANDERSON COUNTY ET AL.,
Defendants in Error.

No. 612, OCTOBER TERM, 1916
No. 243, OCTOBER TERM, 1917

ABBREVIATIONS.

R=Transcript of Record herein, 3 volumes.
P=Page.
I. & G. N. R'y=International & Great Northern Railway chartered August, 1911; and here plaintiff in error.
I. & G. N. R. R. (new company)=International & Great Northern R. R. formed in 1879—after foreclosure in U. S. Court of old I. & G. N. R. R.
I. & G. N. R. R.=International & Great Northern Railroad formed by agreement and consolidation of H. & G. N. and International Railroads, effective fall 1873.
H. & G. N. R. R.=Houston & Great Northern Railroad chartered 1866.
International R. R.=International Railroad chartered August, 1870.
References to the Record are to the red pagings when in conflict with the black, otherwise to the black pagings.

I.

Concise Abstract, or Statement of Case, Presenting Succinctly the Questions Involved and the Manner in Which They Were Raised.

Defendants in error were plaintiffs, and sued, in the District State Court of Anderson County, Texas, the plaintiff in error here, the I. & G. N. R'y chartered in 1911, for a restraining injunction, as alleged, forever to prevent it from moving its shops and roundhouses at Palestine, Texas; and for a mandatory injunction to compel it to move its general offices from Houston, Texas, to Palestine, and keep them there forever. The venue was changed to the District Court of Cherokee County.

The I. & G. N. R'y is an intrastate and interstate carrier, owning 1106 miles of main track road in Texas.

The defendants in error are Anderson County, Texas, the Town of Palestine, Texas, which is 160 miles in the interior, north of Houston; and Wright, Ozment, Bowers, Hearne, Robinson, Link, Sewall, Hodges, Colley and Hughes, citizens of Palestine, who sued on behalf of themselves and of other citizens of Palestine. (R., 46.)

The litigation resulted in a decree for defendants in error, affirmed by the Court of Civil Appeals, and a writ of error to review the Court of Civil Appeals, upon all points herein presented, was denied by the Supreme, the ultimate court of the State. Every point here presented is a Federal question, was raised in the trial court as a Federal question, and carried to the Court of Civil Appeals, and presented to the Supreme Court, as such, and as pointed out below.

The decree was that the general offices, as defined below and in the statute herein involved (statute set out

p. 228 of appendix hereto), and that the shops and roundhouses of the plaintiff in error should be maintained at Palestine perpetually or forever, and should not be maintained or exist at any other place.

As grounds of recovery, the plaintiffs set up alleged contracts as follows:

(*a*) That the H. & G. N. R. R., per Grow, its President, in 1872, agreed with Reagan, representing the people of the then village of Palestine, to locate the shops and general offices of that railroad at Palestine forever, and to extend its railroad into Palestine, and to have a depot therein at the junction with the International Railroad within one year from July 1st, 1872; in consideration of Reagan's making a thorough canvass of Anderson County, to induce the voters thereof to authorize, by their votes, the issue of county bonds for $150,000.00, to be donated to the railroad, and in consideration of such bonds; and that Reagan made the canvass, and that the county came into the transaction and voted and delivered the bonds; that is, that Reagan and Grow made the agreement for the railroad and the people of Palestine, and that the county, by election, voted the bonds and joined therein. (R., pp. 49-53; para. 9-52 of petition.)

(*b*) That the I. & G. N. R. R. having been finally formed in the fall of 1873 (through the consolidation by agreement of the H. & G. N. R. R. and International), through Hoxie, its manager, in 1875, upon the considerations stated in head (*a*), above, and the further consideration of the people of Palestine agreeing *to build rent houses* to be rented for reasonable rents (but for no definite time), agreed to perform all of the undertakings in (*a*), above; and that the rent houses were built. (R., pp. 55-57, para. 20-23.)

The pleadings of the plaintiffs did not set out whether or not the alleged contracts were in writing or in parol. All of the testimony advanced by plaintiffs was upon the theory that they were in parol.

There was a written contract between the county and the H. & G. N. R. R., submitted to the county voters at the election refered to in (*a*), above, and approved by them, whereby in consideration of the building in of the railroad and the locating the depot at the junction with the International, the bonds were stated to have been voted. The County Court decreed that this contract had been carried by the voters, and also decreed, in 1873, that it had been performed by the railroad, and that a parol addition thereto, claimed to have been made locating the shops at Palestine, was not made. This decree and the written contract were in evidence. (R., Vol. 2, pp. 766-780, para. 18.) Neither the decree of the County Court (which was vested with authority to determine the result of the election, Anderson County v. H. & G. N. R. R., 52 Tex., 242), nor the written contract, mentioned the shops or offices; but the written contract stated that the consideration to be performed by the railroad was to build into Palestine and put up the depot at a certain place, and the decree declared that the railroad had performed all of its undertakings, and that the bonds should be issued; which was done. The county, in 1874, endeavored by litigation to repudiate this decree, and the written contract voted by the county voters, as subject to parol modifications, and obtained by fraud. Demurrers were sustained. (Anderson Co. v. H. & G. N. R. R., 52 Tex., 228.)

At the time of the decree of the County Court of Anderson County, the general offices were in Houston, Texas,

where they were located by the charter of the H. & G. N., and no shops were at Palestine. The record and proceedings in Anderson Co. v. H. & G. N. R. R. were introduced in evidence. (R., Vol. 2, p. 827, starting middle of page, to last par. p. 832.)

The alleged contracts were admittedly personal, and not binding upon the properties of the railroad, or its successors, at the time when made. There have been four foreclosures of the properties and sales thereof under foreclosures, including all tangibles and intangibles, and the charters or franchises to be, which, by Texas statute, were subject to mortgage, foreclosure and sale.

The first foreclosures were in 1879, of four different mortgages; the second in 1910-11 of one mortgage. In proper connections below, all of these are pointed out.

As the alleged contracts, herein sued on, were admittedly personal, there was no controversy, but that they were unenforceable against the plaintiff in error and its property (it having been chartered and having purchased the property in 1911), and there having been, as stated above, a previous foreclosure, in 1879; unless there existed a subsequent statute constitutionally securing the alleged contracts of 1872-1875 against the properties and successive owners, by a burden, condition or servitude thereon, and notwithstanding the foreclosures and sales in 1879 and 1910-1911, and the five mortgage contracts intervening.

The plaintiffs, therefore, relied upon a statute of Texas of 1889, herein referred to as the Office-Shops Statute; on the construction and constitutionality of which, and its application hereto, depend all the questions herein, except, perhaps, that of jurisdiction.

This statute is set out in the appendix (p. 229).

It seems clearest, in this introduction, to invert the usual order, and to state the question of jurisdiction last, and the other questions first. We think that the case will be so best understood, on this succinct statement. In our specifications and brief of the argument we shall take up the question of jurisdiction first.

The situation in the years 1866-1875 was very different from the present one. Before the Civil War a small stem of a railroad was built from Houston southwest about fifty miles, now part of the I. & G. N. R'y. In 1866 the H. & G. N. R. R. was incorporated by a special act. Until the adoption of the present Constitution of Texas of 1876 all Texas incorporations were by special acts.

The ante-bellum railroad, extending from Houston southwest, was known as the Houston Tap & Brazoria Railway. (R., Vol. 2, p. 635, para. 1.) The H. & G. N. R. R., chartered in 1866, was authorized to acquire other roads and consolidate therewith, and did acquire the H. T. & B. By its charter the H. & G. N. was authorized to build a road from Houston to Red River, and by it the general offices were located in Houston. (R., Vol. 2, para. 2, pp. 636-638.) The International was chartered in 1870, and authorized to construct a railroad from the Red River, via Austin, the capitol of the State, and San Antonio to the Rio Grande. The charter did not locate its principal offices and domicile, but there was a then statute permitting them to be located at any place on the road. The charter provided that this road might consolidate with any other road. (R., Vol. 2, para. 3, pp. 639-640.)

The International and H. & G. N. commenced active construction soon after they were chartered. The latter pushed north from Houston, and the International north and south from Hearne, near the Brazos River,

towards Palestine and Austin. Each road issued mortgages to finance its constructions. By the spring of 1872 the H. & G. N. R. R. had crossed the Trinity River, building north, and was constructed to about the common line of Trinity and Houston Counties, south of the county seat of Houston County. (Admittedly correct statements plead by defendants in error here. R., pp. 48-49.)

At that time Judge John H. Reagan, a citizen of Anderson County, was residing not in, but in the vicinity of the then village of Palestine, which had 1200 to 1500 people. (R., Vol. 2, p. 817.) Galusha A. Grow was the President of the H. & G. N. R. R. The railroad was built into Palestine, and the depot secured by January 1st, 1873, and the County Court of Anderson County decreed, as set out above, that the railroad had complied with all of its undertakings, and directed the issue of the bonds, and further decreed that the railroad was not obligated to build the shops at Palestine. As has been stated, neither the general offices nor the shops were mentioned in the written contract, nor the decree of the County Court. (R., Vol. 2, pp. 766-780, para. 18.)

The general offices remained in Houston, whither, after the consolidation with the International, those of the International were moved in the fall of 1873, and consolidated in Houston with those of the H. & G. N. R. R. In the fall of 1873 the consolidated railroad commenced to use the name of "International & Great Northern Railroad Company." This consolidation was effected by agreement and resolutions of the stockholders and directors of the H. & G. N. and International Railroads. (R., Vol. 2, p. 724, near bottom of page.)

Before the first date (1872) of the alleged contracts sued on, the International Railroad had issued a mort-

gage and also the H. & G. N., and thereafter, and before the alleged contract of 1875 two other mortgages had been issued by them. (R., Vol. 3, pp. 298-302, par. 21-29, and the documents in full here proved. R., Vol. 1, pp. 309-366, Exhibits Q-Y.)

In 1879 all four mortgages were foreclosed in the U. S. Circuit Court for the Western District of Texas. (Last references just above.) These mortgages were of all rights and franchises and physicals, and of the charters of the consolidated railroad and its constituents. Each decree recited the foreclosure of the charter in these words: Foreclosure of International mortgage of 1871: "Including the franchise of the company to be a corporation" (R., Vol. 1, top p. 313); deed to same effect (R., Vol. 1, p. 327, near middle); decree foreclosing mortgage of International R. R. of Jany. 15th, 1874, and of the H. & G. N. R. R. of the same date. (R., Vol. 1, p. 330.) Decree foreclosed all franchises and corporate rights. (R., Vol. 1, p. 332.) The deed of confirmation included all the "chartered powers" of both roads. (R., Vol. 1, p. 345.) The mortgage of the H. & G. N. R. R. of Feb. 15, 1872 (R., Vol. 1, p. 348), included all "franchises." (R., Vol. 1, p. 353, near bottom.) The deed, duly confirmed, included "chartered powers." (R., Vol. 1, top p. 365.) At the date of the issue of these mortgages, and long after the mortgage of 1881, it was provided by the statute that, upon foreclosures of railroad properties and sales under foreclosures, the charters should become the property of the purchasers, who then should be considered the stockholders of the sold-out railroad corporation; that is, that the purchasers, as a part and incident of the purchase and foreclosure, should have a right to brand the dry charters, as purchased under the foreclosure, and

constitute themselves the stockholders, without taking out a new charter, and no provision was made for the new chartering of sold-out railroads until, by the subsequent act of 1889. The statute in this regard in force in 1879-1881 is set out in the appendix. (P. 224) Each of the four mortgages being foreclosed in 1879, the properties were sold out under the decrees and all bought in by Kennedy and Sloan, as Trustees, who then went through the form of conveying them to the I. & G. N. R. R. Company of 1879. The new company so became the owner of the properties and charters, and was therefore designated, as the old company had been, the I. & G. N. R. R. Company. (R., Vol. 3, p. 936, para. 29.) This deed declared that it conveyed back to the I. & G. N. R. R. "the charter powers and privileges."

The mortgage of 1881, executed by the new I. & G. N. R. R. Company of 1879, was foreclosed in the U. S. Circuit Court for the Northern District of Texas, and sale had thereunder in 1910-11. This, as well as the above mentioned four mortgages, included in the mortgage—the charters or franchises to be (decree of foreclosure, R., Vol. 2, p. 646, near bottom) as authorized by laws in force at the date of the mortgage, and all physical property, and it thus appears that under five different mortgages the charters of the I. & G. N. R. R. Company were sold out, as well as all other properties.

In 1889 a law was enacted in Texas for the first time permitting new railroad charters to be taken out for the purpose of acquiring foreclosed or sold-out railroad properties. Up to that time, as appears above, the laws of Texas did not permit such new charters, but provided for the sale of the old charter and operation of sold-out prop-

erties thereunder. (Appendix, p. 224, old statute, new statute of 1889, appendix, p. 227.)

In 1910 the statute of 1889 was changed. We print in the appendix the original statute of 1889 and the statute as amended of 1910. (Appendix, pp. 227 and 232.) This original statute of 1889 is not to be confused with the Office-Shops Statute of 1889 (p. 229 in the appendix), and referred to above, and under which most of the questions herein involved arise.

All of the properties having been sold out under the decree of 1910 were purchased by Nicodemus, a representative, and conveyed by him to the plaintiff in error, including all franchises to be, and operative franchises, as well as physicals. (R., Vol. 2, pp. 681-700.) The deed expressly conveys "the franchise to be a corporation." (R., Vol. 2, p. 693, towards bottom.) The charter of the plaintiff in error of August, 1911, provided that the general offices should be located in Houston, Texas. (R., Vol. 2, p. 200, at bottom.) The decree of foreclosure reserved jurisdiction in the U. S. Circuit Court of the Northern District of all matters not disposed of, and of all denounced contracts and claims against the properties sold. (R., Vol. 2, pp. 643-662, particularly pp. 660-1-2.) Denunciation of the alleged contracts sued on was made, as provided for in the decree and by resolution of the Board of Directors of the I. & G. N. R'y of 1911. (R., Vol. 3, pp. 919 to 931, para. 17-20.)

The above is a succinct statement, upon which the questions herein involved and the method in which they are raised, are next stated, but we state last the question of jurisdiction. Each one of the questions or legal propositions next below is affirmed by the plaintiff in error, and each is denied by the defendants in error, their denial

of each one of them being vital to the maintenance of their case.

Each one of these questions was raised in the trial court, presented in the Court of Civil Appeals, and presented in application for writ of error to the Supreme Court of Texas. As this is a succinct statement, we here compact the statement of the questions involved and the manner of their raising into the briefest space.

(1) The plaintiff in error maintains that the Office-Shops Statute of 1889(p. 22[illegible] in appendix) could not constitutionally add to the obligations of the alleged personal contracts of 1872-1875, by enlarging their scope, requiring the residence of various persons in Palestine, and defining and enlarging the meaning of the general offices, and by giving security, or creating a burden or servitude on or against the properties of succeeding purchasers; and that the application of the act of 1889 to them, as affecting these purposes, and as securing these alleged contracts, violated their obligations, if contracts they ever were, and violated Sub-section 1 of Section 10, of Art. 1, of the Constitution of the U. S., prohibiting any State from passing a statute violating the obligation of a contract, in that:

(*a*) As construed and enforced herein, the statute of 1889 gave security for the enforcement of the alleged contracts of 1872 and 1875 by a burden or servitude upon the property.

(*b*) The Office-Shops Act of 1889 required all of the persons therein designated to *reside* at the place contracted for as general offices, and to keep and maintain their offices at that place; whereas the alleged contracts sued on not only contain no security for their perform-

ance or residence, but only specified at most that the general offices should be in Palestine.

(*c*) Such statute violated the definitions of the general offices, as recognized in 1872 and 1875 at the time of the making of the alleged contracts; and attempted to enlarge the alleged contracts by designating additional offices and persons to be affected thereby. This point is presented here (4 Ass. here, R., Vol. 3, p. 1346), and 4th specifications of error below (8th Ass. here, R., Vol. 3, p. 1353), 8th specification.

This question was raised upon trial in the following way:

The defendant, the plaintiff in error here, demurred generally; its demurrer was overruled. It presented a request for a peremptory instruction, which was refused. To both of these rulings it took its exceptions. The plaintiffs alleged (R., Vol. 1, p. 53, Sec. 32) that in willful disregard of the alleged contracts of 1872 and 1875, "and in open and flagrant violation of the laws of Texas," the I. & G. N. R'y had, in September, 1911, moved its general offices to Houston; and had caused all of the persons mentioned in the statute, with their subordinates, to move to Houston; and that the plaintiffs had been irreparably damaged by the moving of 250 men, having a high payroll, to Houston, whereby their property values had been diminished $100,000.00. (R., Vol. 1, p. 64, Sec. 35.)

The decree copies the statute in stating its applications.

The defendant specially plead the history of the properties, commencing with the incorporation of the Houston Tap & Brazoria Railway, September 1st, 1856, and succinctly stated above (R., Vol. 1, IX, Vol. 1, pp. 110-126), and then presented that the Office-Shops Act of

1889 (appendix, p. 22.) was unconstitutional and violative of Sub-section 1, of Section 10, of Art. 1, of the Constitution of the U. S., prohibiting the impairment of the obligation of contracts, in that attempt was made to fix a lien, burden and servitude upon the properties, and to add to the obligations of the alleged contracts sued on of 1872 and 1875, and to apply thereto the act of 1889. [R., Vol. 1, p. 126, Sec. 35, Sub-section (*a*).]

When the plaintiffs offered witnesses to prove their alleged contracts of 1872 and 1875, the defendant objected, invoking this exact question. This objection, specifically invoking the contract clause of the Constitution of the U. S., was made to every witness, and it was in every case overruled, and bills of exceptions taken. (R., Vol. 1, p. 397, bill 12 to testimony of Wright, sub-section 12, p. 400; R., Vol. 1, testimony of Wright, bill 13; R., Vol. 1, bill 14, p. 405, testimony of Wright, and sub-section 12, p. 407; R., Vol. 1, p. 412, bill 15, testimony of Wright, sub-section 12, p. 414; R., Vol. 1, bill 16, testimony of Wright, p. 419; R., Vol. 1, testimony of Wright, bill 17, p. 420; R., Vol. 1, testimony of Wright, bill 18, p. 421, and sub-section 12, p. 424; R., Vol. 1, testimony of Mrs. Reagan, bill 19, p. 430, and sub-section 12, p. 432; R., Vol. 2, p. 437, bill 20, testimony of Jacobs, p. 439, sub-section 12; R., Vol. 2, p. 443, bill 21, testimony of Hughes, p. 445, sub-section 12; R., Vol. 2, p. 449, bill 22, testimony of Watts, and sub-section 12, p. 452; R., Vol. 2, p. 462, testimony of Ozment, bill 24, and sub-section 12, p. 464; R., Vol. 2, p. 469, testimony of Ozment, bill 25, and sub-section 12, p. 471; R., Vol. 2, p. 480, bill 28, testimony of Stedman and newspaper article, and sub-section 12, p. 483; R., Vol. 2, p. 494, bill 38, testimony of Word, and sub-section 12, p. 496.)

The witness undertook to testify to a negotiation conducted in Judge Reagan's parlor, and claimed to have been consummated into a contract at Wright's livery stable, in 1872, and also to stump speeches claimed to have been made during the county campaign for the bond issue in the spring of 1872; and to representations therein made by the speakers; and also to conversations with Hoxie in 1875, Hoxie being the manager of the railroad, and also to statements, as made by Grow in parol to the County Court of Anderson County, in 1873, to induce it to issue the bonds, all as set out in the bills of exceptions referred to. The references in the bills to the Statement of Facts are to the original pages thereof, commencing original p. 1 (red paging 635 of R., Vol. 2), and extending to original paging 334 and paging 998 of this Record. The references to the Statement of Facts are at the end of each bill, and the testimony of these witnesses include all of the evidence upon which the decree for plaintiffs stands.

The questions submitted by the court, and answered by the jury, are set out in the decree. (R., Vol. 2, pp. 551 etc.) In accordance with the Texas practice, a motion for a new trial was filed, presenting the question on the stated rulings, all as set out in Sections 36 to 53, inclusive, of the motion for a new trial. (R., Vol. 2, pp. 571-575, 595(d), 598(a-1).) The motion for a new trial was overruled, and an appeal taken. (R., Vol. 2, p. 619.)

On this appeal to the Court of Civil Appeals this point was presented, the motion for a new trial constituting, under the Texas statute, the assignment of error.

The Court of Civil Appeals affirmed the decree of the lower court by its judgment. (R., Vol. 2, 1023, opinion, 1001-1022.) Motion for a re-hearing was made and was

overruled. (R., Vol. 2, p. 1067.) In this motion for a re-hearing in the Court of Civil Appeals, the question now presented was again presented to the court. (R., Vol. 3, p. 1032, Secs. 27, 28.) The court overruled the motion for a re-hearing. (R., 1066, Vol. 3.) The defendant and plaintiff in error here then presented its application for a writ of error to the Supreme Court of Texas (R., Vol. 3, p. 1073), and therein again presented this question. The Supreme Court refused the writ. (R., Vol. 3, p. 1288.)

The Supreme Court gave no opinion. The opinion of the Court of Civil Appeals is set out in the record. (R., Vol. 3, p. 1001.)

(2) The plaintiff in error maintains that the Office-Shops Act of 1889 (p. 22[illegible], appendix) could not constitutionally add to the obligations of the alleged personal contracts of 1872-1875, by enlarging their scope requiring the residence of various persons in Palestine, and defining and enlarging the meaning of general offices, and by giving security, through creating a burden or servitude on or against the properties of succeeding corporations, and that the application of the Act of 1889 to these alleged contracts, as affecting these purposes, and as set out in question 1, above, violated the first section of the 14th Amendment to the Constitution of the U. S., by interfering with and taking property without due process of law. This is presented here (5th Ass., R., Vol. 3, p. 1347) and 5th specification of error.

This question was raised upon trial in the following way: The defendant demurred generally, and presented a request for a peremptory instruction, both of which were overruled. It took its exceptions. The defendant plead that the statute of 1889 (appendix, p. 22[illegible]) was in

conflict with Sec. 1, of the 14th Amendment to the Constitution of the U. S., in the terms of the question now stated. [R., Vol. 1, p. 128(e).] When the plaintiffs offered witnesses to prove their alleged contracts of 1872 and 1879, the defendant objected in the terms of this question. This was objection 15 in all of the bills of exceptions referred to in connection with question 1, above.

In the motion for a new trial it is pointed out that it was error, on the grounds of this question, to admit in evidence the testimony of these witnesses and the newspaper article. (R., Vol. 2, pp. 571-574, Secs. 36-58), and that this question went to the whole matter. [R., Vol. 2, pp. 598 and 600(d-1).] This point was made in the motion for re-hearing (R., Vol. 3, p. 1035, Sec. 33), and in the application for a writ of error from the Supreme Court of Texas. (R., Vol. 3, p. 1180, Sec. 14.

(3) Plaintiffs in error maintain that the Office-Shops Statute of 1889 (p. 229 of appendix) could not constitutionally add to the obligations of the alleged personal contracts of 1872-1875 by enlarging their scope and requiring the residence of various persons in Palestine, and defining and enlarging the meaning of general offces, and by giving security or creating a burden or servitude on or against the properties of succeeding purchasers; and that the application of said act of 1889 in this case, and insisted upon by the plaintiffs below to effect these purposes, was violative of Sub-section 1, of Section 10, of Art. 1, of the Constitution of the U. S., in that by so enlarging and securing by burden and lien the alleged contracts of 1872 and 1875 through the subsequent act of 1889 as construed and applied to the mortgage contract of 1881 (which covered all of the properties of the I. & G. N. R'y, and its charters or franchises to be), the obliga-

tions of said mortgage contract of 1881 were violated. This point is presented here (3rd Ass., R., Vol. 3, p. 1345) and 3rd specification below.

This question was raised in the following way: The defendant plead that the mortgage contract of 1881 covered all of the properties herein involved. (R., Vol. 1, pp. 209-222.) It also set up and plead a decree of foreclosure of this mortgage in 1910-1911 and the sale thereunder, and approval of the sale by the court, being the U. S. Circuit Court for the Northern District of Texas. (R., Vol. 1, pp. 239-259.) The regularity of this mortgage, the decree of foreclosure, and the sale thereunder to Nicodemus, the approval of the sale, and the conveyance to the I. & G. N. R'y, the plaintiff in error here, chartered August, 1911, were all proved without dispute. (R., Vol. 2, pp. 642, 663, 666, 680 and 686.) It was proved that the property sold for less than the amount of the mortgage. (R., Vol. 2, p. 663.)

The plaintiffs below, the defendants in error here, introduced these documents, and also the charter of the plaintiff in error. (R., 701.) The decree foreclosing the mortgage, and all of these matters being before the court (the defendant had plead the mortgage and all of the same matter introduced by the plaintiffs below), when the plaintiffs thereafter called witnesses for the purpose of proving their said alleged contracts of 1872-1875, the defendant objected in the terms of this question, as shown in the bills (objection 13 of each) referred to in connection with question 1, above.

The motion for the new trial set out this error. (R., Vol. 2, pp. 571-575, Secs. 36-53, pp. 598-599(b-1). The overruling of this motion, the course of appeal and denial of the writ of error by the Supreme Court, all appear in

connection with question 1. A motion for a re-hearing was made in the Court of Civil Appeals, including this question. (R., Vol. 3, p. 1031, Sec. 25.) On application for a writ of error to the Supreme Court the question was again presented. (R., Vol. 3, p. 1178, Sec. 13, and p. 1171, Sec. 12.)

(4) Plaintiff in error maintains that the Office-Shops Statute of 1889 (p. 223 appendix), could not constitutionally add to and secure against the properties, and against succeeding purchasers and corporations, the alleged personal contracts sued on of 1872 and 1875 by enlarging their scopes, and by giving security or creating a burden or servitude on or against the properties of the plaintiff in error, as against the obligations and scope of the contracts of four intervening mortgages foreclosed in 1879, without violating the obligations of the contracts of said four foreclosed mortgages, of which the plaintiff in error is the assignee, and without violating Sub-section 1, of Section 10, of Art. 1, of the Constitution of the United States, in that, as construed and enforced herein, the statute of 1889 enlarged and gave security to the alleged contracts of 1872 and 1875, and in 1889 made them prior in law over mortgages foreclosed in 1879. This point is presented in our assignments here (6 Ass., R., Vol. 3, pp. 1347 and 1348) and 6th specification below (7 Ass., R., Vol. 3, pp. 1349-1353) and 7th specification below.

This question was raised on trial in the following way: The defendant set up that the International Railroad had made a mortgage in 1871 which was foreclosed in 1879, and the properties sold out. (R., 116-119, Sec. 33-a–33-c, inclusive), and that on the 15th of January, 1874, the International Railroad made another mortgage, and the H. & G. N. another mortgage, which were sued on and

foreclosed and sold out (R., Vol. I, 119, 120; 33-f-33-i); and that before February, 1873, the Houston & Great Northern Railway made a mortgage, which was foreclosed and sold out. (R., 120-122, 33-j–33-n.) That all of these foreclosures were in the United States Circuit Court, and to all of them the I. & G. N. R. R. Co., consolidated out of the International and H. & G. N. R. R., was a defendant (ib), and that the purchasers, at all of these sales, were Kennedy and Sloan, who conveyed under all of their purchases to the I. & G. N. R. R. Company of 1879. (R., 120-121.) These mortgages were plead as of the terms before stated.

The mortgages, decrees of foreclosure and the whole proceedings and deeds were plead and proved on trial, each mortgage including the charters as well as all of the physicals and operating franchises of the railroad and railroads. In connection with these, this question was presented. (R., Vol. 1, pp. 130-132.) All of the mortgages and the decrees foreclosing the same in the United States Court were proved without controversy. (R., Vol. 3, pp. 932-936.)

In the motion for a new trial this point was presented as foundation for error. (R., Vol. 2, p. 602, Sub-section f.) It was again presented in the motion for a re-hearing (R., Vol. 3, p. 1032-1040), and in the application for a writ of error to the Supreme Court. (R., Vol. 3, pp. 1215 and 1216, 23 Ass.)

(5) The plaintiff in error maintains that the Office-Shops Act of 1889 (p. 229, appendix) could not constitutionally add to the obligations of the alleged personal contracts of 1872-1875, by enlarging their scope and giving security therefor, as has been decreed in this case; because, to do so would violate Section 1, of Art. 14, of

the Amendments to the Constitution of the United States, in that by mere force of said act, as construed and enforced, personal obligations (if any there were of the alleged contracts of 1872 and 1875) would be revived and enforced as against the properties and the successive purchasers thereof; when they had been eliminated and had ceased to exist by the foreclosure sales of the mortgages of 1881 and of the four mortgages described in the last question, No. 4, it being unconstitutional and contrary to the Constitution of the United States, and a taking of property without due process of law, and to Section 1, of the 14th Amendment thereto, by enactment of the legislature to revive and enforce personal contracts, to wit: Herein the alleged contracts of 1872 and 1875 entered into by sold-out corporations, as against their successor or successors, and when such sold-out corporations were sold out under mortgages prior in time to the passage of the Statute of 1889 relied on herein as reviving, extending and securing the obligations. This question is presented in our seventh asisgnment, here made to this court (R., Vol. 3, p. 1349-1353), and in our seventh specification.

This point was raised in the following way: Pleading and proof were made, as set out in connection with the questions above, with reference to the mortgages prior to 1879 and of 1881. The properties and the charters were all sold out, as appears above, in 1879, under mortgages which included directly and by force of law the charters, as well as all other intangibles and tangibles. The sale in 1879 was anterior to the passage of the act of 1889, relied on, and the sale in 1910-1911 was subsequent to the act of 1889, but under a mortgage anterior to that act. As pointed out, when the five foreclosed mortgages were

executed, they, under existing laws, were authorized to include, and did include, the charters as subject to the mortgages, whereby, on the sale in 1879, the charters and all the properties were sold out and became the property of a new company, the old company ceasing to exist. The five mortgages all expressly included the charters or franchises to be, as appears above and below. The statute brought the charters, as a matter of law, even if not included in the mortgages, within the scope of the mortgages. (Statute, appendix, p. 224) The plaintiff in error, in its answer in the trial court, propounded that on these facts, and by the force of the Act of 1889, as construed by the plaintiff below, it was entitled to the defence stated by this question. (R., 131.) This point was presented in the motion for new trial. (R., 602-3, Vol. 2, Sec. CX, Sub-sec. g.) Being overruled by the Court of Civil Appeals, it was presented to the Supreme Court in petition for writ of error. (R., p. 1215, Vol. 3, Sec. 23.)

(6) The plaintiff in error maintains that the Office-Shops Act of 1889 (appendix, p. 229) is unconstitutional, as herein construed and enforced, and that it could not constitutionally add to the obligations of the alleged personal contracts of 1872 and 1875, by enlarging their scope, or securing them against the properties and successors of the corporations alleged to have made those admittedly personal contracts, and by making those alleged contracts a part of the charter or charters of the property, as ruled by the Court of Civil Appeals; because the above described four mortgages foreclosed in 1879 included the charters expressly and by force of a statute then in force, and long thereafter in force, and in force before the date of any of said mortgages, all as has been stated in the last question, whereby the act of 1889 (appendix, p. 229),

as herein construed and enforced, is an attempt to fasten on the purchasers of said charters at the foreclosure sales of 1879, and on to their property, and on to their assigns, as a part of and modification of the charters purchased under the foreclosures in 1879, the alleged contracts of 1872 and 1875, and to enlarge and secure them in violation of Sub-section 1, of Section 10, of Art. 1, of the Constitution of the United States, prohibiting any State from passing a law violating the obligations of a contract, and in violation of Sec. 1, of the 14th Amendment to the Constitution of the United States, in attempting to burden, modify, change and take away charters and rights acquired in 1879, under foreclosure sales, without due process of law. This question is presented here in assignments six, seven and eight (R., Vol. 3, pp. 1347-1353), and specifications six, seven and eight, below.

This question was raised in the following way: The four mortgages prior to 1879 were plead, set out and proved, as stated in connection with the questions above; and upon the pleading of these mortgages, foreclosures and sales thereunder, the position was taken in the answer on the trial that in 1879 a new company had acquired the old charters, free of every obligation of a personal character, and also the properties so freed, and that it would violate the constitutional provisions now invoked, then specially plead, to overlook the obligations of the foreclosed mortgages, and to make such alleged contracts of 1872 and 1875 (admittedly personal when made) a part of the charter and obligations of the I. & G. N. R. R. effective as so made in 1889, by the Office-Shops Statute then passed, the position being taken that a new company acquiring the old charters was made in 1879, and that neither the properties could be burdened, nor

the old charters modified in 1889 by giving security for the performance of the alleged contracts of 1872 and 1875 as against the new company, an organization of 1879. (R., Vol. 1, pp. 130, 131.)

This position was presented on the motion for a new trial (R., pp. 602 and 3 (f) and (g) in the motion for a re-hearing in the Court of Civil Appeals (R., Vol. 3, p. 1033, Sec. 28, p. 1040, Sec. 49), and to the Supreme Court in application for a writ of error. (R., Vol. 3, p. 1215, Sec. 23.)

(7) Plaintiff in error maintains that the decrees of the United States Circuit Court for the Western District of Texas, foreclosing, in 1879, the four mortgages referred to in connection with question 6 above, and the decrees confirming the sales thereunder, and the deeds made by the Master thereunder; and the decree of foreclosure of the U. S. Circuit Court for the Northern District of Texas of 1910, and the decree confirming the sale thereunder in 1911, and the Master's deed thereunder; through which all of the above were passed down; all as set out in connection with questions last above; vested in it rights, titles and muniments, privileges and immunities guaranteed by the Constitution of the United States and by Sec. 709 of the Revised Statutes of the United States as amended (1875), and as amended Sec. c-3, 1911 (Sec. 237, 33d Stat. L., 1156), and the charters and franchises to be and all the tangibles and intangibles of the I. & G. N. R. R. Company and of its predecessors free of every lien, burden, extension, security or modification herein contended to have been created by the Office-Shops Act of 1889. (Appendix, p. 229.) Such Act of 1889, being subsequent to the mortgages foreclosed in 1879, and subsequent to the mortgage of 1881 foreclosed in 1910-11, and

could not modify, change and set to one side the muniments, rights and titles and immunities obtained under said mortgages and decrees of foreclosure. This question is presented in Sec. 2 of the assignments made here (R., Vol. 3, p. 1345), and the second specification of error in this brief.

This question was raised in the following way on trial: The defendant plead and set out, as has been stated above, in connection with the last stated questions, all of the five mentioned foreclosed mortgages, and the decrees and proceedings in the U. S. Circuit Court for the Western District of Texas in 1879, and in the U. S. Circuit Court for the Northern District of Texas in 1910-11, and the deeds made thereunder, and fully proved the same as set out in connection with last questions above, specifically pleading these proceedings and muniments, and its titles, and as having bought and acquired the charters, rights and properties free of all of the modifications, burdens and extensions attempted by the plaintiff under the guarantee of the decrees of the U. S. Courts as specifically alleged. The defendant moved the court to give a peremptory instruction for it, which was refused. (R., Vol. 1, p. 511.)

Defendant made its motion for new trial setting out this question as not having been sustained and as error not to have sustained it (R., Vol. 2, pp. 562 and 3, Sec. 3), and again presented this error in its motion for a rehearing (R., Vol. 3, p. 1025, Sec. 5), and presented the same matter to the Supreme Court of Texas in its petition for writ of error (R., Vol. 3, p. 1145, Sec. 3).

At the time when the plaintiffs below tendered their testimony to which objections were made, these various mortgages and decrees in and prior to 1879 had not been

introduced; but in each of the bills of exceptions to the testimony of each of the witnesses the defendant (plaintiff in error here) objected that the plaintiffs had already introduced conveyances to the property of the sold-out railroad under the foreclosure of 1910-11 and its charter and decree of foreclosure, from which it appears that the defendant had bought free of all the obligations now asserted. (Sec. 18 of each bill referred to in connection with question 1 above.)

(8) Plaintiff in error maintains that the Act of 1889, known as the Office Shops Act (App., p. 22?), is void and unconstitutional, and in conflict with Sec. 1 of Art. 14 of the Amendments to the Constitution of the United States, as herein construed and applied to extend and secure the alleged contracts sued on of 1872-1875, because it is an undue interference with the business and obligations of the defendant, which it owes to the public in state and interstate commerce; wherein, as applied and attempted to be enforced herein, that statute interferes with the lawful discretion of the plaintiff in error to conduct its business within the limits of the law; and whereby in attempting to place burdens, liens and conditions on and securing personal alleged contracts made as alleged in 1872-1875, and to tie down its general offices and shops at Palestine forever, its property is taken without due process of law, and it is denied the equal protection of the law by such illegal interference with its property.

This question is presented in our fifth assignment here (R., Vol. 3, p. 1347), and fifth specification of error in this brief.

This question was raised in the following manner:

In the answer it was set out that this was a large railroad, with 1106 miles of main line track, doing a large

business, and that Palestine was an interior small town where its business could not be conveniently dispatched, and that the Act of 1889 took its property without due process of law by interfering with its lawful discretion in the administration of the same. (R., Vol. 1, p. 138, and pp. 128 and 9.) This point was presented as the fifteenth objection, as set out in all of the bills above referred to in connection with question 1. There was a peremptory instruction requested which was overruled (R., 2, p. 511), and the point was presented on motion for new trial. (R., Vol. 2, pp. 571-575, Secs. 36-53 and 600 (c-1). The question was again presented to the Court of Civil Appeals in a motion for re-hearing (R., Vol. 3, pp. 1034 and 5, Secs. 32-34), and to the Supreme Court of Texas in the application for a writ of error. (R., Vol. 3, p. 1181, Sec. 15.)

(9) Plaintiff in error maintains that the Act of 1889, the Office-Shops Act (p. 229 of appendix), as construed and applied as securing the alleged personal contracts of 1872-1875, is in violation of Section 1 of Article 14 of the Amendments to the Constitution of the United States; in that, if such statute is applicable, it imposes great penalties of not less than $5000 per day for any infringement of the act, and constitutes an attempt to abridge the privileges and immunities of the defendant below and the plaintiff in error here, and to deprive it of its property without due process of law, and to deny the equal protection of the law, and to penalize it for resorting to the courts at the rate of $5000 per day, or since September 30th, 1911, to the present time, in an amount of over $10,000,000, and by the forfeiture of its charter, whereby such act, as construed and applied, is unconstitutional. This question is presented here in the thirteenth assign-

ment (R., Vol. 3, p. 1355), and is the thirteenth specification of error.

This question was raised in the following way: It was interposed as an objection to the testimony of each witness tendered by the plaintiffs to prove the alleged parol contracts of 1872-1875 (being Sec. 14 in each one of the bills of exception referred to and mentioned in connection with question 1 above), and the point was overruled by the court, and careful bills preserved. Section 1 of the Fourteenth Amendment in connection with this proposition was invoked by defendant in its answer (R., Vol. 1, p. 128d), and peremptory instruction was requested by the defendant, and the question here raised presented in its motion for new trial (R., Vol. 2, p. 615, Sec. 139), on motion for re-hearing (R., Vol. 3, p. 1038, Sec. 33), and presented to the Supreme Court of Texas in the application for a writ of error. (R., 3, p. 1180, Sec. 14.)

(10) The plaintiff in error maintains that the Office-Shops Act of 1889 (App., p. 229), is unconstitutional as applied and enforced herein; in that such act is applicable only to chartered railroads, and not applicable to individuals, receivers or other persons operating as rail common carriers or to any other persons or corporations whatsoever; and therefore violative of Section 1 of Article 14 of the Amendments to the Constitution of the United States, being legislation against a species or class not rightly classified on any legal ground; and in that it places a burden upon the species and class not placed upon other persons and corporations classifiable with it, thereby violating the prohibition of Sec. 1 of the Fourteenth Amendment prohibiting any State from passing any law denying to any person "the equal protection of the laws," and abridging the privileges and immunities of the de-

fendant, and depriving it of its property without due process of law. This question is contained in our fourteenth assignment here (R., Vol. 3, p. 1356, Sec. 14), and in our fourteenth specification of error.

This question was raised in the following way: When the plaintiffs below brought forward testimony, in an effort to prove the alleged contract of 1872-1875, objection was made as appears in Section 16 of all of the bills referred to in connection with question 1 above, the objection being in the exact terms of this question. The objection was overruled and all of the testimony admitted over the same and objections thereto.

The defendant presented a peremptory charge, which was overruled, and also in its motion for a new trial presented this question, which was again overruled (R., Vol. 2, pp. 571 to 575, Secs. 36-53, p. 601 (f-1)], and the point was again presented to the Court of Civil Appeals in motion for re-hearing (R., Vol. 3, p. 1036, Secs. 36 and 37) to the Supreme Court in an application for a writ of error. (R., Vol. 3, p. 1183, Sec. 16.)

(11) The plaintiff in error maintains that its charter of 1911 is a contract, and a contract for which it paid large considerations by assuming the burden of the Act of 1910 (Appendix, p. 232), and that this charter was taken out in August, 1911, with the benefit of the construction of the Supreme Court of Texas (which is the ultimate court of Texas) of the Act of 1889 in the case of K. C. M. & O. R'y v. Sweetwater (137 S. W., 1117, and 104 Tex., 329), wherein the Supreme Court of Texas held that a contract, made with a railroad for the location of its shops and offices, was personal, and remained such under the Act of 1889, and therefore was cut off by the fore-

closure proceeding, and did not bind a subsequent railroad purchasing at foreclosure.

It was contended by the defendant in error that it had taken out its charter under this decision, and that the construction of the Act of 1889 by the ultimate court of the State entered into the obligations of its contract and charer of 1911; wherefore to enforce the Act of 1889 as extending and securing the alleged contracts of 1872-1875 would be violative of the obligation of the charter contract of the plaintiff in error of 1911, and would give a construction to the Act of 1889 in conflict with Sub-Section 1 of Section 10 of Article I of the Constitution of the United States. This question is contained in the nineteenth assignment here (R., Vol. 3, p. 1359), and the nineteenth specification of error below.

This question was raised in the following way: The defendant plead that it had taken out its charter of 1911 under the obligations of the Statute of 1910 (App., p. 232), and that it took out this charter under the construction of the Act of 1889 announced by the Supreme Court of Texas, and finally ruled not later than June, 1911, the charter being taken out in August, 1911, the Supreme Court making its ruling in the case of K. C. M. & O. R'y v. Sweetwater, wherein it held in office-shops litigation that the Act of 1889 did not secure or make applicable a previous contract as against a purchaser at foreclosure sale, and that the Act of 1889 did not give security as against such purchaser and the property for the performance of a contract to locate the shops and offices at a place. The defendant also plead that under the burdens of the Act of 1910, under which it had take out its charter, it had paid out a million dollars, assuming certain burdens imposed by that statute. (R., Vol. 1, pp.

132-137.) The charter of the defendant had been introduced by the plaintiffs showing its incorporation in August, 1911, and the location of its general offices at Houston, Texas. (R., p. 701, Vol. 2.) The defendant proved that it had paid out not less than one million dollars under the Act of 1910, under which its charter was taken out. (R., Vol. 3, p. 945, Sec. 35.) In its pleading the defendant invoked the contract clause of the Constitution of the United States, setting up that the construction by the Supreme Court of Texas had entered into the contract (R., p. 137, Vol. 1), to wit, its charter. This question was presented in the motion for new trial, which constituted the assignments of error in the Court of Civil Appeals. (R., Vol. 2, p. 603, Sec. 111.)

(12) The plaintiff in error maintains that the Act of 1889, as construed and applied herein, is unconstitutional and void, wherein the alleged contracts of 1872-1875 are supposed to be secured, tied down and extended and made enforceable forever. This construction and this enforcement of such alleged contracts violate the commerce clause of the Constitution of the United States (Const., Sub-sec. 3 of Sec. 8, Art. I), giving Congress the power to regulate commerce between the States and with foreign countries, and this without regard to the acts of Congress exercising this power, as well as with regard to the same. This question is founded on the tenth assignment here (R., Vol. 3, p. 1347), and tenth specification of error.

This question was raised in the following way: The defendant (the plaintiff in error here) plead that it was a large road, engaged in interstate commerce, having 1106 miles of main track; that Palestine was a small interior town; that it owed extensive duties in interstate

commerce, and that to tie its shops and offices down in Palestine forever would interfere with its operations in interstate commerce and the commerce clause of the Constitution of the United States giving Congress control of these matters and the acts of Congress regulative thereof. (R., Vol. 1, pp. 138-140.) On trial it introduced testimony, which was not contradicted, showing that one-half of its business was interstate and foreign commerce, and that such business could not be equally well dispatched from Palestine. (R., Vol. 3, pp. 965-8, Sec. 44.)

An instruction for an issue on this point was presented and overruled. (R., Vol. 2, p. 520.) This point was presented in motion for new trial. [R., Vol. 2, p. 600 (e-1).] A motion for re-hearing was made in the Court of Civil Appeals (R., Vol. 3, p. 1047, Sec. 71), and the point presented to the Supreme Court in the petition for writ of error. (R., Vol. 3, p. 1241, Sec. 36.)

(13) Plaintiff in error maintains that the Office-Shops Statute of 1889 (p. 229 in appendix), even if it could be applied to extend and secure *in rem* and against purchasers of the property the alleged personal contracts of 1872-1875, herein sued on, could not constitutionally be applied, as it was applied, to create property rights and annex them to such alleged contracts of 1872-1875, without violating Section 1 of the Fourteenth Amendment to the Constitution of the United States; and that in so construing and applying said Act of 1889 to transactions which did not show any contract or any contract property right, property of the plaintiff in error was taken and burdened without due process of law, by the mere enactment of the Act of 1889 as construed, and its application to alleged agreements as constituting contracts; when such alleged agreements did not in any respect con-

stitute contracts, and were not ever shown in the evidence as contracts; in that:

(*a*) The alleged agreements of 1872 were alleged as dependent upon Judge Reagan's political activities in inducing the people to vote a bond issue, such political activities never being a consideration for a contract, or constituting the basis of a contract or the basis for acquiring any property right, it being impossible that the inducing the people or the public executives by stump speeches or otherwise to enter into a contract can be consideration for a contract, and violative of the foundation of government to so suppose.

(*b*) Because as to the alleged contract of 1875, it included the alleged agreement of 1872 and all of its vices, and the only other further consideration alleged was that the people were to furnish rent houses, but it was neither alleged nor shown that they were to furnish rent houses for any definite time.

(*c*) Because in the evidence it was nowhere shown that it was agreed that Judge Reagan's political services should be a consideration, or that the rent houses should be rented for any definite time, but, on the contrary, it was shown without dispute that there was a contract in writing between the county and the railroad for the issue of the $150,000 in bonds; and because such contract in writing provided that two considerations should be furnished by the railroad, and two only, to wit, to build into Palestine and to put up a depot at a certain place; and because it was shown in the evidence that both of these considerations had been complied with, and the County Court of Anderson County, having jurisdiction of this matter, had decreed that the shops were no part of the contract, and that the railroad had completely complied

with all of its undertakings; the general offices being then and remaining at Houston, and neither the general offices nor the shops being mentioned in the written contract, and neither in the decree of the County Court, except to state that the shops were not involved in the contract. This point is founded on the sixteenth and eighteenth assignments here. (R., pp. 1357, 1358.) These are the sixteenth and eighteenth specifications of error.

This question was raised in the following way:

The defendant plead that the contract was in writing and of the character stated above, and that the election had been held on it and sustained, and that the road had built in and secured the depot, and the County Court had decreed that the railroad had done everything it undertook to do, and had not agreed to place the shops at Palestine, and that in 1874 the county instituted the suit in an attempt to overthrow the written contract, and had lost the suit, and the case had been affirmed against the county by the Supreme Court of Texas, holding that the written contract was complete evidence of the whole transaction. (R., Vol. 1, 140-143.) No testimony was adduced that Judge Reagan had ever agreed that his political influence should be a consideration for the three-party agreement, plead as made in 1872, and there was no evidence whatever that the rent houses were to be rented for any definite time. But the testimony only went to the effect that an agreement had been made that the county should issue $150,000 of bonds, and that Judge Reagan had said at the time this agreement was made that he would aid in canvassing the matter before the county, and the evidence showing the written contract with the county submitted to the county voters and approved by them, and decreed by the County Court having final juris-

diction of the matter to have been performed as stated above.

On trial, when the plaintiffs offered testimony in support of their alleged contracts which they claimed were in parol, the defendant objected that there was a written contract not subject to variation, and that after the lapse of forty years what inducements outside of the written contract there were could not be proved, and that Judge Reagan's political services could not be the basis or the consideration for any contract; that the County Court had adjudicated the whole matter, and that the plaintiffs rely upon the Act of 1889, as construed by them, to constitute a right and to deprive it of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States. These objections were all overruled and all of the testimony admitted over them and bills of exception taken. In the bills of exception these objections were presented under heads 1, 2, 3, 4, 5, 6, 7, 8, 8a and 14. The same point was presented as against the testimony of every witness, and in all of the bills described in connection with question 1 above.

17a objection in each bill was that there could not be a contract binding forever, as plead, because that would be indeterminate as stating no time and not a contract, but terminable on option if contract at all, and shown in this case to have been terminated on option, if there was a contract. (Statement of bills in connection with question 1.)

A peremptory instruction was requested, which was overruled. (R., Vol. 2, p. 511.) On motion for new trial it was presented that Judge Reagan's political influence could not be a consideration as alleged [R., Vol. 2,

pp. 579 and 580, 564 (6)]; that the rent houses not being stipulated to be rented for a definite time were not a consideration (R., p. 579, pp. 580 and 609); and that therefore there could be no contract on either basis; that the written contract and the decree of the County Court and the absence of all evidence showed that there was no contract covering the offices and shops, and that it was a violation of Section 1 of the Fourteenth Amendment to apply the Act of 1889 for the security or extension of the alleged contracts of 1872-1875, because these were never alleged or proved to be contracts, and that to so apply the Act of 1889 would be burdening and taking property without due process of law, in that this would be a mere creation of a property right where there was none plead or proved, even in the way of unsecured personal contracts. This question was presented in the motion for new trial (R., Vol. 2, Secs. 6 and 8) in motion for re-hearing and to the Supreme Court.

(14) The plaintiff in error maintains that the District State Court did not have jurisdiction and power to entertain, try and decree in this suit, and that in entertaining this suit and decreeing the same and the higher courts in affirming such decree, the jurisdiction of the United States District Court for the Northern District of Texas has been invaded; in that such court and its predecessor, the United States Circuit Court, had acquired and had reserved exclusive jurisdiction, and still has jurisdiction over the litigation of the matters herein involved; having the power to reserve jurisdiction thereof, and having reserved jurisdiction thereof in foreclosing the mortgage of 1881 by its decree of May 4th, 1910. It is now maintained, as it was maintained on trial, that the U. S. Court rightly exercised the power to re-

serve, as it did, exclusive jurisdiction to determine the validity and priorities of any liens and burdens against the sold-out properties in the hands of the purchaser or his assigns, when claimed to originate under the sold-out railroad or by its act or contract, or that of some one prior in title, whether prior or subsequent to the foreclosed mortgage, as here claimed; and that such reservation of jurisdiction is a condition and term of sale made in the decree of foreclosure, and that it was warranted by the court, in effect, that such burdens or liens should be litigated in that court alone; and that this was a rightful exercise of the power and jurisdiction inherent in any court and in the United States Circuit Court, now the United States District Court. It being maintained as a legal proposition that a court has a right to retain jurisdiction, in foreclosing (over burdens) liens and rights against the foreclosed property. This question is founded on the first assignment here (R., Vol. 3, p. 1344), and first specification of error.

This question was raised in the following manner: The defendant filed a plea to the jurisdiction, wherein it set up that on February 25th, 1908, the Mercantile Trust Company filed its bill on the third mortgage against the I. & G. N. Railroad Company in the Circuit Court of the United States for the Northern District of Texas for foreclosure and for a receivership, and that the receivership was granted and T. J. Freeman appointed Receiver. (R., Vol. 1, 69-70.) That the Farmers Loan & Trust Company, Trustee, intervened in this suit, and filed its bill for a foreclosure of the second mortgage of 1881, aggregating the principal amount of $10,391,000, and that Freeman was also appointed Receiver on this bill of intervention (R., 70-72), and that Gould and others in-

tervened, and that all of the suits were consolidated and Freeman appointed Receiver in the consolidated suits (R., 72-73); that the receivership was run along, but that on May 10th, 1910, said second mortgage was decreed foreclosed and said property ordered sold by Master Commissioner (R., 74-76); that the sale was deferred from time to time, but was finally made in June, 1911; that the I. & G. N. Railway Company, the plaintiff in error here, was chartered the 8th of August, 1911, and its charter located its general offices at Houston, Texas (R., 76-78); that Nicodemus bought the properties at the sale, and transferred his purchase to the I. & G. N. Railway Company to whom a conveyance was made under the order of the court (R., 78-80); that in the decree of foreclosure the United States Circuit Court expressly reserved jurisdiction of the litigation of any claims *in rem* against the property or burdens thereon; copy of the decree was made a part of the plea to the jurisdiction, it being stated in the decree that the Commissioner should give notice to all persons having claims on the property to present the same (R., 79), and that the purchaser should have the right within six months after completion of the sale to elect whether or not it assumed any contract of the railroad company, and that all questions not by the decree disposed of were reserved for the court; the court stating in the decree that it reserved "jurisdiction of this cause and the property affected by this decree for the final disposition of all such questions and matters," and otherwise and generally in the decree the court reserved jurisdiction by direction and by implication of the properties for the purpose of enforcing the decree in all its terms and controlling all litigations securing to fix a burden or servitude upon the properties

or to enforce any contract affecting the same which had been denounced by the purchaser. (R., 79-80.) This plea to the jurisdiction and the identical plea in bar were tried by the court by agreement without jury, and all of the decree and documents thereon referred to were introduced in evidence, and the court overruled the plea, and the defendant excepted. (R., Vol. 2, p. 552.)

As a special plea in bar and as constituting Section VIII of its answer, the defendant repeated its plea to the jurisdiction. (R., 97-110.) This plea in bar was presented in identical terms in the plea to the jurisdiction. All of the documents, decrees and deeds referred to in the plea in bar and the denunciation of these contracts, authorized by the decree, were proved in evidence and also agreed on. (R., Vol. 3, pp. 875 to 932; Vol. 3, pp. 631-634.) None of these were disputed.

The point that the Federal Court alone had jurisdiction of this case was presented in the motion for new trial in the terms of this question. (R., Vol. 2, p. 563, Sec. 3.) The point was again presented in the motion for a rehearing (R., Vol. 3, pp. 1024-5, Secs. 2, 3 and 4), and to the Supreme Court of Texas, in an application for a writ of error. (R., Vol. 3, p. 1127, second assignment.)

II.

SPECIFICATIONS OF ERROR.

(Assignments of Error, Vol. 3 of R., pp. 1344-1359.)

(1)

The Court of Civil Appeals erred in holding that the District Court of the State of Texas had jurisdiction to try this case, and in holding that the jurisdiction did not

exist exclusively in the United States District Court for the Northern District of Texas, the successor to the United States Circuit Court for that District;

Because the United States Circuit Court for the Northern District of Texas foreclosed the second mortgage of the International & Great Northern Railway Company, executed in 1881, by its decree of May, 1910;

And because that court, so foreclosing this mortgage, had the power to reserve, as it did, the exclusive jurisdiction to determine the validity and priorities of any burdens, liens, conditions, duties or servitudes imposed on the franchises or other property of the sold-out railroad;

And because that court and all courts making a foreclosure, especially of complicated properties, has the power to reserve to itself, in the decree, the exclusive power over litigation of such matters asserted under or in connection with the acts of the foreclosed debtor or its predecessor in title, and the power to reserve to itself the disposition of them in supplemental litigations instead of delaying the case to bring all these matters in before the decree of foreclosure and sale thereunder.

And because such reservation of jurisdiction is, as it were, a contract and warranty of the court foreclosing, that the litigation of such matters shall be exclusively in the court of foreclosure;

And because this reservation was made in the decree of foreclosure referred to, covering all the matters in this litigation, and being so made, is for the benefit of the purchaser at the foreclosure sale under the decree of foreclosure, which was the International & Great Northern Railway Company, the plaintiff.

(2)

The Court of Civil Appeals erred in holding that the District Court of the State of Texas had jurisdiction of this case, and in holding that the jurisdiciton was not exclusively in the United States District Court for the Northern District of Texas, successor to the United States Circuit Court, for that district; and in denying the right, title, interest, privileges and immunities of plaintiff in error established by said court;

Because the litigation in the State Court is in conflict with and a denial of the right, title, privileges and immunities of the plaintiff in error as protected by the decree of the United States Court for the Northern District of Texas, entered in the exercise of powers conferred on that court by the Constitution of the United States; that court by its decree foreclosing the properties of the International & Great Northern Railroad now owned by the International & Great Northern Railway Company; and as protected by Section 237 of the Act of Congress of March 3, 1911 (33 Stats. 1156), re-enacting Art. 709 of the Revised Statutes of the United States;

And because the International & Great Northern Railway Company acquired the properties of the sold-out International & Great Northern Railroad Company in 1911 by sale under the decree of foreclosure of the United States Circuit Court for the Northern District of Texas, wherein it was provided that any such contracts as the alleged contracts herein, asserted and affirmed by the Court of Civil Appeals, could be denounced by the purchaser of the property or its assigns, if any such alleged contracts existed;

And because the plaintiff in error purchasing the property under the decree of forclosure denounced these alleged contracts, if they existed in accordance with the terms of the decree;

And because this decree reserved the litigation of the matters herein exclusively for the foreclosing court.

Whereby, the plaintiff in error was denied all of its rights, titles, privileges and immunities under the decree of foreclosure of the United States Circuit Court for the Northern District of Texas, and presents that the decree and judgment of the Court of Civil Appeals is in conflict therewith, and draws the same in question.

(3)

The Court of Civil Appeals erred in refusing to hold that Articles 6423-6424-6425 of the Revised Statutes of the State of Texas, as construed and applied by that court in this case, did impair the obligation of the contract evidenced by the mortgage of 1881, made by the International & Great Northern Railroad Company, and in holding that such articles are not in violation of subsection 1 of Section 10 of Article 1 of the Constitution of the United States.

Because the alleged contracts herein involved and upon which the decree stands were claimed to be made in 1872 and 1875;

Because the mortgage of 1881 mortgaged all of the properties then owned or thereafter to be acquired of the International & Great Northern Railroad Company and its charter. This mortgage was foreclosed in 1910, and all of the properties of the International & Great Northern Railroad Company, including all of its fran-

chises and its charter, being all covered by this mortgage, were sold out at a loss to the mortgagees;

And because the plaintiff in error, as purchaser under that foreclosure sale, is the assignee of all the rights and interests whatsoever a loss to the mortgagees;

And because the plaintiffs below and defendants in error here and the Court of Civil Appeals maintain that the Act of 1889 (Revised Statutes of the State of Texas 6423-6424-6425) makes prior in law rights, if any, which were junior in time to said mortgage by giving security for the alleged contracts of 1872 and 1875 by the Act of 1889 (Revised Statutes of Texas 6423-6424-6425) by way of a servitude, burden or duty against the properties of the sold-out railroad, and by extending the terms of the contracts, if any.

Whereby it is presented that by such subsequent act (as construed and as enforced by the Court of Civil Appeals), the obligation of the contract evidenced by the mortgage of 1881 is violated.

(4)

The Court of Civil Appeals erred in affirming the judgment of the trial court and in (as a means to that affirmance) failing and refusing to hold that Revised Statutes 6423-6424-6425 of the State of Texas of 1911, first enacted in 1889, is unconstitutional and invalid as applied in this case by that court;

Because the plaintiffs sued herein on certain alleged contracts alleged to have been made in 1872 and 1875, long before the enactment of the statute relied on;

And because such alleged contracts were when made in 1872 and 1875 admittedly personal;

And because they are now maintained to be secured by the Act of 1889 by such act imposing a duty, lien, burden or servitude upon the properties of the sold-out International & Great Northern Railroad Company, acquired by the plaintiff in error under foreclosure sale of the mortgage of 1881;

And because it is now maintained by the Court of Civil Appeals that the Statute of 1889 did burden, add to, extend and define the alleged contracts of 1872 and 1875;

Whereby it appears that such Act of 1889, as construed and applied in this case, is unconstitutional and invalid, and violates sub-section 1 of Section 10 of Article 1 of the Constitution of the United States prohibiting a State from passing a law impairing the obligations of contracts; the contention of the plaintiffs below and defendants in error here being that their alleged contracts of 1872 and 1875 were first secured and extended by the Act of 1889, so that they thereby became secured against and a burden upon the property, and perpetual obligations upon all persons subsequently purchasing, owning or operating the same.

(5)

The Court of Civil Appeals erred in holding that the Act of 1889, now Articles 6423-4-5 of the Revised Statutes of Texas of 1911, is not unconstitutional and void as construed and applied by that court, and as necessarily construed and applied in affirming the decree of the trial court;

Because this act is violative of Section 1 of the Fourteenth Amendment to the Constitution of the United

States, which provides that no State shall deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the law;

And because this statute, as applied in this case, and as resulting in the decree in this case, requiring the plaintiff in error to keep and maintain perpetually and forever its general offices as defined in the Statute and its shops at Palestine, creates an undue interference with the business of the plaintiff and with its duties to the public; to its stockholders and to other persons; and an undue interference with its exercise of those duties and of its powers to exercise the same, in state and interstate commerce;

Wherein the statute attempts to interfere with the lawful discretion and power of the plaintiff in error (as it is construed and applied in this case), to conduct its business within its own discretion within the limits of law;

And wherein it is now attempted by this Statute of 1889, subsequent to the alleged contracts of 1872 and 1875, and in security of the same and enlargement thereof, to place burdens, liens and obligations upon the properties and upon the plaintiff in error;

Thereby denying to the plaintiff in error the equal protection of the law, and taking its property without due process of law by this illegal interference and command that it shall forever and perpetually (without regard to exigencies which may arise and its duties and powers) maintain its general offices and shops and roundhouses at Palestine, Texas.

(6)

The Court of Civil Appeals erred in refusing to hold

that the foreclosure sales of all of the properties of the International & Great Northern Railroad Company made in the United States Circuit Court and by its authority in 1879, under decrees made by it, foreclosng four mortgages (including mortgages of date prior to the alleged contracts of 1872 and 1875) did not vest in the purchasers at such foreclosure sales and their assigns and the plaintiff in error, the franchises and rights both to do and to be of the sold-out railroads and of the sold-out International & Great Northern Railroad, then sold out, and all the properties and the charter and charters then owned by the International & Great Northern Railroad Company; free of every obligation of the alleged contracts herein sued on and established as of 1872 and 1875, and claimed to have been secured and extended by the Act of 1889;

Because, under Article 4912 of Paschal's Digest of the Laws of Texas enacted by the Legislature of Texas on December 19th, 1857, anterior to all of the transactions herein involved, and carried into Articles 4260 of the Revised Statutes of Texas of 1879, the purchasers at the foreclosure sales of 1879 by the force of this statute as well as by the terms of the foreclosing mortgage, and independently of the same, and their assigns, because the owners of all of the properties of the sold-out railroad and of all of its charters and charter, and franchises to be, free of all obligations of the sold-out railroad and the constitutents out of which it had been consolidated, being under this statute relieved of any obligation to take out a new charter, and not taking out any new charter, for which at that time there was no provision, i. e., that a new charter should be taken out to operate the properties of the sold-out road, the object of R. S. 4260

of Revised Statutes of 1879 of Texas (Article 4260 the same as Article 4912 of Paschal's Digest) being to free the railroad and the properties of every obligation and contract and to foreclose the charter or charters and carry them forward as the property of the purchasers at foreclosure;

And because all of the properties whatsoever of the International & Great Northern Railroad were sold out and foreclosed by and under the decrees entered in 1879;

And because the Court of Civil Appeals, in affirming the decree of the trial court, has violated Sub-section 1, Section 10, of Article 1 of the Constitution of the United States prohibiting the passage of a law violating the obligation of a contract, in that said court has construed such statute to revive and to secure and extend personal contracts eliminated as to the franchise to be and as to all of the properties by the foreclosure proceedings of 1879 and the sale thereunder directed and had by the United States Circuit Court for the Western District of Texas;

And because the four mortgage contracts foreclosed in 1879 were executed subsequent to the statute of December 19, 1857, and with the benefit of it, and their obligations could not be violated by the subsequent statute of 1889, as enforced and construed by the Court of Civil Appeals;

And because such foreclosure sales having been had by the Interational & Great Northern Railroad Company in 1881 mortgaged all of its franchises and charter and properties then in its possession or thereafter to be acquired, which mortgage was foreclosed in 1910 in the United States Circuit Court for the Northern District of Texas, under which foreclosure and sale thereunder the plaintiff in error holds;

Therefore the Court of Civil Appeals, in applying the subsequent Act of 1889, has violated the obligations of the mortgage contract of 1881, made by a corporation freed by the foreclosure proceedings of 1879 of all the obligations, if any, of the alleged contracts herein sued on of 1872 and 1875;

And because the Court of Civil Appeals, in affirming the decree of the trial court, has applied the Statute of 1889 in violation of the decrees of foreclosure and sales thereunder and decrees of approval made by the United States Circuit Court in 1879 and the decree of the United States Circuit Court of the Northern District of Texas made in 1910 foreclosing the mortgage of 1881;

And because the court erred in holding that in this collateral proceeding the good faith of the decrees of foreclosure of the United States Circuit Court made in 1879 and the decrees of that court confirming the sales made under the decrees of foreclosure, could be drawn in issue and the good faith thereof questioned; whereby there has been a denial of the rights, titles, privileges and immunities of the plaintiff in error holding under the foreclosure and decrees of 1879 and the foreclosure and decrees of 1910-1911 of the United States Circuit Courts and a denial of its rights, titles and privileges and immunities founded on such decrees, lawfully entered in the exercise of the powers conferred on those courts by the Constitution of the United States, and as protected by Section 237 of the Act of March 3, 1911 (*1*33 Stats., 1156), re-enacting Section 709 of the Revised Statutes of the United States.

(7)

The Court of Civil Appeals erred in affirming the de-

cree of the trial court, and in holding, as a necessary predicate to the affirmance of such decree, that the alleged contracts of 1872-1875, upon which the decree stands, are binding upon the plaintiff in error by force of the Act of 1889, now carried into Art. 6423-4-5 of the Revised Statutes of Texas of 1911, and are binding upon its properties as obligations thereon, and as a condition of the operation of the same in the business of a common rail carrier.

Because, in 1879, before the passage of the Act of 1889, in the Circuit Court of the United States for the Western District of Texas, these alleged contracts upon which the decree against the plaintiff in error stands of 1872 and 1875, had been wholly set aside as personal obligations, if they ever existed, or ever were personal obligations as against the International & Great Northern Railroad Company, and had become wholly extinguished and unenforcible;

And because, by reason of the facts hereinbelow stated, to now revive and enforce, the same would violate the obligations of the alleged contracts sued on, and of the contracts evidenced by the court mortgages prior to 1879, and the two mortgages prior to the first of the alleged contracts of 1872, and of the contract evidenced by the mortgage of 1881, and would draw in question, contradict and impeach the rights, titles, privileges and immunities of the plaintiff in error under and by right of the decrees of the United States Circuit Courts, and violate the equal protection of the law to which the plaintiff in error is entitled; and would deprive the plaintiff in error of its property without due process of law, all by reason of the facts now stated, and all of which are without contradiction in the evidence.

(1) The Houston & Great Northern Railroad was incorporated by the statute of the State of Texas in 1866.

(2) The International Railroad was incorporated by the statute of the State of Texas in 1870.

(3) The legislative charters of these two roads authorized them to consolidate with any railroad, and their consolidation was completed by agreement in September, 1873, at which time the consolidated railroad under these consolidated legislative charters took the name of the International & Great Northern Railroad.

(4) The International & Great Northern Railroad operating under these consolidated charters, consolidated by agreement of the two roads, and continued to exist until sold out under mortgage foreclosure of 1879, below set out, whereby its charter and charters passed to the purchasers thereat; and the properties were again sold out under the mortgage of 1881, which was foreclosed by decree of the United States Circuit Court for the Northern District of Texas, in May, 1910, and sale made thereunder, of all of its properties in 1911 to the plaintiff in error. The International & Great Northern Railway Company, incorporated in 1911, and the International & Great Northern Railroad Company became extinct by such sale and foreclosure in 1910-1911, and finally went out of action at that time.

(5) The alleged contracts sued on and which are carried into the decree herein affirmed are alleged to have been executed by the Houston & Great Northern Railroad Company in March and May, 1872, and by the consolidated International & Great Northern Railroad Company about June, 1875.

(6) The Houston & Great Northern Railroad Company, on the 15th of February, 1872, executed a mortgage

to secure bonds for the principal amount of $4,084,000.00, conveying to Taylor and Dodge, Trustees, to secure the same, all of its properties then owned or to be owned, including all of its franchises and rights. At the suit of Taylor and Dodge, No. 137 in Equity, in the United States Circuit Court for the Western District of Texas, on April 15, 1879, as against the defendants the Houston & Great Northern Railroad Company and the International & Great Northern Railroad Company, a decree of foreclosure was entered of this mortgage, and all of the properties were adjudged to be sold and were duly sold, and the report of sale confirmed by the court on August 4, 1879, and the properties included in the mortgage conveyed by direction of the court to Kennedy and Sloan, Trustees, the purchasers thereof, in consideration of $500,000.00 in gold. The above mortgage was executed before the date of any of the agreements or alleged contracts herein involved.

(7) On the 15th of January, 1874, the International Railroad executed a mortgage to Barnes and Pearsall as Trustees, and on the same day the Houston & Great Northern Railroad Company executed its mortgage to Barnes and Pearsall as Trustees (both being then in fact consolidated into the International & Great Northern Railroad Company), the first mortgage being to secure the principal amount of $2,448,000.00, and the second mortgage being to secure the principal amount of $3,062,000.00. Barnes and Pearsall, as Trustees, sued the International & Great Northern Railroad Company for foreclosure of these mortgages, and by decree of the United States Circuit Court for the Western District of Texas, dated August 4, 1879, they were foreclosed and all of the properties thereby covered directed to be sold.

These mortgages covered all of the properties owned or to be owned, and all of the franchises whatsoever of the railroads, and thereafter the properties were duly sold and the report of sale confirmed by the court on October 14, 1879, and the properties conveyed by the Master, in compliance with these decrees, to the purchasers, Kennedy and Sloan, Trustees. These mortgages covered all of the properties owned or to be owned by either corporation, and all of the franchises.

(8) On the 1st of April, 1871, the International Railroad executed a mortgage to Stewart and Osborn, Trustees, conveying to them all of the property owned or to be owned, and all of the franchises, including the charter, to secure the bonded indebtedness of the principal amount of $4,224,000.00, which mortgage at the suit of Stewart and Osborn v. International Railroad and the International & Great Northern Railroad et al., 138 Equity, was foreclosed by the United States Circuit Court for the Western *Circuit* of Texas, by decree entered in Equity No. 138, April 15, 1879, and the properties ordered to be sold, and the properties having been sold for $500,000.00, the sale was confirmed and the Special Master, under these decrees, made a conveyance to the purchasers, Kennedy and Sloan, Trustees, of date October, 1879, conveying all the properties sold.

(9) Kennedy and Sloan, Trustees, the purchasers of all of the properties, *i. e.,* all of the properties of the railroad foreclosed as above, being all of its properties; executed a deed of conveyance, after the consummation of all of the above recited matters, dated November, 1879, wherein they conveyed all of the properties bought to the International & Great Northern Railroad Company.

(10) Under the laws of the State of Texas then ex-

isting, and under the provisions of Articles 4912 of Paschal's Digest, and Article 4260 of the Revised Statutes of Texas of 1879, the purchasers and their assigns of any sold-out railways were relieved of taking out a new charter, but were authorized to adopt the charter or charters of the sold-out railroad or railroads, and operate the properties under it, which charter was in effect by this statute (existing at and before the execution of the mortgages and the creation of the charters involved), subjected to the mortgage; there being then no provision for the creation of a new railroad charter to operate the properties of a sold-out railroad, and the effect of the statute being to eliminate all unsecured obligations and personal contracts as against the sold-out railroad, and as against its charter and to make the purchasers of the sold-out railroad owners and corporators of the charter or charters of the sold-out railroad, and to constitute these charters a new, separate and independent corporation, free of all of such obligations, if any, as are sued on herein.

(11) In 1881 the International & Great Northern Railroad Company, as thus re-constituted, executed its mortgage, duly authorized by its stockholders and directors, which was foreclosed in the United States Circuit Court for the Northern District of Texas, in 1910, and sale had thereunder, and approved in 1911; by which mortgage it was contracted and agreed that all of the then properties of the International & Great Northern Railroad Company then owned or to be owned, and its charters were mortgaged to secure a bond issue for the principal amount of $10,391,000.00. Under this last foreclosure the International & Great Northern Railway Company purchased and acquired all of the properties mortgaged, which included all of the properties of the railroad owned

and to be owned, including its charter and franchise to be.

(12) In 1889 the legislature passed the statute known as the General Office and Shops Statute, now Arts. 6423-4-5, of the Revised Statutes of 1911; construed by the Court of Civil Appeals, in affirming the decree of the trial court, to have secured the alleged contracts of 1872 and 1875, and to give security to those contracts prior in law, though the security was created subsequent in time to the contracts evidenced by four mortgages foreclosed in 1879, and though two of these mortgages were prior in time to the earliest of the alleged contracts herein involved.

The plaintiff in error, the International & Great Northern Railway Company, is assignee of and entitled to all of the rights protected by the four mortgage contracts foreclosed in 1879, and of the purchasers at such foreclosure, eliminating the alleged contracts sued on, and to all of the rights of the reconstituted International & Great Northern Railroad Company as reconstituted under and by these foreclosures and sales, and as free of the alleged contracts sued on; and to all of the rights of the mortgagees of the mortgage contract of 1881 made by the International & Great Northern Railroad Company which had been freed from the alleged contracts sued on.

Wherefore, the plaintiff in error represents that the decree of affirmance of the Court of Civil Appals affirming the decree of the trial court violates Sub-section 1, of Section 10, of Art. 1, of the Constitution of the United States, forbidding any State to pass a law in violation of the obligations of a contract; in that the obligations of the alleged contracts of 1872-1875 and the five mortgage contracts are all added to, modified and changed, by the effect given to the Act of 1879.

And wherefore the plaintiff in error presents that it is protected by the respective decrees of the United States Courts above set out, entered in the exercise of powers conferred on those courts by the Constitution of the United States, and that it acquired the properties of the sold-out International & Great Northern Railroad Company under these decrees.

And, wherefore, the plaintiff in error invokes its right, title and immunities conferred on it by such decrees, and derived under them and Section 237 of the Act of March 3, 1911, of Congress (33 Statutes, 1156), re-enacting Section 709 of the Revised Statutes of the United States.

Wherefore, the plaintiff in error invokes Section 1, of the Fourteenth Amendment to the Constitution of the United States, as having been violated by the decree of the Court of Civil Appeals affirming the decree of the trial court, whereby, unless relief will be given, it will be denied the equal protection of the laws, and deprived of its property without due process of law.

And wherefore, the plaintiff in error also invokes the decrees of the various United States Courts set out above, still in full force and effect, and attempted to be collaterally impeached and set aside by the decrees of the Court of Civil Appeals.

(8)

The Court of Civil Appeals erred by failing to hold that the trial court erred in refusing to give the plaintiff in error's requested peremptory instruction 1:

Because the Trustee and bondholders under the mortgage of 1881 took their liens without any notice, as shown in the evidence, and without proof of any notice of the al-

leged contracts set up by the defendants in error, as of date 1872 and 1875; being then only personal contracts unsecured, if contracts at all.

And because the plaintiff in error purchased under the foreclosure of the mortgage of 1881, and succeeded to all of the rights of the Trustee and bondholders therein, and thereby acquired title free from the operation of such alleged contracts and of the Statute of 1889 (Revised Statutes of Texas of 1911, Articles 6423-4-5), passed subsequent to the attaching of the mortgage lien of the mortgage contract of 1881.

And because to enforce the Statute of 1889 (as it has been enforced in this case and must be enforced to support the decree of the trial court), violates Sub-section 1, of Section 10, of Article 1, of the Constitution of the United States, prohibiting any State from passing a law impairing the obligations of contracts.

And because of the action of the Court of Civil Appeals in affirming the decree of the trial court is violative of Section 1, of the Fourteenth Amendment to the Constitution of the United States, providing that no State shall pass any law depriving any person of life, liberty or property without due process of law; in that by such legislative enactment in 1889, as construed, the rights of the bondholders and the mortgagees lawfully contracted in 1881 (and of whom the plaintiff in error is assignee as purchaser under foreclosure) are limited and impaired.

(9)

The Court of Civil Appeals erred in affirming the decree of the trial court and in refusing to maintain that the alleged contracts sued on of date of 1872 and 1875

are to be measured and determined by the laws and statutes existing at the time of their creation, and in refusing to maintain that the adding of more extensive obligations thereto by the subsequent Act of 1889, as construed and applied by the court, is violative of Sub-section 1, of Section 10, of Article 1, of the Constitution of the United States, prohibiting any State from passing any law impairing the obligation of a contract.

Because the Act of 1889, Articles 6423-4-5, of the Revised Statutes of 1911, commanly known as the Office-Shops Act (by the construction of the court necessary in order to maintain the decree of the trial court) modified, extended and secured the alleged personal contracts of 1872 and 1875 herein involved, and enforced in the decree, by securing them *in rem*, or making them inhere in or be a duty on or a servitude upon or run with the properties now owned by the defendant, and by adding to the obligations, if any, of such alleged contracts, and violating the same, and extending and re-defining the term "General Offices" as understood under the laws and customs existing in 1872 and 1875, and by adding numerous obligations and re-defining and stating contracts for the parties such as they never made for themselves, and by attempting to make a new and more extended contract for the parties, if any there ever were, over and beyond those alleged to have been made in 1872 and 1875.

(10)

The Court of Civil Appeals erred in affirming the decree of the trial court, and erred in holding (as a necessary means to such affirmance) that by the operation of the General Office and Shops Statute of 1889 (R. S., 6423-4-5),

plaintiff in error is forever bound to keep and maintain its general offices, machine shops and roundhouses at Palestine, and erred in holding that the statute so construed creates an obligation running with the properties of the road forever;

Because the statute so construed is in violation of and in conflict with Sub-section 3, of Section 8, of Article 1, of the Constitution of the United States, conferring upon Congress the power to regulate commerce among the States with foreign nations and the Indian tribes.

And because the consequence of this ruling was to deprive plaintiff in error of the power to so regulate its affairs as best to serve the interests involved in interstate and foreign commerce; and to place a perpetual burden upon such commerce;

And because this interference (by this statute so construed and enforced), is not a matter of mere indirect police regulation, but is an attempt to regulate in an illegal mannner and an attempt to bind down at Palestine forever the general offices as defined in the statute, and shops and roundhouses forever; thus illegally interfering with the direct means of operating this large railroad in interstate and foreign commerce, and thus illegally interfering forever with terminals and the ability of the plaintiff in error to comply with the Hours of Service Law and the other acts of Congress; whereby the field exclusively reserved for Congress by the Constitution of the United States is invaded, and whereby the acts of Congress are invaded;

And because it was proved that not less than one-half of the carriage of persons and property made by this large railroad was in interstate and foreign commerce.

(12)

The Court of Civil Appeals erred in sustaining the action of the trial court wherein the trial court refused to submit as a special issue to the jury (requested subject to other positions taken) whether or not to require the International & Great Northern Railway Company to forever maintain its general offices at Palestine would place a burden upon interstate commerce, as requested in special issue 7 presented by the railway company and refused.

Because the plaintiff in error, under Sub-section 3 of Section 8 of Article 1 of the Constitution of the United States, and the laws of the United States enacted in pursuance thereof, had the right to have this issue of fact determined by the jury subject to its contentions previously taken that this was a matter of law, and not yielding such contentions; that is, had the right to have the jury determine whether or not the requirements that plaintiff in error should forever maintain its general offices and the offices of each of the persons mentioned in the Act of 1889 (R. S. of Texas 6423-4-5) at Palestine would be a restraint of and burden upon interstate commerce.

(13)

The Court of Civil Appeals erred in failing and refusing to hold that the Act of 1889, known as the Office-Shops Act, carried into Articles 6423-4-5 of the Revised Statutes of Texas, is unconstitutional and invalid and violative of Section 1 of Article XIV of the Amendments to the Constitution of the United States, and erred in affirming the decree of the trial court based on this statute;

Because the statute imposes penalties for its violation of $5,000 per day;

And because such statute, on its face, by reason of these great penalties, constitutes an attempt to abridge the privileges and immunities of the plaintiff in error, and to deprive it of its property without due process of law, and denies to it the equal protection of the laws by penalizing it and threatening to penalize it at the rate of $5,000 per day, in the aggregate millions of dollars, if it should resort to the courts to resist such an action as this, as it does; or if it should refuse to obey and observe such statute;

And because the Act of 1889 above mentioned has been construed to change and modify the obligations of the contract, if any, made in 1872 and 1875;

And because the plaintiff in error has refused to comply with said Act of 1889 as construed and as applied by the Court of Civil Appeals to the alleged contracts of 1872 and 1875;

Whereby it is apparent that the act is unconstitutional, and is void; and that upon grounds other than that of the extreme penalties, it is unconstitutional, and that at least its constitutionality is doubtful on such other grounds.

Wherefore, it is now presented that this act is unconstitutional and void by reason of the excessive and great penalties therein contained.

(14)

The Court of Civil Appeals erred in not holding and in refusing to hold that the so-called Office-Shops Act of the Legislature of Texas of 1889, now carried into the

Revised Statutes of Texas as Articles 6423-4-5, is unconstitutional and void;

Because this act is by its terms applicable only to chartered railroads, and is not applicable to individuals, receivers, or other persons operating rail carriers; or to other persons or corporations in any business engaged; and so violates Section 1 of Article 14 of the Amendment to the Constitution of the United States as being directed against a species or class not rightfully classified on any legal ground; and because the act as construed places a burden on a species or class, to wit, on chartered railroads alone, not placed on other persons or corporations not classified with it; thereby violating the provision of the Constitution of the United States invoked, and denying to the plaintiff in error the equal protection of the law and abridging its privileges and immunities and depriving it of its property without due process of law.

(15)

The Court of Civil Appeals erred in affirming the decree of the trial court and in giving effect to the Act of 1889 (Revised Statutes of Texas of 1911, Arts. 6423-4-5), as construed by it in violation of Sub-section 1 of Section 10 of Article 1 of the Constitution of the United States prohibiting any State from passing any law impairing the obligations of contracts;

Because the undisputed evidence shows that the International & Great Northern Railroad Company made its mortgage contract in 1881, mortgaging all of its properties and right to be a corporation, and that bonds were issued thereunder of the par value of $10,391,000 principal, and being unpaid were foreclosed in the United States

Circuit Court for the Northern District of Texas in 1910, and all of the properties of the International & Great Northern Railroad Company were sold for an amount insufficient to satisfy said bonds, the purchaser at the foreclosure sale being the International & Great Northern Railway Company chartered in 1911, and the plaintiff in error herein;

And because at the time the mortgage was executed in 1881, the purchasers at foreclosure sale had under the laws of Texas the right to take all of the properties and franchises and to operate the same, including the undisputed right to locate the general offices and machine shops of the railway company at such points as the owners of the property might desire; this privilege being mortgaged by the International & Great Northern Railroad Company in 1881 and sold under the foreclosure sale, and eight years subsequent to the execution of the mortgage the Statute of 1889 was passed;

And because the undisputed facts show that the mortgage was issued and the bonds sold in 1881 without any notice of the alleged contracts of 1872-1875 relied on herein.

Wherefore, it follows that at the sale of said properties under the mortgage contract of 1881 the purchaser acquired the right under the laws of Texas to locate the general offices at any place on its line desired by the owners of the property, which right they have executed by locating their general offices in Houston, Texas;

Wherefore, the denial of this right denies to the plaintiff in error, the purchaser, a valuable right mortgaged and sold under the contract of 1881, and is in violation of the Constitution of the United States in that behalf.

(16)

The Court of Civil Appeals erred in affirming the decree of the trial court, and erred in refusing to rule that the alleged contracts sued on of 1872 and 1875 were not contracts in violation of the Fourteenth Amendment to the Constitution of the United States and Section 1 thereof;

Because there is an entire absence in the record and statement of facts of any pleading or evidence or finding of the jury legally sufficient to form or support a contract;

And because there is entire absence of evidence in the record on which any contract could lawfully rest;

And because there is no pleading of the same or proof of the same or finding of the jury in support of the same;

And because the alleged contracts were grounded upon and involved in whole or in part, unlawful consideration or considerations in violation of public policy, and were non-enforceable;

And because the alleged contracts sued on were grounded upon and involved as stated illegal consideration, to wit, the barter of political influence, and therefore were in violation of public policy and non-enforcible.

Wherefore, there has been denied to plaintiff in error the due process of law, and the decree of the Court of Civil Appeals affirming the decree of the trial court is in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, providing that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

(17)

The Court of Civil Appeals erred in affirming the decree of the trial court, and thereby denied to plaintiff in error the equal protection of the law and due process of law.

Because the Supreme Court of Texas has indubitably declared as a rule of property in Texas that a contract on the part of a railroad corporation for the location of its general offices and machine shops at a given point is not valid unless authorized or ratified by the board of directors as such of the railroad company.

And because there is an entire absence of any evidence showing or tending to show that the Board of Directors of the plaintiff in error or of the Houston & Great Northern Railroad Company or of the International Railroad Company or of the International & Great Northern Railroad Company, predecessors in title to the plaintiff in error, ever at any time authorized or ratified any character of contract for the location of the general office or machine shops or roundhouses, or any or all of them, of either company, at Palestine, Texas;

And because, in so far as purely negative facts may be proved, it affirmatively appears from the evidence that no such action by either board of directors was ever taken;

Wherefore, the decree of the Court of Civil Appeals affirming the decree of the trial court, based upon alleged contracts not approved by the proper action of any board of directors, is a denial to plaintiff in error of the equal protection of the law guaranteed to it by the Fourteenth Amendment to the Constitution of the United States, this

decree enforcing against plaintiff in error alleged contracts not so authorized or ratified;

Because the courts of Texas have refused to enforce such alleged contracts against other corporations and persons within the jurisdiction of the State of Texas, thus taking the properties, rights, privileges and immunities of the plaintiff in error and withholding from it its rights, privileges and immunities guaranteed to it and to other persons and corporations within the jurisdiction of the State of Texas in denial to it of the equal protection of the law.

(18)

The Court of Civil Appeals erred in affirming the decree of the District Court and have denied to plaintiff in error by this action the equal protection of the law and due process of the law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States;

Because the statutes of the State of Texas, in force now and at the time when limitation accrued, provide that causes of action of the character declared upon in this suit shall be barred within two years and within four years from the date of the breach of the alleged contracts sued on, if valid;

And because the uncontradicted evidence in this case shows that if the alleged contracts sued on were ever in fact made, then that the same had been breached by the Houston & Great Northern Railroad Company and by the International & Great Northern Railroad Company, the predecessors in title to the plaintiff in error, for more

than two years and for more than four years prior to the institution of this suit;

And because under decisions of the ultimate court and courts of Texas it has been established as a rule of property that limitation having accrued against all such contracts as these, the same shall be enforced as a defense or defenses in all cases within the jurisdiction of this State for the protection of all persons entitled thereto, except the plaintiff in error in this cause.

Wherefore, it follows that the enforcement of the statutes of limitation in favor of all persons entitled to the privileges and immunities granted by such statutes and denial of their enforcement for the protection of the plaintiff in error and the preservation of its properties, rights, privileges and immunities, is a denial to plaintiff in error of its properties, rights, privileges and immunities guaranteed to it under the Constitution of the United States, and is a denial to the plaintiff in error of the equal protection of the law guaranteed to it by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(19)

The Court of Civil Appeals erred in imposing upon the title to the property bought by plaintiff in error at the foreclosure sale of 1911 before stated, under process of the United States Circuit Court for the Northern District of Texas, and under the laws of the United States, a burden, servitude, duty or lien not existing thereon under the laws of Texas at the time of such process, such imposition being accomplished by a clearly erroneous construction and application of the Office-Shops Statute of 1889 before

referred to, which, by its own terms, applied only to railroad companies making the contracts referred to in it and to others with which they might consolidate; and the Court of Civil Appeals thereby imported into said statutes provisions affecting the title aforesaid which did not exist at the time of, or prior to the purchase by plaintiff in error, thereby denying the completeness of its title under the foreclosure aforesaid and under the laws of the United States.

BRIEF OF THE ARGUMENT.

III.

The points under this head are the seventh and fourteenth questions stated in our introduction grounded on the first and second assignments and first and second specifications.

The State Courts had no jurisdiction of this litigation; and the result reached is a denial of the right, title, privileges and immunities of the defendant under the decrees of the United States Courts.

We consider that these two points can best be discussed together, but we now state them separately, as follows:

(a) The United States Circuit Court for the Northern District of Texas had the right to reserve, as it did, in its decree of foreclosure of May 14th, 1910, exclusive jurisdiction to determine the validity and priorities of burdens, servitudes and conditions of ownership against the sold-out properties and their franchises and charters.

Such a reservation of jurisdiction is a condition and term of the sale made, and warranty, by the court, to its extent, that such claims as are herein involved shall be

litigated in the foreclosing court alone; and this, the rightful exercise of a power and jurisdiction inherent in any court in making foreclosure and directing sales, and constantly exercised by the State and Federal Courts, especially in connection with complicated properties.

(*b*) The litigation and decree herein involved are in conflict with and in denial of the right, title, privileges and immunities protected by the decrees of the United States Circuit Court, in exercise of powers conferred on it by the Constitution of the United States, and by Sec. 237, of the act of Congress of March 3rd, 1911 (33 Stat. L., 1156), and the Revised Statutes of the United States, Sec. 709, as amended in 1875. (Vol. 2, Comp. Stat. 1916, Sec. 1214.) This point is raised upon the decrees of foreclosure in the United States Courts of 1879 and 1910-1911.

Independently of the statute, as well as on it, this is a Federal question, for a Federal Court is involved, and no court can collaterally deny the decrees of another court, and the rights, titles, privileges and immunities thereby established. It is an invasion of jurisdiction to do so.

In the beginning of this litigation an *ex parte* writ of injunction was granted against the defendant, and an interlocutory appeal was taken therefrom, resulting ultimately in a writ of error allowed by the Supreme Court of Texas. (I. & G. N. R'y Co. v. Anderson County, et al., 156 S. W., 498, and 106 Tex., 60.)

The case was before the Supreme Court on the first review, only on the pleading of the plaintiffs; the defendant (plaintiff in error here) demurring orally in that court. Upon this presentation the Supreme Court of Texas was of the opinion that the Office-Shops Act of 1889 (R. S., 6423-4-5, p. 229, appendix) operated a qual-

ification in connection with the alleged contracts if proved, and created "a *burden* which accompanies its enjoyment, to be borne as a privilege of its use, and inheres in it with even more virtue than that of an original charter obligation because of the nature imparted to it by the general law." (156 S. W., p. 502, bot. second column, 106 Tex., p. 69.) At the end of the opinion the court declared that this Office-Shops Statute operated (in connection with the alleged contracts if proved to exist) as to *the general offices, machine shops and roundhouses, "to impress them as property or instrumentalities necessary to the use of property with a character of servitude for the benefit of the particular community (Palestine),* from which they are not exempt in the hands of the purchasing company." (End of opinion, 156 S. W., p. 505; 106 Tex., 73.) In other words, the Supreme Court of Texas decided that the original charters of the consolidated I. & G. N. R. R., issued in 1866 and 1870, and consolidated in 1873, could be modified by the Act of 1889, so as to secure the alleged contracts of 1872 and 1875 as "a burden" upon the charters inhering in them, and also as a "servitude" upon the general offices, machine shops and roundhouses and property. The Court of Civil Appeals, after trial, was confronted with the questions now presented, with all of the undoubted facts, having reference to the foreclosure decrees of the United States Circuit Court entered in 1879 and 1910, and to our claim that the decree of foreclosure involved and declared a reservation of jurisdiction.

The court overruled the pleas to the jurisdiction and in bar, but stated that: "Clearly the Federal Court had the power to reserve jurisdiction to determine the validity and priorities of any liens and burdens against the

sold-out properties of the I. & G. N. R. R. in the hands of the purchaser, or his assign, and its jurisdiction in that respect would be certainly exclusive. But the appellees, by their suit, are not seeking, in the nature of *a private or personal* right, to subject the property to any *burden, lien, claim or right* growing out of or attached to the acts of the sold-out company. Nor is the effect of the appellees' suit to hold or subject the purchaser of the sold-out company in liability in his property to a personal or private claim or encumbrance, in favor of appellees, by reason of any contract or liability incurred by the sold-out company." (R., Vol. 3, p. 1017.) (I. & G. N. R'y v. Anderson County et al., 174 S. W., p. 316, bot. of first column, Sec. 13; also same opinion in this Record, Vol. 3, p. 1001.)

In other words, the position of the Court of Civil Appeals, now under review, is that the United States Circuit Court could reserve jurisdiction, where *a private controversy of personal right was involved,* but could not reserve jurisdiction *where a public controversy of public right was involved.*

The position is that the jurisdiction of the United States Court could not be ousted in regard to a private right, but could be in regard to a public right. There is no authority for such a proposition. Public rights are as much capable of and subject to litigation in the United States Courts as any other rights. The distinction is an impossible one.

It is impossible for us to discuss this distinction made by the court, and on which its decision as to jurisdiction turns, other than to state that there is no such distinction.

The only other proposition of the court is that the

State Court has jurisdiction, because the United States Court had "dismissed the proceedings." We shall show below that were that true, it would not oust the reserved jurisdiction. (R., Vol. 3, p. 1018, 174 S. W., 316, 2nd column.)

The court turned loose the property. It did not dismiss the case. But whether it did or did not turn loose the property, or dismiss the case, is absolutely immaterial. This has been too plainly decided to be more than stated to this court, and in cases quoted with approval in the Julian and College cases by this court, discussed below (R'y v. College, 208 U. S., 38; Jessup v. Railway, 44 Fed., 664; Trust Co. v. Railway, 59 Fed., 385). An examination of the precedents, a few of which are mentioned below, will show that this reserved jurisdiction has been frequently exercised, after the property is turned loose, and after the present case is closed on the docket.

But the statement of the Court of Civil Appeals, were there anything in it, would involve a grave accusation of the United States Circuit Court of the Northern District of Texas; an accusation of judicial trickery and fraud. For the decree discharging the Receiver and turning the property loose was entered after the foreclosure purchase had been consummated, and after the I. & G. N. R'y in 1911 had paid for the properties, and gone into action. It will not be lightly assumed that the United States Court, after this was done and the sale confirmed, and the property paid for, undertook to vary the terms of purchase—nothing of the sort was done.

It is fundamental that the points now raised by us could be made by pleas to the jurisdiction, or in bar (we made them both ways, as appears in our showing how the question was raised), or by suing out an injunction from

the United States Court to prevent the litigation. We have pursued the course of raising the issue in the State Court. The opinion of the Supreme Court of Texas is referred to by the Court of Civil Appeals. The Supreme Court considers that the act of 1889 fastens the alleged contracts of 1872 and 1875 as a "*burden*" upon these charters, and as a "*servitude*" upon all or a part of the physical properties. The Court of Civil Appeals insists that the litigation is of a public nature, and admits that the jurisdiction would be in the Federal Court, under the reservations made, if only private rights were being asserted. As we have stated, we can make no such distinction, for the jurisdiction of the Federal Court is not limited by the fact that a public, instead of a private, right is under litigation. Certain private rights are under litigation. For this suit is brought, among others, by ten persons, suing for themselves and all citizens of Palestine, who set out that they have been irreparably damaged by removing from Palestine employes having a large payroll, and that the volume of business in Palestine has been reduced, and that thereby there has been "materially depreciated all property values therein, and such damage, already amounting to over $100,000.00 when this suit was brought, has continued and will continue to increase until the return of said officers and their subordinates to their rightful location." (R., Vol. 1, p. 64, Sec. 35.)

Except for efficient operation, the general public is not interested in the location of the general offices and shops. The plaintiffs frankly state why they bring this suit. They wish to make money for themselves out of it. Here the people of Texas and of the United States had nothing whatever to gain by forever chaining down these in-

stitutions in this small, interior town. There were obviously many other places where they could be as well located. The only possible *public* right was that they should not be "*forever*" so chained down in Palestine. It was not proposed to "forever" chain them down elsewhere. The point has been precisely decided by a most reputable authority. The Court of Appeals of New York, in People v. Rome, W. & O. R. Co. (8 N. E., 369), decided that where a railroad, which, by consolidation, had become the owner of two lines between termini, abandoned one of them, but substantially accommodated the public by the other, it could not be compelled by *mandamus* to operate the other, there being no "*public right*" to protect, and no "public duty" to enforce.

The court seems to have an idea that a right is public merely because it is claimed to have been created by statute. But all sorts of private rights depend on statutory law.

It is important that we now consider a portion of the railroad history and the decrees of the Federal Courts in connection with the questions under discussion, in order to show how it comes about that the claimed rights, if they ever existed, were reserved to the jurisdiction of the Federal Court. As a part of this statement we refer to the statement of how the questions herein involved were raised (seventh and fourteenth questions), and to our preliminary statement, giving a history of the properties.

The H. & G. N. R. R. executed a mortgage in 1871 for nearly five and a half million dollars. This was foreclosed in the United States Circuit Court for the Western District of Texas, and all of the properties sold out thereunder. The decree of foreclosure and confirmation of sale

is shown in the Record. (R., Vol. I, 321-325, and 298-299, and 309.)

The International Railroad, in January, 1875, executed a mortgage, foreclosed in the United States District Court for the Western District of Texas, in 1879, the mortgage being for nearly $8,300,000.00. The decree of foreclosure and the confirmation of sale are shown in the Record. (R., Vol. 1, 329-339, and 339-342.)

The H. & G. N. had executed another mortgage for over $5,400,000.00, of date February, 1872, foreclosed by the United States District Court for the Western District of Texas in 1879; the decree and confirmation of sale thereunder is set out in the Record. (R., 347-358, and 358-362.) In the second decree mentioned above there was also included a mortgage of January 15th, 1875, executed by the H. & G. N. R. R. All of these mortgages included the charter rights of the railroads, and the decrees and sales included all corporate rights, privileges and franchises. On the three foreclosure sales Kennedy and Sloan were the purchasers, as Trustees, and on November 1st, 1879, executed a deed to the I. & G. N. R. R. Co., conveying all the properties and franchises to it. (R., Vol. 2, p. 848.) See, also, opinion of Court of Civil Appeals. (174 S. W., pp. 315-16, Sec. 11.) This deed was a mere memorandum. The title, of course, to the charters had passed without it.

Most of the stockholders in the new railroad, after 1879, were the same persons as the stockholders before 1879. We here cite no authority to support the proposition that stockholders can buy property of a sold-out corporation, without committing fraud; that is discussed below. We took the position, as appears in our statement of the case, that the foreclosing sale of the charters, au-

thorized by the then existing laws (p. 224 of appendix) eliminated all personal contracts like those the plaintiffs claim, and that the plaintiffs could not claim that by the act of 1889 these sold-out charters had been modified and burdens placed upon them and the other property to secure their pre-existing contracts of 1872-1875. The plaintiffs below answered that the foreclosure sales of 1879, in the United States Circuit Court of the Western District of Texas were fraudulent, and not genuine sales. No evidence was brought to support fraud, but it was contended that fraud might exist by reason of the fact that the stock ownership in the new railroad of 1879 was principally the same as in the old railroad. The courts encourage previous stockholders to buy in the properties, as it does all persons, in order to increase the number of bidders. No issue of fraud was submitted to the jury, but the case being upon special issues, were there any issues of fraud, it might be presumed that an unsubmitted issue was found by the judge after verdict. We cannot point out what does not exist in the Record, but under these circumstances the Court of Civil Appeals found that "under these pleadings the question of a *bona fide sale* to any third person became issuable. The facts and circumstances warrant the inference of fact, which in support of the court's judgment we must assume that the court made, that there was not a *bona fide* judicial sale. Hence in such finding of fact the legal effect of the sale and deeds to the Trustees (Kennedy and Sloan) would not discharge admitted corporate obligations." (This case, 174 S. W., 316, 1st. col., and copy of opinion in Record, Vol. 3, p. 1017.)

N. Pac. R. R. Co. v. Boyd, 228 U. S., 482, is relied on by the Court of Civil Appeals to support this finding. (174

S. W., 316, middle of first col., R., Vol. 3, p. 1017.) In other words, *in a collateral proceeding,* the Court of Civil Appeals of Texas, *in 1915,* finds that three *fraudulent decrees were* entered in the *United States Circuit Court* of the Western District of *Texas, in 1879,* foreclosing and selling the charters and all properties of the railroads, and which decrees settled the fact that the I. & G. N. R. R. was bound by the mortgages of its constituents, the H. & G. N. and the International, and expressly declared that the charters and franchises were sold, in accordance with the provisions of the then statute. (Appendix, p. 224.) On this ground alone the Court of Civil Appeals rules the point against us, and, of course, the whole case.

Of course, this is a complete misapprehension of the Boyd case. In the Boyd case the stockholders were shown to have obtained something out of the foreclosed properties, to which the creditors were entitled. In this case no attempt was made to show any such thing, and no one could point out any such thing anywhere in the Record. In this way the decrees of the United States Circuit Court for the Western District of Texas entered in 1879 are set aside and held for naught, by the decree of a State Court collaterally entered in *1915.* This cannot be done, as has been decided in Anderson Co. v. H. & G. N. R. R., 52 Tex., 229, and involving these very transactions. But no precedents are needed.

In 1881 a mortgage was executed by the I. & G. N. R. R., the new company which came into existence in 1879 through the foreclosure and acquisition of the sold-out properties and charters of the old prior I. & G. N. R. R. Co. and all its constituents. This mortgage of 1881 is set out in the Record, was for over $10,000,000.00, and

expressly covered the franchises to be. (R., Vol. 1, p. 213.) We have shown, in the statement of these questions, how the matter of jurisdiction and the right under the Federal Court's decrees was raised. The Farmers Loan & Trust Company was Trustee of the mortgage of 1881, and sued in the United States District Court for the Northern District of Texas, in 1908. (R., Vol. 2, p. 642, and Vol. 1, pp. 191-223.)

In this case, by plea to the jurisdiction, and special plea in bar, repeating the terms of the plea to jurisdiction, these foreclosure proceedings were all set out, and in their replication our opponents admitted that all of these allegations were true, including the decree of foreclosure of 1910 (R., Vol. 1, p. 368-370), except as to the terms of the mortgage which were proved. It was agreed that the plea to the jurisdiction should be tried without jury, there being no disputed issue of fact. (R., 383-384.) All of the allegations of the pleas were also proved. (R., Vol. 1, 631-634.)

The court overruled the plea (R., Vol. 2, 552); the same matters were pleaded in bar, and the Constitution of the United States invoked, and Sec. 709, of Revised Statutes, carried into Sec. 237 of the Act of Congress of March 3rd, 1911, in protection of all of the rights, privileges and immunities acquired under the decrees. (R., Vol. 1, pp. 109-110.)

It thus appears that on the foreclosure of the mortgage of 1881 all of the rights of the new I. & G. N. R. R. Co. of 1879, freed from all of the personal obligations of the old I. & G. N. R. R. Co. prior to 1879, and from the alleged personal contracts of 1872, 1875, sued on, were mortgaged, including the charters, by the mortgage of 1881. And in the decree of the U. S. Circuit Court for the

Northern District of Texas, entered in 1910, it is declared that the lien of the second mortgage of 1881 was prior to all other liens, except as the court should state. (R., Vol. 2, p. 647.) By Section 12 of the decree (R., Vol. 2, p. 653) the mortgaged premises, property and franchises and all the right, title, estate and equity of redemption of all parties and of all persons claiming or to claim under all or any of the parties of, in or to the said premises, property and franchises, and every part and parcel thereof, were forever barred and foreclosed. The terms of the sale were then set out, and it was provided that the sale should be subject to the first mortgage of 1879, and "to any unpaid indebtedness or liability contracted or incurred by said defendant railroad, in the operation of its railroad, which the court may hereafter order or decree herein to be prior or superior to the lien of said mortgage dated June 15th, 1881, * * * and subject also to the debts, claims, liens and demands of whatsoever nature heretofore incurred or created, or which may be hereafter incurred or created by the Receiver herein under orders of the court heretofore entered herein." And also decreed to be subject to certain specified liens on particular properties. (R., Vol. 2, pp. 656-8.) The Commissioner appointed to make the sale was to give notice requiring all claimants for liabilities to bring the same forward, under condition that if they did not so do, they should not enforce them "against the properties sold, or against the purchaser or his successor or assigns." But that if such claims were permitted, the purchasers should have the right to contest them in the United States District Court. (R., Vol. 2, bot. p. 656, to p. 657.)

It was again set out exactly what the purchasers should

take subject to, and that they should not take subject to matters then not stated or provided for. (R., Vol. 2, p. 658.) At the end of the decree it was provided that the purchaser, on the terms stated, could denounce any contract of the sold-out railroad as not to be assumed by it, and that "all questions not hereby disposed of, including the disposition of all claims heretofore filed herein, or hereafter to be so filed in accordance with the provisions of this decree, are hereby reserved for future adjudication, and the court reserves jurisdiction of this cause, and of the property affected by this decree, for the purpose of final disposition of all such questions and matters, and any party to this proceeding and any claimant whose claims have been or shall be so filed herein may apply to the court for further orders and directions at the foot of this decree." (R., Vol. 2, pp. 660-661.)

The I. & G. N. R'y having acquired the properties and charters under the sale under this decree of foreclosure, denounced all of the alleged contracts sued on herein as not to be assumed by it. (R., Vol. 3, Secs. 17 to 20, pp. 920-932; and particularly pp. 928 and 929, covering these very matters; pleading of this matter of denunciation, R., Vol. 1, pp. 294-308.)

It appears from the decision of the Court of Civil Appeals, and the prior opinion of the Supreme Court of Texas, that, in defiance of the decrees of 1879 and of 1910-1911 of the United States Courts, our opponents are attempting to deny the rights, titles, privileges and immunities thereby secured and protected, in conflict with Sec. 237, of the Act of Congress of March 3rd, 1911, and the Revised Statutes of the United States, Sec. 709. And in conflict with the general proposition that it invades jurisdiction of one court (here Federal Courts) for anoth-

er court to deny its claims and to set them aside. This of itself presents a fundamental Federal question. Shall, or shall not the decrees of these courts (having jurisdiction) be set aside, those entered in 1879, as fraudulently entered, and accomplishing a fraudulent sale of the properties, without any proof whatsoever of a fraud, and in a collateral proceeding, and by decree entered in 1914-15 in the State Courts? Further, if such a thing be conceivable, where is the litigation to be conducted to determine that these decrees are fraudulent and void? Where is their faith and credit to be tested? Of course, this can only be done in the court where the fraudulent decrees were entered, if fraud it was.

Can the decree of the United States Court be so lightly set aside in the State Court after the lapse of 35 years? It sounds foolish to ask such a question, but that is precisely what has been attempted.

It takes no reservation in a decree for a court to retain the power to enforce its decrees. That power is inherent. A court of equity will issue its writ of injunction as readily to prevent infringement of its decree, by attempted litigation elsewhere of the titles under the decree, as a court of law will issue an execution. And so this court will maintain a decree of a Federal Court entered years ago—as not capable of being set aside by a State Court as fraudulently entered. It is a Federal question, because a Federal Court is involved. But the whole case is here. The decrees of the United States Court of 1879 are irreconcilable with the decree of the State Court here. The State Court frankly recognizes the conflict, and after the lapse of 35 years collaterally modifies or sets aside the Federal Court decrees as fraud-

ulently obtained. Which shall prevail? Both cannot. Here is a head-on collision.

This question is closely related to that to which we now proceed, and often they are so discussed in the precedents.

But we now proceed to a broader view, and one which is only apparently less simple, but which can be reduced to very simple terms. Taking the opinions of the Supreme Court and Court of Civil Appeals of Texas together, this case stands upon the Act of 1889 as having modified the charters of the sold-out I. & G. N. R. R., sold out in 1879, by placing a burden thereon and on the physicals, in spite of the four mortgages prior to 1879, authorizing the mortgaging of the charters; and also as having placed a servitude upon the properties. Therefore, we are dealing with the supposition that these charters and properties and other properties which, through the foreclosure of 1879, were passed down free of all personal claims, and of all personal obligations, such as the alleged contracts of 1872-1875, have, by the Act of 1889, been subjected to liens, servitudes, conditions and burdens, and that the foreclosures of 1879 are fraudulent, so that by them the alleged personal contracts of 1872-1875 were not eliminated, but remaining in full force and vigor until they were secured in 1889, over all of the guarantees of the mortgage of 1881, as well as the four mortgages prior to 1879, and without any proof of notice to the mortgagees of 1881 of the supposed frauds committed in 1879. It is assumed that the old I. & G. N. R. R. Co., existing before 1879, existed straight down, notwithstanding the foreclosure sales, through the mortgage of 1881, and until the foreclosure sale of 1910-11, and that so existing, on the ground that a Federal Court could not re-

serve jurisdiction over a *public* litigation, its reservation of jurisdiction is null.

It is fundamental, in the law of mortgage foreclosure, that a foreclosing court can foreclose property and turn over its possession, without waiting to bring in every person having rights against the same, reserving its jurisdiction to litigate such rights, if any, whenever they are presented; and prohibiting such litigation in any other court. All persons claiming rights against property, subject to a foreclosed lien, are necessary parties to the foreclosure, to cut off their equity of redemption, although the foreclosure as such is valid without making them parties; and when such persons are prior in time, they are proper parties in order to determine the extent of their claim, so as to better measure the value of the thing sold. But to bring in all of these parties would often interminably delay a sale. What then shall a court do? Shall it delay sale almost indefinitely, or sell the property with a contract to guarantee to the purchaser that, whenever any such attacks are made, they shall all be gathered into one hand, and drawn to one head, where all of their relative situations may be correlated and there litigated? Theoretically this could be done in advance of sale; practically it is impossible, in complicated properties, to bring all of such claimants in in advance of sale.

Therefore, it is too well settled for discussion that a court may reserve this jurisdiction. Did or did not the United States Circuit Court for the Northern District of Texas so reserve? What is the meaning of its decree of 1910? The court had the power. Did it do so directly or by implication?

Our opponents here do not claim title, but "a burden" or an encumbrance, or a "*qualification*" or a *servitude*

(we use the expressions of the Supreme Court of Texas) as created by the Statute of 1889 subsequent to the foreclosed mortgage of 1881. It is immaterial whether these claimed securities are subsequent or prior. The only confusion in relation to these fundamental principles is the erroneous conception of a part of the bar, that a court making foreclosure loses its jurisdiction after decree of foreclosure and sale, as to all left out prior and subsequent proper or necessary parties. A little reflection will convince anyone of the impossibility of such a principle.

It is not necessary that there should be an express reservation of jurisdiction. We respectfully insist that the reservations in the decree of 1910 were express. They need not be expressed for the fundamental reason that when a court declares what the property is sold subject to, it thereby means to declare that it shall not be sold subject to any other claims, unless ascertained by it. The reservations in the decree of foreclosure of 1910 are expressed, and their terminology shows that they were copied from the reservations which this court has considered in the decrees involved in Julian v. Trust Company (193 U. S., 93), and Wabash R. R. v. College (208 U. S., 38).

We state these as our leading cases, and they are so familiar to this court that it would be an imposition to give more than a brief resume of them.

In the Julian case a railroad had been sold out under a decree of the U. S. Court, the recitals of which were not more extensive than those of this decree. In that case the decree provided, as the decree here, that the purchaser should take the property subject to obligations incurred, or to be incurred, by the Receiver, which the fore-

closing court should adjudge; and as here, subject to certain recited burdens, and to a continued right of the court to subject the properties to other burdens. The implication was that the properties were passed only subject to such burdens originating under the sold-out insolvent, or its Receiver, as the court should determine. In North Carolina there was a statute passed, *before* the instant foreclosed mortgage was created, providing that the properties should be liable for damages for persons killed in preference to a mortgage lien. Here we have practically the same case, except that our case is stronger, because the Statute of 1889 was passed *after* the foreclosed mortgage of 1881.

Plaintiffs claiming damages for deaths sued the sold-out railroad, *claiming that it still existed* (as is here claimed that the I. & G. N. R. R. existed after the Office-Shops Act of 1889, notwithstanding the foreclosures and sales of 1879 in the United States Court), and having recovered judgments in the State Court, Julian, the sheriff, levied and was enjoined by the United States Court, and so the litigation proceeded into this court. It was held that this court was not bound to follow interpretations of statutes made by the highest State Court, as to transactions originating under particular contrary State decisions, or when there had been no State decisions. (cf. contradictory decision of Supreme Court of Texas, that such office-shops location contracts were personal under the Act of 1889, and did not run through a foreclosure; K. C. M. & O. R'y v. Sweetwater, 104 Tex., 329; June v. Fairmont, 215 U. S., 249.) But the main point was the one now under consideration. It was held that the jurisdiction was exclusively in the United States Court, and that under the decree of the United States

Court that court had guaranteed the purchaser, and contracted with it, that it should not be held on any claims which that particular court did not approve, if arising out of or attachable to the contract or transaction of the sold-out insolvent railroad or Receiver.

Wabash v. College (208 U. S., 38) was a case identical with ours, when its more complicated facts are analyzed. In that case the United States Court foreclosed and delivered the property to the purchaser. The railroad had been composed (as the sold-out I. & G. N. R. R. was composed) of various consolidated railroads, one or more of which had issued certain obligations. The college had not been a party, and like the plaintiff claims here, because of a certain situation, when consolidation came about, their previously unsecured equipment obligations were given a superior lien or security.

The litigation in other courts than the foreclosing court was enjoined at the instance of the purchasers of the property.

We thus see how the remedy works out. The door of the foreclosing court remains open for all claiming under the foreclosed insolvent, or through its action, or that of any constituent of the foreclosed insolvent, or persons under whom he holds, or who have rights of a personal character secured by statute, when those rights are dependent upon personal contracts. If a litigant so claiming enters other courts, he can be enjoined by the purchaser, or his assigns, by writ of injunction out of the foreclosing court, as was done in the Wabash case, whereas, in the Julian case no injunction was sought until the litigation in the State Court had been completed.

In Wabash v. College, the reservations of the decree were not as express as here. The decree provided that

the purchasers should be vested with all ofthe right and title to the property, but there was one reservation identical with that here, using the same language. The decree in this case having evidently been copied, to that extent, from that decree, to wit: That all questions "not hereby disposed of," etc., were reserved. This court held that by that decree the foreclosing court said to the purchaser, "You must take this property subject to all claims which this court shall hereafter adjudge to be lawful, and you may be assured that you will be held to pay none other, and for the purpose of making good this statement, the court reserves jurisdiction."

Of the multitude of cases in the Federal Reporter we shall cite very few, and then come to a few fundamental applications.

In Jessup v. Railway (44 Fed., 664) a situation was involved where a purchaser at foreclosure was sued, it being contended that the foreclosing court had parted with possession of the property, as is here contended, and thereby lost jurisdiction. The suit was for a tort of the Receiver. The report does not show that there were any express reservations. Under the well known act of Congress the Receiver was suable in the State Court on any cause of action arising out of his operation, but it was held that as the Receiver had been discharged, and as the foreclosing court "had parted with possession of the property and the assets, it was clearly its duty to protect the purchaser of the property to this extent, * * * when the purchaser bought this property it purchased it under the conditions named in the decree and order of sale." The court states that the agreement of the purchaser with the court, in effect, was: "To pay such just claims as might be allowed against the Receiver, as be-

fore stated, is in fact a part of the price paid by the purchaser for the road, and it is the duty of the court to protect it against any unjust claims with the same diligence and care that it would protect a fund, if actually in the registry of the court for distribution." This was declared to be part of the good faith due the purchaser, that is, to require all persons to come in and litigate in the court.

In Lang v. Choctow R'y (160 Fed., 355) a railroad and its predecessors appropriated land which caved into a river, and the railroad was foreclosed. Suit had been long running in the State Court for the value of the land, and after foreclosure the purchaser was sued for the purpose, as asserted, of subjecting the properties to a lien paramount to the foreclosed mortgages, precisely as here. The decree of foreclosure provided that the purchaser should pay all claims, when the foreclosing court should allow them, with reservation of jurisdiction to enforce compliance with its orders, and the same reservation in the same words as inserted in the decree here, to wit: "All questions not hereby disposed of and determined are hereby reserved for further adjudication." It was held that the jurisdiction was solely in the foreclosing court.

In S. L., etc., Company v. Company (148 Fed., 450) a suit was brought in the United States Court for damages for trespass, and involved, as a principal question, whether or not a deed included a right, and this was litigated to the end in that court. There were no reservations in the judgment, but afterwards the litigation of the same right was attempted in the State Court, and the State suit was enjoined out of the equity side of the United

States Court. This case illustrates how the first branch of the discussion comes in here.

Trust Company v. Railway (59 Fed., 385—Texas case) is cited as a foundation authority in the Julian case, and, therefore, is of force.

A Texas railroad was foreclosed in the United States Court, and the foreclosed properties surrendered to the purchaser, subject to such claims as should be adjudged valid by the foreclosing court. Kitchens sued the purchaser for damages alleged to have been done by the Receiver, and many other persons were proceeding to litigate with the purchaser. The Receiver had been discharged, and possession of the property turned over. It was held that Kitchens could not sue on the outside.

These principles have been frequently applied by this court. In Dietzsch v. Huidekoper, 13 Otto (103 U. S.), 494, and its related case of Kern v. Huidekoper, 13 Otto, 485, there had been a law judgment in a replevin case for possession. Afterwards a suit was brought on a replevin bond given in such proceedings and begun in the State Court. This was held in contradiction to the judgment of the law court, and the equity side enjoined.

In Root v. Woolworth (150 U. S., 401) it was involved that Morton had obtained a decree against Root, establishing his title, and then Woolworth acquired Morton's title. Root re-entered, Woolworth as assignee of Morton (the case being closed on the docket), filed a supplemental bill against Root to enforce Morton's decree. Held: "That such a bill might be filed as well after as before the decree, and might be filed upon some matter omitted in the original bill, or to bring forward parties before the court, or it may be used to impeach the decree." Therefore, this court will not, we believe, view

with favor the attack collaterally made on the decrees and jurisdiction of the United States Courts herein involved; and will hold that our titles and rights thereunder cannot be violated in the State Court.

We do not think that we should further discuss fundamental principles so often established by this court. We submit that it should be adjudged that the State Court has no jurisdiction, and also that our *rights, titles and immunities derived under the decrees of the Federal Courts of 1879 and 1910* are being invaded and denied. At bottom, the questions come back to the same thing, if they be analyzed to the bottom. But although this is a Federal question, it is so merely because the jurisdiction of the Federal Courts is being invaded. The same principles are rigidly enforced for the benefit of the State Courts, as this court has said: it is a principle which has been applied "in many cases—sometimes in favor of the jurisdiction of the courts of the States, and sometimes in favor of the jurisdiction of the courts of the United States, but always, it is believed, impartially, and with a spirit of respect for the just authority of the States of the Union." (Palmer v. Texas Waters Pierce Oil Co., 212 U. S., 125; compare Wabash Railway v. College, 208 U. S., 54.)

Hardly a greater blow could be given to the jurisdiction, especially of the State Courts, than to maintain the plaintiffs' contention, for then their most solemn judgments and decrees could be corroded or destroyed by subsequent Federal Court litigations.

Let us now apply these principles more specifically to the decree of the United States Circuit Court of the Northern District of Texas of 1910.

The decree commences with the declaration that the allegations of the bill of the Farmers Loan & Trust Com-

pany were true, and that the mortgage of 1881 was subject to the first mortgage of 1879, which was made immediately after the foreclosures and the formation of the new company in that year. (R., Vol. 2, pp. 643-4.) The property is then carefully described, and the lien of the mortgage of 1881 is declared to be prior and superior to all other liens of any party, and to be only *subordinate to one stated lien* (not of party—first mortgage of 1879), with the exceptions in the decree to be stated. (R., Vol. 2, p. 647, Sec. 6.) The amount due is ascertained to be over $12,000,000.00. (R., Vol. 2, p. 652.) It is stated that all the corporate rights, privileges, immunities and franchises of the railroad were subject to the mortgage, whether acquired before or after its date (R., Vol. 2, p. 646); that all the assets in the hands of the Receiver are subject to it after applications, which might be allowed by the court against the same with priority over said second mortgage dated June 15, 1881. (R., Vol. 2, p. 647.) It is declared that the property shall be sold subject to payment of claims *which may be allowed by the court* against the same, with priority over the foreclosed mortgage, and that there should be sold every right of the railway and all the rights of all parties to the litigation, "and of all persons claiming or to claim under them, or either of them, of, in or to the said premises, property and franchises, and every part and parcel thereof shall be forever barred and foreclosed, and that said sale shall be made upon the terms and in the manner following, to wit:" that is, of all persons not coming forward under the terms of the decree, and as provided at the foot of the decree where careful reservations were made to permit them to come forward in the United States Court. (R., Vol. 2, p. 653.)

It was further provided "that any unpaid indebtedness or liability contracted or incurred" by the sold-out railroad in its operation might be decreed by the court hereafter to be prior or superior to the lien of the foreclosed mortgage of date June 15th, 1881, and that the property was sold subject to the liens and liabilities created and incurred, or to be created and incurred, by the Receiver. (R., Vol. 2, p. 656.)

It was open to our opponents to bring their suit in the Federal Court, and there to enforce and obtain priorities (if they can) over the mortgage contract of 1881 and its foreclosure, as against the plaintiff in error, the purchaser under the foreclosure sale, for, in the very terms of the decree they claim a "liability" as contracted by the I. & G. N. R. R. Company and its constituents in 1872 and 1875, and secured in 1889 by the statute, and claimed the same "to be prior or superior to the lien of said mortgage dated June 15th, 1881," to copy the words of the decree.

With painful care this is again made clear by a careful iteration, that the sale shall be subject to indebtedness or liabilities which the foreclosing court may, in the future, declare. (R., Vol. 2, p. 658.) The Commissioner making the sale was directed to make publication before sale, and to invite all persons claiming liabilities to present the same, and intervene within three months, with notice that they should have no claim against the property if they did not so intervene.

Whether or not this clause would be binding would be solely for the foreclosing court to determine.

Coming to the end of the decree, the whole matter is again stated, and it was stated that the purchaser might denounce in the method therein provided any contract of the sold-out railroad as not assumed by him. (R., Vol.

2, pp. 660-661.) It was proved herein that the I. & G. N. R'y purchaser had, within such period, denounced the alleged contracts herein sued on.

If the denunciation was not valid, or the stipulation therefor—that is a matter reserved to the United States Court.

That denunciation was made in accordance with the terms of the decree by filing a written statement with the clerk of the court that no contract made by the sold-out railroad, or any of its constituents, for the location of the general offices and shops at Palestine would be performed, and by serving notices of such denunciations upon the city council of Palestine and the Commissioners' Court of Anderson County, which court is the executive of that County. (R., Vol. 1, pp. 294-306; Vol. 3, pp. 920-932, particularly 928-929.) Then, almost at the end of the decree it is stated: "All questions not hereby disposed of, including the discharge of the Receiver, etc., and including the disposition of *all claims heretofore filed* herein, or hereafter to be *so filed in accordance with* the provisions of this decree, are hereby reserved for future adjudication; and the court reserves jurisdiction of this case, and of the property affected by this decree for the purpose of final disposition of all such questions and matters, and any party to this proceeding and any claimant whose claims have been or shall be filed herein may apply to the court for further orders and directions at the foot of this decree." R., Vol. 2, 660-661.)

Why do not our opponents enter at the door left open for them, and litigate in the only place where litigation is possible? They are claiming rights against properties sold out by the court; they are claiming secured contracts connected with and conditioning the enjoyment

of those properties. They are claiming that their rights passed down through the decrees of the United States Circuit Court for the Western District of Texas made in 1879, unimpaired, because, as they say, such decrees were fraudulently obtained, and so passed unimpaired through the mortgage of 1881 and its foreclosure in 1910, although the mortgagees of 1881 had no notice. They propose to set aside or modify these decrees, and claim that they have done so in the State Courts, and that they are not bound by the reservations of jurisdiction actual and implied in the decree of the United States Circuit Court for the Northern District of Texas of 1910.

Under that decree the defendant purchased the property with all of its guarantees, titles, warranties and immunities. It would have been sufficient if the decree had merely recited what burdens the property was sold under, for that bears the implication that it was sold under no others, unless to be allowed by that court. But it went far beyond that. A mere recital that a property is sold under stated burdens in the decree carries an indisputable implication that the property is sold under no other burden, unless thereafter ascertained by the foreclosing court. But this property was expressly subjected only to such unrecited "indebtedness" or "liability" contracted by the sold-out railroad in its operation as the foreclosing court might ascertain in the future to be prior or superior to the lien of the foreclosed mortgage.

One of the two legs of this case is an alleged engagement in 1875 to rent houses as a consideration for locating the shops and offices at Palestine forever. This was a contract made in the operation of the road, if at all, and an asserted liability, and so the other leg of 1872.

How can it be then, that the plaintiffs are not here in

flat conflict with the decree of the United States Court and with its reservations? The word "liability" is very different from the word "indebtedness." It has been often construed, and includes every kind of obligation ascertained or imperfect, as opposed to debts. (25 Cyc., 223, Note 85; Encyc., Vol. 18, 846-848.) When the word "liability" is used in connection with the word "indebtedness," it is used in distinction therefrom, and includes an obligation such as not to permit a smoke nuisance. (Vol. 18, Encyc., p. 848.) With explicitness it is stated that the property is subjected to listed liabilities and such other liabilities as the court might thereafter determine to be prior to the mortgage of 1881, and to no others, which the court should not so determine.

The purchaser was given right near the end of the decree to denounce these very contracts, which it has done, without acknowledging their existence. (R., Vol. 2, p. 661.) The foreclosing court had the right to give this power, or it did not have the right. If it did not, it is a matter "not hereby disposed of," and reserved in the decree. The court reserved the right to construe its own decree,and to gather up all the ragged ends of claims against the sold-out defendant, or its property, including its mortgage franchises mortgaged in 1881, as the law then authorized, and we have seen in the College case that such a reservation includes the acts of constituents who merge into the foreclosed corporation.

The decree states that all questions not hereby disposed of, including the discharge of the Receivers, etc., "are hereby reserved for future adjudication." (R., Vol. 2, p. 661.) The word "including" is a word of addition, and not of definition or limitation. This meaning has been often litigated. (Cooper v. Stimson, 5 Minn.,

522; State v. Salt Co., 98 Pac., 549; Mayben v. Rosser, 103 Pac., 676; Re Goetz, 71 Hun., Appellate Division S. C., 272; Calhoun v. R'y, 4 Fed. Cases, 1045-1047.)

But we do not think that we should further cite precedents in construction of so plain matters.

The effect of the denunciation of these alleged contracts under the terms of the decree, and the existence or non-existence of the liabilities now asserted (claimed to be conditions inherent in and burdens upon and servitudes on properties involved) were not only by implication reserved, but expressly reserved by the United States Court, and we have seen that letting go the possession of the property, or the remoteness of any decrees in time do not affect these principles. The properties are sold and let go, and the reservations are made because of these principles, and in order to avoid the retention of the properties in the possession of the court, until all complicated claims may be settled.

The plaintiffs below have commenced wrong. It is immaterial for our immediate purposes whether they have a right, or have not a right, or whether the foreclosure case be open in the United States Court, or not. We respectfully present that the time has come to enforce these principles, as to which we put our opponents on warning from the very beginning of this litigation.

It makes no difference whether the subject be approached from the point of view of the reservations (direct or implied) of jurisdiction; or from the point of view of the denial of rights, immunities, privileges and titles derived under the decrees of the United States Court. We have traced our title and rights down through and by the decrees of 1879 and the prior mortgages, then foreclosed, the mortgage of 1881, made without notice of

frauds alleged to have been committed in the United States Court in 1881, and the decrees of 1910-11. Those immunities, privileges and titles are denied in the State Court, and those solemn decrees of the United States Court rendered in 1879 are declared in the State Court to have been fraudulently obtained, this declaration being made in 1915. Whether it be considered that our opponents are defeated by lack of jurisdiction of the State Court, or by a conflict of the State Court with these decrees, the result is the same; those decrees and their reservations prevent an insuperable obstacle to this suit.

The difficulties now discussed were keenly felt by the Texas Court of Civil Appeals—hence its two declarations dwelt on at the commencement of the argument on this point: first, it is conceded that the United States Court intended to make a reservation of jurisdiction, but that such reservation is not applicable, because *a public matter is under litigation,* as if the United States Court was ousted of the litigation of public matters (174 S. W., bot. 1st col., p. 316); and, secondly, and more astonishing, if possible, the prior declaration of that court that it would assume that the trial judge found in the trial of this case in 1913 that the three decrees of foreclosure entered in the United States Circuit Court for the Western District of Texas in 1879, and the three decrees affirming sales thereunder, were all fraudulent. No such issue was submitted to the jury; there was no evidence to support an issue of fraud, and it does not indicate fraud that stockholders should purchase at foreclosure. It is a commendable thing to do. (Opinion Court Civ. App., 174 S. W., p. 315, first col., end of Sec. 11.) Discussions by the Court of Civil Appeals of whether there was not a lien *in rem,* and the use of the word "lien," in-

stead of burden, or condition, or limitation, or servitude, makes no difference. Such a discussion over these words is a mere logomachy. Our opponents sometimes claim they have a right running with the property; sometimes they say, with the Supreme Court, that it is a burden or servitude inherent in, or right upon the property, but they always come back to it as secured by the Act of 1889, giving them a prior right over the mortgage of 1881 (made without notice), the foreclosures of 1879 and the four mortgages then foreclosed to secure their alleged contracts of 1872-1875; and always contending that they can set aside or modify in the State Court the Federal decrees of 1879 as fraudulent. If they cannot, they recognize that they cannot prevail.

We submit that no plainer case can be made of the violation of the decrees of the Federal Courts, and the titles, rights and immunities secured thereby, and of the reservation of jurisdiction now invoked.

IV.

In the interest of the systematic presentation of our views concerning the impairment of the obligation of contracts by the General Office Act of 1889 as construed and applied in this case, we shall submit, first, propositions bearing upon the subject, and, next, a statement of the evidence called for by the propositions, and last, an argument based upon the propositions and evidence.

Propositions.

(a) The second mortgage of the International & Great Northern Railroad Company, executed June 15, 1881, to the Farmers Loan & Trust Company, Trustee, to secure

the second mortgage bonds of said company of the same date, for the principal sum, in the aggregate, of $10,391,000.00, with interest, also executed to said Farmers Loan & Trust Company, Trustee, embraced all the railroads, properties and franchises, including the franchise to be a corporation, then owned or thereafter to be acquired by said railroad company, except certain lands not here involved; and said second mortgage and bonds constituted contracts of said railroad company, the bonds being secured by the lien created by the mortgage on its railroad properties and franchises; and the obligation of said contracts was protected by Subdivision 1, of Section 10, of Art. 1, of the Constitution of the United States, from impairment by any law passed by a State.

(*b*) In proceedings duly instituted by the Farmers Loan & Trust Company, Trustee, complainant, against the International & Great Northern Railroad Company, defendant, the United States Circuit Court for the Northern District of Texas, on May 10, 1910, made and entered a decree foreclosing the lien of said mortgage of June 15, 1881, to satisfy the principal and interest of said second mortgage bonds, then amounting to $12,165,545.60, and ordered the sale of the railroads, properties and franchises of said railroad company by particular description for that purpose by a Master Commissioner appointed by the court. And in pursuance of said decree of foreclosure said Master Commissioner did, on July 13, 1911, sell said railroads, properties and franchises to Frank C. Nicodemus, Jr., for the sum of $12,645,000.00; and after confirmation of the sale and the compliance of Nicodemus with its terms and conditions, the Master Commissioner executed a deed on August 31, 1911, to the International & Great Northern Railway Company, conveying to said

company all of the railroads, properties and franchises of the sold-out company, including the franchise to be a corporation, the deed being executed to said railway company in accordance with an assignment of said Nicodemus of all his right, title and interest therein acquired by him by his purchase, and the International & Great Northern Railroad Company, Thomas J. Freeman, Receiver of that company, and the Farmers Loan & Trust Company, Trustee, joined in the execution of that deed.

(*c*) The International & Great Northern Railway Company was incorporated by the filing in the office of the Secretary of State of the State of Texas, on August 10, 1911, by Frank C. Nicodemus, Jr., and associates, of articles of incorporation under and in pursuance of Art. 4550, Chapter 11, Title 94, of the Revised Civil Statutes, as amended by an act of the legislature of Texas approved Sept. 1, 1910 (the amended article being 6625 of the Revised Civil Statutes of 1911), for the purpose of acquiring, owning, maintaining and operating the railroad properties and franchises sold at the foreclosure sale of June 13, 1911, to said Frank C. Nicodemus, Jr., pursuant to said decree of May 10, 1911. And by said articles of incorporation the place for the establishment of the principal business office, the public and general offices of said International & Great Northern Railway Company, was designated as the City of Houston, in Harris County, Texas, such designation having been made in accordance with Article 6408, Revised Civil Statutes of 1911, contained in Chapter 1, of the title embracing said Article 6625—said Article 6408 having been Article 4352 of the Revised Civil Statutes of 1895, and, as therein shown, having been contained in Chapter 1, of the title embracing said Article 4550.

(*d*) As the result of the sale under decree of foreclosure of May 10, 1910, of the railroads, properties and franchises (including the franchise to be a corporation) of said International & Great Northern Railroad Company to said Frank C. Nicodemus, Jr., and the confirmation of the sale and the conveyance of said railroads, properties and franchises of said International & Great Northern R. R. Company in accordance with the assignment and direction of said Nicodemus, that company took said railroads, properties and franchises freed from liability for any and all debts of the sold-out company, and from all merely personal obligations, including the alleged contract sued on herein of the sold-out company.

(*e*) The statute of the State of Texas known as the General Office Statute, which was enacted March 27, 1889, and which is now Artciles 6423, 6424 and 6425 of the Revised Civil Statutes of 1911, as construed by the Supreme Court of Texas in the case reported in 156 S. W., 499, and by the Court of Civil Appeals at Texarkana in its decision to review which its writ of error was granted, and reported in 174 S. W., 305, by imposing, as held by those courts, a burden, duty or servitude upon the properties and franchises of the sold-out company in the hands of and as owned by plaintiff in error by virtue of the operation of that statute upon the contract alleged to have been made in 1872 between Grow, as President of the Houston & Great Northern Railroad Company, and John H. Reagan, representing the citizens of the City of Palestine, and by virtue of its operation upon the contract alleged to have been made in 1872 between said Houston & Great Northern Railroad Company and Anderson County, and by virtue of its operation upon the contract alleged to have

been made in 1875 between Hoxie, representing the International & Great Northern Railroad Company, and Wright, Ozment and others, representing themselves and other citizens of Palestine, each of said contracts with said Houston & Great Northern Railroad Company being, as alleged, for the location and maintenance forever of its general offices, machine shops and roundhouses at Palestine, and the contract with said International & Great Northern Railroad Company being, as alleged, for the location and maintenance forever of its general offices, machine shops and roundhouses at Palestine, is unconstitutional and void, by reason of violating the obligation of the contracts of said mortgage and bonds of June 15, 1881, in contravention of Subdivision 1, of Section 10, of Article 1, of the Constitution of the United States, prohibiting any State from passing any law impairing the obligations of contracts.

(*f*) The General Office Statute of 1889, as construed and applied in this case, violated the obligation of the mortgage contract of June 15, 1881, in contravention of Subdivision 1, of Section 10, of Article 1, of the Constitution of the United States, prohibiting any State from passing any law violating the obligation of a contract, by imparting to the alleged contracts of 1872 and 1875, which are sued on herein, and whose existence as valid obligations is a condition precedent to the invocation of that statute by defendants in error, if it may be invoked at all by them, the quality of surviving the mortgage foreclosure sale to Nicodemus under which plaintiff in error claims, when, under the law in force when they were made, they were, as purely personal obligations, extinguished by said sale, with the result that not only was the said mortgage contract of 1881 burdened by a new

condition and duty not existing when it was made, but there were given to said alleged contracts of 1872 and 1875 vitality, efficacy and force not possessed by them when made.

(*g*) The General Office Statute of 1889, as construed and applied in this case, cannot be justified as the legitimate exercise of the police power of the State, since the location and maintenance of the general offices, machine shops and roundhouses at Palestine were not for a public purpose, but were, on the contrary, for a private purpose benefiting only a single community.

(*h*) The General Office Statute of 1889, as construed and applied in this case, cannot be justified as the legitimate exercise of the police power of the State, since it was not legislation for the protection of the public from injury, neither the morals, health, safety of the public, nor the general welfare being secured against detriment by the legislation.

(*i*) The General Office Statute of 1889, as construed and applied in this case, cannot be justified as the legitimate exercise of the police power of the State, since, instead of being an enactment in the interest of the morals, health or safety of the public, or of the general welfare, by scuring protection from injury in respect to any of those purposes, it was designed, and its effect, as regards this case, was, to impart to the alleged contracts of 1872 and 1875 the feature of surviving a mortgage foreclosure sale, when, under the law in force when they were made, if they ever were made, they were extinguished by such sale.

Statement Under Foregoing Propositions.

On June 15, 1881, the International & Great Northern

Railroad Company executed to the Farmers Loan & Trust Company, Trustee, its second mortgage to secure its second mortgage bonds of the same date, for the principal sum, in the aggregate, of $10,391,000.00, with interest, also executed to said Farmers Loan & Trust Company, Trustee, on all its railroads, properties and franchises, including its franchise to be a corporation, then owned, or thereafter to be acquired by said railroad company, except certain lands not here involved. (R., Vol. 3, pp. 895-908, inc.)

On April 20, 1908, the Farmers Loan & Trust Company, Trustee, filed its suit in the United States Circuit Court for the Northern District of Texas, against the International & Great Northern Railroad Company to foreclose the lien of said second mortgage on said railroad properties and franchises covered by that mortgage, to satisfy the unpaid principal and interest of said bonds. (R., Vol. 3, pp. 877-894, inc.)

On May 10, 1910, the United States Circuit Court for the Northern District of Texas entered a decree foreclosing the lien of said second mortgage of June 15, 1881, to satisfy principal and interest of said second mortgage bonds, then amounting to $12,165,545.60, and ordered the sale of the railroad properties and franchises of said railroad company, by particular description, covered by said mortgage for that purpose by a Master Commissioner appointed by the court. (R., Vol. 2, pp. 643-662, inc.)

The Master Commissioner appointed by the court on June 13, 1911, offered for sale at public auction to the highest bidder, in accordance with the terms and provisions of said decree, all the property, premises and franchises directed thereby to be sold, and Frank C. Nicodemus, Jr., being the last and highest bidder, the

said property, premises and franchises were struck off and adjudicated to him for the sum of $12,265,000.00. (R., Vol. 2, pp. 663-664.)

As shown by the Master Commissioner's report, said Nicodemus, as purchaser, deposited with him the sum of $100,000.00, in conformity with the requirement of said decree, and paid to the Master Commissioner on account of said purchase a sufficient sum to make up, with said deposit, at least ten per cent. of his accepted bid, which said last mentioned sum was paid in conformity with the decree by the purchaser's handing to the Master Commissioner certificates of the Farmers Loan & Trust Company representing $990,000.00 face value of second mortgage bonds of the International & Great Northern Railroad Company, with coupons annexed maturing March 1, 1908, and subsequently. (R., Vol. 2, p. 664.)

On June 14, 1911, the United States Circuit Court for the Northern District of Texas entered a decree ratifying, approving and confirming the sale to Frank C. Nicodemus, Jr., and making the same absolute, and adjudicating said Nicodemus to be the purchaser of said property, premises and franchises, subject, however, to all the terms and conditions of the decree of foreclosure of May 10, 1910, and subject also to the due performance by the purchaser, his successors or assigns of all the obligations therein prescribed.

On September 22, 1911, the Master Commissioner made his final report, showing compliance by the said Frank C. Nicodemus, Jr., as purchaser, with all the terms and conditions of the decree of foreclosure of May 10, 1910, and the due performance by said purchaser of all the obligations therein described, including the payment of the

purchase price; and by said final report said Master Commissioner recited that said Nicodemus, as purchaser, had delivered to him an assignment wherein and whereby he assigned, transferred and set over to the International & Great Northern Railway Company all his right, title and interest under said decree, or by virtue of his said bid and purchase and the payment of the entire purchase price bid, in and to all the railroads, property, rights, franchises, functions, immunities and appurtenances thereunto belonging, rolling stock, property and premises of every kind and description sold at said sale, including his right to receive conveyance and possession thereof, and wherein and whereby he directed that the deed or deeds directed by said decree to be made to the purchaser or purchasers at said sale, or his, its or their successors or assigns, conveying and releasing said property as in said decree provided be made and delivered to said International & Great Northern Railway Company, its successors and assigns, a copy of said assignment being attached to and made a part of the report. (R., Vol. 2, pp. 668-675, inc.) A copy of the assignment by Nicodemus as purchaser to the International & Great Northern Railway Company recited in said final report of the Master Commissioner appears on pages 675-679, inclusive, of Vol. 3 of the Record.

On August 31, 1911, the Master Commissioner, joined by the International & Great Northern Railroad Company, Thomas J. Freeman, Receiver of that company, the Farmers Loan & Trust Company, Trustee, and Frank C. Nicodemus, Jr., executed a deed conveying to the International & Great Northern Railway Company all of the railroads, properties and franchises purchased by Nicodemus at foreclosure sale on June 13, 1911, the as-

signment from Nicodemus to said railway company recited in the final report of the Master Commissioner being also recited in said deed. (R., Vol. 2, pp. 686-701, inc.)

On September 25, 1911, the United States Circuit Court for the Northern District of Texas in all things ratified and confirmed the final report of the Master Commissioner above mentioned, and in the decree of confirmation approved and confirmed the action of the Master Commissioner in executing, acknowledging and delivering to the International & Great Northern Railway Company, assignee of the purchaser, a deed of conveyance of said railroads, property and franchises as in said report fully set forth. (R., Vol. 2, pp. 682-686, inc.)

On August 10, 1911, the International & Great Northern Railway Company filed its articles of incorporation in the office of the Secretary of State of the State of Texas, in pursuance of Article 4550, of Chapter 11, of Title 94, of the Revised Civil Statutes of 1895, as amended by an act of the legislature of the State of Texas approved Sept. 1, 1910, and as so amended, being Article 6625, Revised Civil Statutes of 1911; and in its articles of incorporation said railway company stated that it was organized for the purpose of acquiring, owning, maintaining and operating the railroads theretofore forming the International & Great Northern Railroad, and purchased by Frank C. Nicodemus, Jr., one of the incorporators, at a sale thereof on June 13, 1911, pursuant to decree of foreclosure and sale entered on or about May 10, 1910, referring to the decree above set forth; and in said articles of incorporation the company stated that the place at which should be established and maintained its principal business office, its public and general offices, was the City of Houston, in Harris County, Texas. (R., Vol. 2,

pp. 701-707, inc.) It was shown that the amount at which the properties were sold at the Master Commissioner's sale to Frank C. Nicodemus, Jr., was $12,645,000.00, in consequence of which there was a deficit of $317,387.72 under the decree. (R., Vol. 2, p. 633.)

Argument Under Foregoing Propositions.

A brief discussion of what is meant by the obligation of a contract will serve, we believe, the purpose of aiding the court to perceive readily the strength of our position that the obligation created by the contracts of the mortgage and bonds of June 15, 1881, was impaired by the subsequent legislation of which we complain as producing that effect.

In the case of McCracken v. Hayward, 2 Howard, 608, the court gave the following exposition of the meaning of the expression "the obligation of a contract":

> "The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either than that which the terms of the contract indicate according to their settled legal meaning; when it becomes consummated, the law defines the duty and right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty or to impair the right, it necessarily bears on the obligation of the contract in favor of one party, to the injury of the other; hence, any law which in its operation amounts to a denial or obstruction of the rights accruing by

> contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution."

In the case of Von Hoffman v. City of Quincy, 4 Wallace, 535, the court declared:

> "It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement."

In the recent case of Northern Pacific Railway Company v. Wall, 241 U. S., 87, the court, citing Von Hoffman v. City of Quincy, declared:

> "As this court has often held, the laws in force at the time and place of the making of a contract, and which affect its validity, performance and enforcement, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms."

Applying the principle that the laws in existence when a contract is made constitute a part of it, and give it binding force, to our case, we are justified in the assertion that the law which was in force at the time of the execution of the mortgage and bonds of June 15, 1881, constituted a part of such mortgage and bonds. That law was, as declared in the case of International & Great Northern R'y Co. v. Anderson County, 150 S. W., 239, that "in the absence of any statute affecting the liability of the purchaser of a railroad sold under judicial proceeding, or under deed of trust, a purchaser who acquires the property and franchises of such railroad company takes the property free from all liability for its former indebted-

ness not secured by a lien, and free from all mere personal obligations of the former company." Substantially the same statement was made in Hoard v. Railway Co., 123 U. S., 222, in the following language:

> "Persons who purchased the railroad at the mortgage foreclosure did not thereby under any statute of the State, or any contract of which we are aware, become obligated to pay the debts and perform the obligations of the railroad company. They bought the property of that company, and its franchises; but if, as such purchasers, they thereby became bound to pay all the debts and perform all the obligations of the corporations whose property they bought, it would put an end to purchase of railroads."

There is nothing in the case of I. & G. N. R'y Co. v. Anderson County, 156 S. W., 499, decided by the Supreme Court of Texas, opposed to the doctrine that we have stated on this subject. On the contrary, the following statement contained in that decision is in harmony with the doctrine we have asserted:

> "As above stated, the plaintiff in error (referring to the present plaintiff in error) is shown to be a distinct corporation from the International & Great Northern Railroad. Though regarded as the successor of that company, it is too well settled to admit of doubt that it would ordinarily stand relieved of all liabilities and obligations, not constituting a prior encumbrance upon the property it acquired, that were personal to that company. While the general rule has been qualified in this State by statutory provision, only to the extent of and as governed by such qualification, did the plaintiff in error succeed to such liabilities and obligations of the former company."

The evident reference of the court in speaking of the qualification of the general rule by statutory provision in this State, is to what for brevity we shall speak of as

the General Office Statute, though it relates to machine shops and roundhouses as well as to general offices, contained in Arts. 6423, 6424 and 6425, of the Revised Civil Statutes of Texas, the first of which articles is quoted in the opinion in that case. Although, in another part of its opinion, the court stated that a purchaser of the corporate franchises and property of a railroad company under judicial process succeeds to all its statutory and common law duties to the public, and that a railway company, in whomsoever may be its ownership, stands charged with every duty and obligation to the public imposed by its charter and the nature of its business, and from those it cannot escape without legislative permission, so long as the corporate existence continues, that statement manifestly was not intended to conflict with the previous statement that, ordinarily, a successor company acquiring the property and franchises of a sold-out company as the result of foreclosure proceedings, is relieved of all liability and obligations, not constituting a prior encumbrance upon the property, that are merely personal in their character. But the court had in mind, in asserting that the purchaser succeeds to all of the statutory and common law duties of the sold-out company, that the statutory and common law duties, applicable to railroad companies generally, are not affected by any change in ownership incident to sale under judicial process. And the court, having before it, and being engaged in the consideration of the General Office Statute, had especially in mind that, since, as the court held that statute imposed a public duty upon the sold-out company that survived the sale of its property and franchises in the hands of the purchaser, the duty to forever maintain general offices, machine shops and roundhouses under

the circumstances of this case was one of those public duties preserved notwithstanding the sale. That this was the idea of the court is evidenced by the following portion of the quotation made by the court from Elliott on Railroads, Vol. 1, p. 753:

> "The new corporation organized thereunder does not become liable for any debts or liabilities of the old company for which the purchasers would not be liable by the terms of their purchase if incorporated. But it does generally become liable to perform the public duties imposed by law upon the old corporation."

And this is the more manifest when the following sentence, immediately succeeding the language quoted, is read:

> "Thus, the new company has been held liable for a failure to maintain and repair bridges forming a part of the highway over its road, where that duty was imposed by law upon its predecessor."

Since, at the time of the execution of the mortgage and bonds of June 15, 1881, the law was that merely personal contracts of railroad companies were terminated upon the sale of the property and franchises of the company by virtue of mortgage foreclosure proceedings, and since that law constituted a part of the contract when the mortgage lien was foreclosed by the decree entered on May 10, 1910, the contracts alleged to have been made in 1872 and 1875 by the Houston & Great Northern Railroad Company and the International & Great Northern Railroad Company for the location and perpetual maintenance at Palestine of the general offices, machine shops and roundhouses in question, ceased to exist or operate, for without doubt, as was held by the Supreme Court of

Texas in the opinion above refered to, those contracts were merely of a personal nature. Indeed, in the absence of a holding, that such was the character of the contracts is indisputable.

It is claimed by the other side that notwithstanding the state of the law as we have indicated it, prior to the enactment of the General Office Statute of 1889, now Arts. 6423, 6424 and 6425, Revised Civil Statutes of Texas, the rule has been different with respect to the location and maintenance of general offices, machine shops and roundhouses established in pursuance of contracts coming within the terms of that statute, though entered into before its enactment. And they rely upon the decision of the Supreme Court of Texas in I. & G. N. R'y Co. v. Anderson County, 156 S. W., 499, as well as upon I. & G. N. R'y Co. v. Anderson County, 174 S. W., 305. While the decision of the Court of Civil Appeals, at Texarkana, whose opinion, reported in 174 S. W., 305, is copied on pages 1001 to 1022, inclusive, of the Record, is now the subject of review on this writ of error, by reason of the refusal, as shown on page 1288 of the Record, by the Supreme Court of Texas, of a writ of error applied for to correct the errors committed by said Court of Civil Appeals, yet undoubtedly the decision of the Court of Civil Appeals was influenced by the previous decision of the Supreme Court of Texas, in this case, upon a writ of error to the Court of Civil Appeals at Galveston, consequent upon the decision of the last named court in an appeal from the order of the District Judge granting an interlocutory injunction in this case. This assertion is borne out not only by the references by the Court of Appeals to the Supreme Court's holding that the General Office Statute imposed

a burden and public duty upon the sold-out company, which passed to the plaintiff in error upon its acquisition of the properties and franchises of the sold-out company, and by the entire reasoning of the Court of Civil Appeals, but also by the facts that naturally the Court of Civil Appeals would respect and follow the decision of the Supreme Court, the higher tribunal, upon the same questions in the same case, and that errors were assigned by the plaintiff in error in its application for a writ of error upon the assumption that the Court of Civil Appeals entertained the same views as the Supreme Court, and was guided and governed by its decision. (R., pp. 1171 and 1172 and 1178.) We shall, accordingly, direct our criticisms indiscriminately against the legal positions of the Supreme Court, as well as those of the Court of Civil Appeals.

The Supreme Court, in its opinion, after observing that the general rule that all obligations of a merely personal nature of a sold-out company cease upon the sale of its property and franchises under foreclosure proceedings, and that such rule had been qualified in this State by statutory provision, made the following statement:

> "The question, therefore, as to whether it (referring to the plaintiff in error) rests under the same duty as the International & Great Northern Railroad Company in respect to the maintenance at Palestine of its general offices, machine shops and roundhouses is determined by the nature of that company's obligation in the premises, and the relation of the plaintiff in error to such obligation."

The meaning evidently is that, in order for the General Office Statute to operate against the sold-out company, its obligation created by the contracts relied on would have to be considered. And the views and conclusions of

the Court of Civil Appeals were strictly in harmony with that conception.

As preliminary to the criticism of the views of the Supreme Court of Texas with respect to the operation of the General Office Statute of 1889, it is well enough to advert to the point that though "it is undoubtedly the general rule for this court to accept the construction placed by the courts of the State upon its statutes and Constitution, yet one exception to this rule has always been recognized, and that in reference to the matter of contracts alleged to have been impaired." (McCullough v. Virginia, 172 U. S., 102.) The same principle is expressed in Douglas v. Kentucky, 168 U. S., 488, as follows:

> "The doctrine that this court possesses paramount authority, when reviewing the final judgment of a State Court upholding a State enactment alleged to be in violation of the contract clause of the Constitution, to determine for itself the existence or non-existence of the contract set up, and whether its obligation has been impaired by the State enactment has been affirmed in numerous other cases."

The recent case of Detroit United R'y Co. v. Michigan, 242 U. S., 238, affirms this doctrine. Many other authorities with which this court is entirely familiar, to the same effect, might be cited, but those given are sufficient to justify the position which we now assume that the construction placed by the Supreme Court of Texas upon the General Office Statute of Texas is not, the impairment of the obligation of a contract being involved, binding upon this court, but that this court is at liberty to examine and determine the question for itself, independently of any views of the Supreme Court of Texas upon the subject.

The folowing extract from the opinion of the Supreme

Court of Texas will serve to indicate the process of reasoning that led to its conclusion as to the meaning and scope of the General Office Statute in its application to the contracts forming the basis of this suit: "It is a qualification of its franchise, and inseparable from it, a burden which accompanies its enjoyment, to be borne as a privilege of its use, and inheres in it with even more virtue than that of an orignal charter obligation, because of the nature imparted to it by a general law. The charter duties and obligations of a railroad corporation, for whose violation its charter may be subjected to forfeiture, necessarily inhere in its franchise, because they operate as conditions upon which it may be exercised. For the stronger reason that a statute imports, duties or obligations imposed by a general law, the observance of which is by the same authority made a condition of the corporate existence, must be held to sustain to the corporate franchise a relation of the same continuing force. They are clearly not to be classed or regarded as merely of a private character. That they have been made the subject of general statutory provision distinguishes them from those duties and obligations which only affect individuals. The concern of the State in their performance, manifested by these enactments of its legislative department, and the penalty prescribed for their violation, necessarily impresses them with a public nature. A duty laid by law upon a railroad corporation, for whose breach its charter may be forfeited at the suit of the State, can hardly be considered as a private duty. As its performance is by statute made a condition of the exercise of corporate rights and privileges which vitally affect the public, it is essentially for the benefit of the public. It goes to the essence of the contract between the corporation and the

State, in virtue of which such rights and privileges, constituting the corporate franchise, are granted and enjoyed. It is founded upon considerations of public policy, as expressed in a general law of the State, and must have been intended to subserve a public interest. For these reasons we are clearly of the opinion that the duty to which, according to the petition, the International & Great Northern Railroad Company was subject, under Art. 6423, in respect to the maintenance of its general offices, machine shops and roundhouses at Palestine, was a public duty."

In addition to the foregoing, the Supreme Court characterized the duty imposed by the General Office Statute as "not only a limitation upon the continuance of its corporate powers, but a limitation that pertained to the use and enjoyment of essential parts of the railroad property"; and observed that "it qualified their use and enjoyment by an abridgment of the important right of location, which otherwise the company would have possessed as an incident of ownership, and impressed their use with an obligation to maintain the location provided by the statute," and that "as it inhered in the corporate franchise exercised by the former company, it necessarily subsists with the franchise in the hands of the present owner," and that "the transfer to such owner of the right to own and operate the road also transferred the obligation attached to such right, and the enjoyment of the right must be in observance of the obligation." And finally, the court observed that "it cannot be denied, we think, that the effect of our statute, in the requirement that the location therein provided of the general offices, machine shops and roundhouses of a railroad company, subject to its operation, should be maintained,

is to impress them as property or instrumentalities necessary to the use of property, with a character of servitude for the benefit of the particular community, from which they are not exempt in the hands of a purchasing company."

In this reasoning we respectfully submit that there are several elements that are palpably unsound. The notion that, because a subject is regulated by a general law, there arises a public duty, is manifestly unsound, since, carried to its logical result, it would make every obligation imposed by general law a matter of public duty. Thus, the State of Texas has general laws regulating the conveyance of real estate, the descent and distribution of property of decedents, the rights and liabilities of parties to negotiable instruments, the rights and duties of landlords and tenants, and many others that might be mentioned. If we take a case involving the rights and liabilities of a landlord and tenant, we shall readily perceive that no question of a public nature can possibly arise or be involved. The controversy in a case of that character is exclusively between two private parties, and it is a matter of no sort of concern to the general public; likewise, the same considerations apply to the other statutes that we have mentioned, as well as to many others regulating the rights and liabilities of parties to private transactions.

We believe that the Supreme Court of Texas was betrayed into the error of confusing two things which, though closely related, are different from each other. That every general statute is designed for the public good is not to be disputed, but the acceptance of that assertion does not compel recognition of the proposition that

every transaction to which a statute intended for the public good is applicable is of a public character, for though, recurring to the case of landlord and tenant that we have employed for illustration, there can be no dispute that the general law upon that subject was enacted for the public welfare, a particular transaction between two persons, to which the statute is applicable, is merely an example of a thing of a private nature, governed by a statute enacted for the public good.

The view of the Supreme Court of Texas that the denunciation by the statute of the forfeiture of the charter of a railroad company for violating the provisions of the General Office Statute creates a public duty, and that its performance is made a condition of the exercise of corporate rights and privileges which vitally affect the public, going to the essence of the contract between the corporation and the State, in view of which such rights and privileges constituting the corporate franchise are granted and enjoyed is, we submit, radically unsound. The forfeiture of the charter for violation of the statute is in the nature of a penalty, and there is no connection between the infliction of that penalty and the contracts on account of which the General Office Statute operates and is invoked in this case. If the reasoning of the court on that subject is sound, every confessedly personal obligation, such as maintaining a station at a certain place, would, if the penalty for not maintaining a station were the forfeiture of the charter of the company, cling to the property and qualify and limit the franchise in whosesoever hands it might be. But we imagine that the other side would shrink from giving the doctrine of the Supreme Court of Texas such expanded operation, though logical-

ly there is no escape from such enlarged application of the doctrine. Furthermore, if the forfeiture should be incurred, and decreed, and the charter thereby destroyed, the duty of maintenance would of necessity die with the adjudication of forfeiture, with the result that by violating the law the company could get rid of the duty attaching to or inhering in the franchise as held by the Supreme Court of Texas.

The Court of Civil Appeals at Texarkana held that the provisions of the charters of the Houston & Great Northern Railroad Company and the International Railroad Company, taken together, meant that the principal office of the consolidated company, the International & Great Northern Railroad Company, should be established at Houston, Texas, or at such point on the line of railway as might be deemed most convenient for the transaction of the business of the company, and might be moved from time to time to such places on said line as the progress of the work of construction might render expedient and necessary, and that, therefore, the domicile of the company was not fixed by its charter at Houston. In the light of that holding, which, being a matter of State law, is no longer open to controversy, the reproduction of Article 6423, which is the first provision of the General Office Statute, will conclusively show that in this case a contract was essential to render that statute operative as to plaintiff in error's predecessor. That article is as follows:

> "Every railroad company chartered by this State, or owning or operating any line of railway within this State, shall keep and maintain permanently its general offices within the State of Texas at the place named in its charter for the locating of its general offices; and, if no certain place is named in its char-

ter where its general offices shall be located and maintained, then said railroad company shall keep and maintain its general offices at such place within this State where it shall have contracted or agreed, or shall hereafter contract or agree, to locate its general office for a valuable consideration; and, if said railroad company has not contracted or agreed for a valuable consideration to maintain its general offices at any certain place within this State, then such general offices shall be located and maintained at such place on its line in this State as said railroad companies may designate to be on its line of railway. And such railroads shall keep and maintain their machine shops and roundhouses, or either, at such place or places as they may have contracted to keep them for a valuable consideration received; and, if said general offices and shops and roundhouses, or either, are located on the line of a railroad in a county which has aided said railroad by an issue of bonds in consideration of such location being made, then such location shall not be changed; and this shall apply as well to a railroad that may have been consolidated with another, as to those which have maintained their original organization."

That the defendants in error recognize the necessity for a contract in order to render that statute available to them in this case appears from their claims that, in the absence of a charter provision locating the general offices, machine shops and roundhouses, the railroad company is bound to keep and maintain such offices, machine shops and roundhouses at Palestine, on the strength of a contract of the Houston & Great Northern Railroad Company to locate and permanently keep and maintain its general offices at that place; that the company is bound to keep and maintain its general offices, machine shops and roundhouses at Palestine on the strength of a contract made by the International & Great Northern Railroad

for that purpose; and that the general offices, machine shops and roundhouses were located at Palestine under a contract between the Houston & Great Northern Railroad Company and Anderson County, binding that company to locate and forever keep and maintain its general offices, machine shops and roundhouses at Palestine, in consideration of an issue of bonds amounting to $150,000, voted by the electors of the county to aid in the construction of the railroad. In other words, their position necessitates the conclusion that, in the absence of one or more of the contracts mentioned, there would be no basis for the operation of the General Office Statute, with the result that, in that condition, that statute could not be invoked in behalf of the defendants in error. It is thus demonstrated that the rights of the defendants in error to insist upon the enforcement of the alleged contract against the plaintiff in error is bottomed primarily upon the making of the contracts, or at least one of them. It is true that the Court of Civil Appeals, to which the writ of error was directed by this court, held, as above shown, adopting the view of the Supreme Court upon the former appeal, that the defense of the railway company and the right of the plaintiffs in this suit against the railway company were entirely dependent upon the General Office Statute, and not upon the enforcement of a private contract, as such, for its validity, and observed in that connection that the contract was only evidence in the line of facts going to prove the application of the statute, and did not operate or have the legal effect to create a lien *in rem* or any other legal liability or claim in favor of appellees. This holding, with the attendant observation of the court, could not alter the real nature of the case. Indeed, if the contracts alleged did not form the basis of

the rights of the plaintiffs in the court below, there would not only be no room for the invocation of the General Office Statute, but the cause of action for the removal of the offices from Palestine, and the threatened removal of the machine shops and roundhouses, would be in the State of Texas, and not in the plaintiffs. In other words, unless the plaintiffs had a contractual right capable of enforcement by them, they were not entitled to any standing in court, and their whole suit was a misconception when they, as private litigants, asserted their rights.

A suggestive case on this subject, presenting the reverse side of the question, is People v. Rome, etc., R'y Co., 8 N. E., 369, where the Court of Appeals of New York held a mandamus at the suit of the Attorney General would not lie to enforce a contract between a railroad company and a town for the erection and maintenance of a depot at the town, the court observing: "The contract right and obligation are not in any proper sense a public matter, in which the people of the State in their sovereign capacity are interested. If there is a valid contract still in force and operative, it must be enforced by the same proceedings taken in behalf of the town, and cannot be enforced by a proceeding instituted by the Attorney General in behalf of the people of the State."

The allegations of the defendants in error in their amended original petition, on which the case was tried in the District Court, that by the transfer from Palestine of the general officers and their subordinates, numbering two hundred and fifty men, with an estimated payroll of two hundred and fifty thousand dollars annually, had greatly reduced the volume of business in said city, and had materially depreciated all property values therein, amounting at the time of the filing of the suit to over

one hundred thousand dollars, and that such damages had increased and would continue to increase until the return of the officers and their subordinates to their alleged rightful location, and that if the plaintiff in error should cease to maintain and operate the machine shops and roundhouses and the general offices of Superintendent of Motive Power and Machinery, and Master Mechanic, at the City of Palestine, with an annual payroll far in excess of the removed general offices, as threatened by plaintiff in error, it would destroy or depreciate defendants in error's property to an amount far in excess of half a million dollars, would imperil and largely sacrifice the property and business of said city, without any way of measuring the injury and fixing compensation, thereby producing irreparable injury, in connection with the preceding allegation that, acting upon the faith and credit of the contracts and agreements pleaded by defendants in error, and in reliance thereon, the defendants in error have acquired property rights in the City of Palestine worth many hundreds of thousands of dollars (R., p. 64), unmistakably fix the character of this suit as one of a private nature, originating in and based upon said contracts and agreements, whose existence was essential to the putting into operation of the provisions of the General Office Statute. All this becomes important in determining the character of this suit as essentially private, founded upon a private right, and in enabling this court, looking beneath the surface, to ascertain the real issues between the parties, as is its function in view of the presentation of the question of the impairment of the obligation of contracts in this case, and to see the necessity of deciding in this case that no construction, whether natural or strained, placed by the State Courts upon the

General Office Statute, shall be suffered to obscure the real controversy.

It is evident that both the Supreme Court of Texas and the Court of Civil Appeals at Texarkana had a keen appreciation of the necessity for determining, in order to justify the conclusion reached by them, that the General Office Statute, as applied to this case, created a public duty upon the part of the railway company enforceable in this suit, in view of the doctrine, established by the authorities, that, in order to give a statute, enacted after the formation of a contract, application to the contract, so as under any circumsances to affect the rights of the parties thereto, it is essential that the statute be enacted for a public, as distinguished from a private, purpose—but of this we shall speak again in dealing with the alleged exertion of the police power of the State in this case.

With respect to the impairment of the obligation of the contract created by the mortgage and bonds of June 15, 1881, we insist that, under the law existing at the time of the execution of the mortgage and bonds, the railroad company executing the same had the right under the law of Texas to establish its general offices, machine shops and roundhouses at such place as it deemed advisable, and that view accords with the construction given by the Court of Civil Appeals at Texarkana of the provisions of the charters of the two companies which were merged into the International & Great Northern Railroad Company. Besides, there was then in force in Texas a general statute providing that any railroad company "shall, so soon as convenient after its organization, establish a principal office at some point on the line of its road, and change the same at pleasure, giving public notice in some newspaper of such establishment and change," the same

being a part of the general railroad law of Texas enacted by the legislature on December 19, 1857. Furthermore, the law, as it existed at the time of the execution of said mortgage and bonds, was that upon the foreclosure of a mortgage upon the property and franchises of a railroad company in Texas, and the sale of such property and franchises under foreclosure, the purchaser acquired the property and franchises relieved of all purely personal contracts of the company as determined by the Texas cases to which we have referred.

To avoid confusion, it is to be observed that the principle that the properties and franchises of a railroad company sold out under judicial sale are relieved in the hands of a purchaser from liability for the debts of the sold-out corporation and all its purely personal obligations, was decided in Texas in the case of H. & T. C. R'y Co. v. Shirley, 54 Texas, 125; Railway Company v. Morris, 67 Texas, 692, and Railway Company v. Newell, 73 Texas, 334, when the statute regulating the sales of such properties and franchises read as follows:

> "In case of the sale of the entire roadbed, track, franchise and chartered right of a railroad company, whether by virtue of an execution, order of sale, deed of trust, or any other power, the purchaser or purchasers at such sale and their associates shall be entitled to have and exercise all the powers, privileges and franchises granted to said company by its charter, or by virtue of the general laws; and the said purchaser or purchasers and their associates shall be deemed and taken to be the true owners of said charter and corporators under the same, and vested with all the powers, rights, privileges and benefits thereof, in the same manner and to the same extent as if they were the original corporators of said company; and shall have power to construct, complete, equip and work the road upon the same

terms and under the same conditions and restrictions as are imposed by their charter and the general laws." (Act of December 19, 1857; Rev. Statutes of 1879, Article 4620; Revised Statutes of 1895, Art. 4549.)

Subsequently, in 1889, there was enacted the statute which was Art. 4550 of the Revised Statutes of 1895, to the effect that upon the sale of the property and franchises of any railroad company within this State under mortgage foreclosure, the purchaser or purchasers thereof and associates should be entitled to form a corporation under the general railroad act for the purpose of acquiring, owning, maintaining and operating the road so purchased as if such road were the road intended to be constructed by the corporation, and that when such charter should be filed, the new corporation should have the powers and privileges then conferred by the laws of this State upon chartered railroads, including the power to construct and extend. Art. 4550 was amended in 1910, and is now found in the Revised Statutes of 1911 as Art. 6625, under which the present plaintiff in error was incorporated. It was held, in Texas Southern R'y Co. v. Harle, 101 Texas, 170, that the purchaser of railroad property and franchises under foreclosure could, with associates, under Article 4550, providing for the formation of a corporation by the purchaser and associates, form a corporation without the necessity of the conveyance of the property and franchises acquired by the purchaser at foreclosure sale tothe new corporation; and as regards that feature, the amendment of 1910 did not change the former law.

In addition to the considerations already presented, to indicate that, if the burden, duty or servitude held by the

Texas Courts to be imposed by the General Office Statute upon railroad companies and their properties and franchises, so as to affect and encumber such properties and franchises, notwithstanding a prior mortgage lien, violates the obligation of the mortgage contract, we mention that the ability to realize the value of the property mortgaged, when resort to foreclosure becomes necessary, is the vital breath of mortgage security; that unless the security for which the mortgagee contracted is available to him, without the assumption by him of a burden which did not exist when his right originated, he loses a property right, and that unless the rights obtained by the mortgagee extend to the purchaser at foreclosure sale, no one could afford to take mortgage security for a loan, since the value of the mortgage lies in what the property mortgaged will bring at judicial sale. The very fact that the Texas Courts have held that a burden, duty or servitude was imposed by the General Office Statute upon the International & Great Northern Railroad Company, its properties and franchises, when no such burden, duty or servitude existed at the time of the execution of the mortgage and bonds of 1881, ought, we think, to be sufficient to establish the impairment of the obligation of the contract, of which we complain, for, undoubtedly, the property and franchises would have a saleable value without the burden, duty or servitude that they would not have with such burden, duty or servitude. Clearly, by so deciding, the courts held that a new condition could be annexed to that mortgage contract, and a new duty, burdening that contract, could be created, for the obligation to perpetually maintain the general offices, machine shops and roundhouses at Palestine affixed a new condition, and created

a new duty, which did not exist at the time of its formation. Indeed, by the General Office Statute, as construed, the contracts of 1872 and 1875 were afforded a security not previously existing, since, under the law as it then existed, those contracts ceased with the foreclosure sale, whereas, by the General Office Statute, as construed and applied to those contracts, they were made to survive the foreclosure sale and continue perpetually. Thus, that statute not only burdened by a new condition and duty the mortgage contract of 1881, but gave to the alleged contracts for the location of the general offices, machine shops and roundhouses a vitality, efficacy and force not possessed when they were made.

That the present plaintiff in error, to which, under the sanction of the court under whose decree of foreclosure the properties and franchises of the International & Great Northern Railroad Company were sold, all of the rights, titles and interest of the immediate purchaser, Nicodemus, were transferred, and to which the conveyance, with the approval of the court, of the properties and franchises of the sold-out company was executed by the Master Commissioner who made the sale, took the properties and franchises freed from the prior personal contracts of the company, results from the legal principle declared in Section 1228, Vol. 3, Pomeroy's Equity Jurisprudence, to the effect that a deed "when given in pursuance of a valid decree and sale, is to convey to the purchaser whatever title the mortgagor had at the time of executing the mortgage, and whatever title he may have subsequently acquired down to the time of foreclosure." The same idea is expressed in Jones on Mortgages, Section 1654, where it is declared that:

"The title takes effect by virtue of the original

deed, and the sale carries that title, and cuts off all liens and interests created subsequent to the mortgage. * * * Title acquired by foreclosure relates back to the date of the mortgage, so as to cut off intervening equities and rights."

To the same effect is the following, taken from U. S. Commonwealth Title & Trust Co., 193 U. S., 651:

> "And the sale and deed relate to the date of the mortgage, conveying the title which was then possessed by the mortgagor."

The rationale of this doctrine is expressed in Vicksburg v. Vicksburg Water Co., 202 U. S., 453, in which was presented the question whether a waterworks company which acquired the property and franchises of a prior company after their sale under decree of foreclosure was entitled to the benefit of certain contract rights which had existed in favor of the sold-out company. The Supreme Court of the United States, in holding that the company which succeeded to the property and franchises of the sold-out company after the foreclosure sale was entitled to the benefit of the contract rights involved, observed:

> "The power to mortgage the privileges and rights of a corporation must necessarily include the power to bring them to sale to make the mortgage effective. We think the mortgage in this case covered and the decree passed the contract rights given originally to the Vicksburg Water Supply Company by the ordinance of November 18, 1886."

That case is peculiarly valuable for the reason that it was there contended that the new company which had acquired the property and franchises of the sold-out company was organized after the taking effect of the Consti-

tution of Mississippi, and that such Constitution reserved to the legislature the power to alter, amend or repeal any charter of incorporation, with certain restrictions, the court observing with respect to that contention:

> "But we think the right ofthe Vicksburg Waterworks Company was acquired under the foreclosure and sale of the contract rights conferred in the ordinance of 1886, and covered in the mortgage as we have stated."

Reference to a few authorities upon the subject of what constitutes the impairment of the obligation of a contract will suffice to establish, in view of what we have shown with respect to the General Office Statute, and its effect on the mortgage contract of 1881, that the obligation of that contract has been impaired. In the early case of Green v. Biddle, 8 Wheaton, 84, the Supreme Court of the United States declared:

> "The objection to a law on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation."

Again, in Planters Bank v. Sharp, 6 Howard, 327, the court said:

> "One of the tests that a contract has been impaired is that its value has been by legislation diminished. It is not, by the Constitution, to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force."

In Words and Phrases, Vol. 4, p. 3412, referring to Blair v. Williams, 14 Ky., 34, and Lapsley v. Brachears, 14 Ky., 47, appears the following:

> "The word 'impair' is familiar to everyone, and means, according to standard writers in our language, by which we teach our children in our own tongue, simply 'to diminish; to injure; to make worse, etc.' It is remarkable that in framing the provision of the Federal Constitution providing that no law should be passed impairing the obligation of any contract, the Convention did not use the word 'lessen' or 'decrease' or 'destroy,' but one more comprehensive, which prohibited making worse in any respect a contract legitimate in its creation. The object, then, of its provision may have been to establish an important principle, and that was, the entire inviolability of contracts."

In Northern Pac. R'y Co. v. Duluth, 208 U. S., 583, is this statement:

> "The legislation which deprives one of the benefit of a contract or adds new duties or obligations thereto necessarily impairs the obligation of the contract, and when the State Court gives effect to subsequent State or municipal legislation which has the effect to impair contract rights by depriving parties of their benefit, and make requirements which the contract did not theretofore impose upon them, a case is presented for the jurisdiction of this court."

The foregoing observations lead indisputably to the conclusion that this legislation as applied by the courts of Texas in this suit impairs:

(*a*) The obligation of the mortgage contract of date June 15, 1881;

(*b*) The obligations of the alleged contracts of 1872 and 1875 by securing them in perpetuity, by saddling them as a servitude or burden upon the property;

(*c*) The obligations of the alleged contracts of 1872 and 1875 in increasing materially the number of offices required to be maintained at Palestine; and

(*d*) In imposing the additional burden of requiring the holders of those offices, with their families, clerks, etc., to reside in the City of Palestine.

When the mortgage of 1881 was executed, it conveyed as security the right to sell all of the property, privileges and franchises of the railroad company, together with the statutory right that the purchasers at such foreclosure sale should have the privilege of operating said property and for all purposes should be considered the original incorporators under the old or sold-out charter, and take the property free from all personal contracts, including the alleged contracts of 1872 and 1875. The statute quoted as construed by the Texas courts destroys the privilege existing at the time the mortgage was given for the purchasers of the property to take it and operate it freed from the alleged contracts of 1872 and 1875. Under the decisions of the Texas courts an obligation which was purely personal when the mortgage contract was made, the performance of which could not be enforced by injunction or other method, and for the breach of which only an action for damages would lie, by an act of the Texas Legislature of 1889, became secured and bound upon the property of the company into whosesoever hands it might go, regardless of judicial or other sales, and subject to specific and perpetual performance under judgments of the courts. It seems that the power to impair as construed by the Texas courts is without restraint and unlimited. When the property was sold, however, at foreclosure sale, the purchaser took all of the rights of the mortgagor back to the date of the mortgage, and must of

necessity have taken the property freed from the personal contracts alleged to have been created in 1872 and 1875, and certainly without the court's added statutory burden and servitude of such contracts on the property, secured in perpetuity.

The Texas courts held in this case that the contracts of 1872 and 1875, plus the statute, became a burden and servitude upon the property in whosesoever hands the property might go. In other words, this purely personal contract by virtue of the statute became in practical effect a covenant running with the soil. If this be true, and if the present International & Great Northern Railroad Company, incorporated under the general laws of the State of Texas by virtue of the statute above referred to, took the property of the sold-out company subject to the alleged contracts of 1872 and 1875, then as to this plaintiff in error, if said contracts or either of them ever existed, the obligations thereof have been impaired in three distinct and undisputed respects:

1. If the original alleged contracts descended to the present owner of the property, they must have descended unimpaired by legislation. Therefore, the contracts under the decisions and laws of Texas were personal obligations without security or means of judicial enforcement or power of specific performance, and for breach of which only an action of damages would lie. Consequently the statute which the Texas Courts say intervenes and makes that contract a lien, burden or servitude upon the property, and secures its enforcement and makes it a subject of specific performance in a decree of court, impairs the obligation of the contract which passed with the property to the present owner.

2. The alleged original contracts of 1872 and 1875 pro-

vided only for the general offices of the company, clearly meaning such as then existed. The evidence is indisputable that the statute adds and designates as general offices a large number of offices not then known to the Houston & Great Northern Railroad or to the International & Great Northern Railway, and which are not generally known as general offices, and the statutory addition of these to the contract imposes additional burdens upon the property in whosesoever hands it may go, and hence necessarily impairs the obligation of the alleged original contracts of 1872 and 1875.

3. There is nothing in the alleged original contracts which requires a residence of any particular officer or officers' families or clerks or employes in the town of Palestine. The nearest approach to any such provision in the contract is the assertion of the agreement to build rent houses to accommodate certain officers, clerks and their families, but there is neither allegation nor proof as to the number of these or the offices which they held, or the officers for which they were clerks, and neither allegation nor proof that either officers or clerks under the contracts were *required* to reside in the town of Palestine. Consequently, the intervention of the Texas courts and their application of the statute requiring a long list of designated officers to perpetually reside with their families and clerks in the town of Palestine, restricts and destroys the freedom which the railroad company had under the alleged original contracts, to employ persons in its service and permit them to reside at such places as the officers or employes and the company might agree upon as in the best interests of the service, and hence the intervening statute as construed by the Texas courts impairs the obligation of these alleged contracts.

We have already remarked that both the Supreme Court of Texas and the Court of Civil Appeals at Texarkana keenly appreciated the necessity for the existence of a public duty on the part of the railroad company in order to make the contracts sued upon binding upon the present company, notwithstanding the state of the law at the time the mortgage and bond contract was executed. That those courts had the correct conception of the necessity for a public duty abundantly appears from the authorities. The justification for the imposition by statute, when such imposition is permissible, of new duties or burdens, is found in the police power of the State exercised for the health, comfort, safety or welfare of the community. The essence of the power lies in the public purpose to be accomplished. The general doctrine as announced in the authorities is well staed in McGeehee on Due Process of Law, page 307, as follows:

> "The police power cannot be interposed to support statutes which have no possible tendency to protect the community or promote the public welfare, but which, having no substantial relation to the public welfare, arbitrarily deprive the owner of liberty or property."

To the same effect is the following, taken from Dobbins v. Los Angeles, 195 U. S., 223:

> "It may be admitted that every intendment is to be made in favor of the lawfulness of the exercise of municipal power making regulations to promote the public health and safety, and that it is not the province of the courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people of the community. But notwithstanding this general rule of the law, it is now thoroughly well settled by

decisions of this court that municipal by-laws and ordinances and even legislative enactments undertaking to regulate useful business enterprises are subject to investigation in the courts with a view of determining whether the law or ordinance is a lawful exercise of the police power, or whether, under the guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property In Lawton v. Steele, 152 U. S., 133-137, Mr. Justice Brown, speaking for the court, said upon this subject: 'To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, required such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to supervision of the courts.' "

The law as thus announced sustains both the proposition that police power must be exercised for the protection of the public, and the proposition that the courts are to judge of whether the power has been legitimately exercised. With respect to the latter proposition, it is declared in C. B. & Q. R. R. Co. v. Chicago, 166 U. S., 226:

> "In determining what is due process of law, regard must be had to substance and not to form. This court, referring to the Fourteenth Amendment, has said: 'Can a statute make anything due process of law which by its own legislation it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail and has no application

where the invasion of private rights is effected under the forms of state legislation.' "

Illustrating the same general thought is the following, taken from Coppage v. Kansas, 236 U. S., 1:

> "Now it seems to us clear that a statutory provision which is not a legitimate police regulation cannot be made such by being placed in the same act with a police regulation, or by being enacted under a title that declares a purpose which would be a proper object for the exercise of that power. * * * Nor can a State, by designating as 'coercion' conduct which is not such in truth, render criminal any normal and essentially innocent exercise of personal liberty or property rights, for to permit this would be to deprive the Fourteenth Amendment of its effective force in this regard."

The court then, after disclaiming any purpose to impugn the motives of the legislature, observed that its purpose was merely "to emphasize the distinction between the form of the statute and its effect as applied to the present case."

If the legislature cannot, as the authorities cited show, make, by express declaration, that a public purpose which is not essentially so, the determination by a State court that a purpose is public, when it is not, is equally unavailing, since the decisions of a State court, even when the contract clause of the Constitution is not involved, are binding on the Supreme Court of the United States only as to the meaning of the State enactment, and obviously no conclusion as to the meaning reached by interpretation could be more effective than a plain, unmistakable announcement in an enactment of this character as of public or private concern.

The nature of an enactment as having a public or pri-

vate object or effect, is independent of the constitutional question raised, so that an authority holding under the due process provision that the object or effect of the enactment is public or private, as the case may be, is a guide in a controversy in which the question is that of the impairment of the obligation of a contract. In other words, a thing is public or private according to its essential nature, and its character does not vary with the manner in which the question is raised or the occasion for its determination. A few illustrative cases of statutes held to be private and not public in their nature will suffice for present purposes. In Missouri Pacific R'y Co. v. Nebraska, 217 U. S., 196, the Supreme Court of Nebraska held the statute requiring railroads to put in switches at their own expense on the application of the owners of elevators erected within a specified limit, to be for a public purpose and justified by the police power in the way of preventing a monopoly. Nevertheless, the Supreme Court of the United States held the act to be unconstitutional, inasmuch as the obligation sought to be imposed by it was not incident to the public duties of railroad companies, and that the imposition of the obligation would transcend the limit of police power. In Lake Shore, Michigan & Southern R'y Co. v. Smith, 173 U. S., 684, the legislature of Michigan attempted to compel railway companies to issue one-thousand-mile tickets to be sold at twenty dollars in the Lower Peninsula, to be good for two years, with certain rights of redemption and usable by the purchaser, his wife and children. The Supreme Court of Michigan held that the enactment violated no provision of the Federal Constitution, but that it came within the legitimate exercise of police power. The Supreme Court of the United States reversed the judgment

of the Supreme Court of Michigan, and held that the act violated due process and equal protection clauses of the Fourteenth Amendment, inasmuch as it made an exception in favor of a particular class of travelers against the general public, who, under the laws of Michigan, were required to pay fare at the rate of three cents a mile, and was an undue interference with the railroad company in the management of its own affairs.

In the case of Loan Association v. Topeka, 20 Wall., 655, the question was presented whether it was within the competency of a municipality, under an act of the legislature seeking to confer the power, to impose a tax upon the property owners for the purpose of promoting manufacturers in the town. It was held by the United States Circuit Court, and the judgment was affirmed by the Supreme Court, that the act was unconstitutional for want of authority to impose taxes in aid of private enterprises upon the theory that such enterprises would advance the prosperity of the municipality. In the case of Yeatman v. King, 2 N. D., 422, 33 Am. St. Rep., 797, was involved the constitutionality of a statute under which the State sought to provide that, upon the furnishing by any county to a farmer of seed wheat, under a contract for the purpose, and upon the non-payment of the indebtedness by a specified date, the indebtedness should be entered upon the tax list of the county as a tax upon the land upon which the seed had been sown, and that the tax should be a first lien both on the crop raised on the land and on the land itself. In a contest between a county, which supplied wheat under that statute, and a person having a mortgage on the land antedating the furnishing the seed, the Supreme Court of the State of North Dakota, in an exhaustive opinion, reviewing and applying

the decisions of the Supreme Court of the United States, held that no legislative fiat could make that a tax which was not really so, and quoted approvingly from the opinion in Munn v. Illinois, 94 U. S., 113, the language: "There is no magic in the language, though used by a constitutional convention, which can change a private business into a public one, or alter the character of the building in which the business is conducted." The conclusion of the court was that the statute violated both the due process clause of the Fourteenth Amendment and the contract clause of the Federal Constitution, and that the lien of the prior mortgage could not be postponed to the lien of the county attempted to be fixed. If in that case the furnishing of seed to all the farmers of the State to enable them to make crops could not, with respect to particular transactions, be treated and recognized as a public purpose, certainly in our case the attempt to place a burden or servitude upon the property of a railroad company to the diminishing of the security of a mortgage cannot be so treated and recognized.

A valuable authority on this subject is St. Louis S. W. R'y Co. of Texas v. Griffin, 106 Texas, 477, in which the Supreme Court of Texas decided that a statute, passed by the legislature of Texas and known as the Blacklisting Law, was of a private and not of a public nature, and therefore not within the police power, the court observing: "There can be no pretense that the act under examination deals with 'the real needs of the people in their health, safety, comfort or convenience.' To add cases as authority would be useless, for this is a fundamental principal of free government, and gains no force by the repetition of it by different courts. The subject of legislation in this statute and its various provisions

as stated above, are purely personal as between the employe and the corporation, and do not directly affect the public in health, safety, comfort, convenience or otherwise." The statute there involved required corporations to give to a discharged employe upon demand a statement of the true cause of his discharge, and prescribed a penalty of $1,000 recoverable by the State for the refusal of the corporation to give the statement, or, if a statement was furnished, for not stating the true cause. The court, in holding, as shown, that the statute had a private and not a public purpose, did not intimate that the infliction of a penalty recoverable by the State could make that public which, in its nature, was private.

In our case it was and is a matter of no more concern to the general public that the general offices, machine shops and roundhouses in question should be located and kept at Palestine than it would be that manufacturing enterprises employing the same number of men and disbursing the same amount of money should be located and maintained there. The only possible interest that the general public has in the matter is that, for the purpose of visitation and convenience in the transaction of business with the railroad company, its general offices shall be located and kept at some place within the State. The general office statute, upon the provisions of which the defendants in error rely, evidently has no reference to the public convenience or to the profitableness or unprofitableness to the railroad company of the location and maintenance of the general offices, shops and roundhouses. On the contrary, those considerations were clearly ignored by devolving the duty to locate the offices, shops and roundhouses in pursuance of contract obligations irrespective of whether the contracts are beneficial or detri-

mental to the public, or are beneficial or detrimental to the company in the conduct of its business.

Indeed, so completely does the statute ignore any purpose to respect the public interest that a contract with a private individual, having in view merely his personal interest, for any valuable consideration, regardless of the amount of value, is a sufficient basis, according to the statute, for binding a railroad company by a location made in pursuance of such contract, though such location should indisputably be to the detriment of the general public and the railroad company.

To give the general office statute the effect of requiring the fulfillment of the contracts in question, notwithstanding the prior execution of the mortgage and bonds of 1881, and to hold that statute, by reason of personal contracts alleged, fixed a duty, burden or servitude upon the railroad properties in the hands of the predecessors of plaintiff in error and in the hands of plaintiff in error, would be a perversion of the police power, not for the general welfare or public good, but for the benefit of a particular community, and would give rise to a plain, unmistakable impairment of the obligation of the contract created by the execution of the mortgage and bonds.

If the course of reasoning we have pursued is sound, the general office statute as construed and applied to the facts of this case is subject to the fatal obpection of not being enacted for a public purpose, and cannot, therefore, furnish the foundation for the exercise of the police power in violation of the obligation of the contract of the mortgage and bonds of 1881 or of the original alleged contracts of 1872-5.

Statutes designed to suppress things that are harmful to the public may operate to render unenforceable contracts made before their enactment, but they are defensi-

141

ble upon the theory that private contracts will not be suffered to prevent that State from inhibiting occupations or the carrying out of transactions injurious to society. In such cases, the primary consideration is not immunity of individuals from their obligations, but the security of the public, the attainment of which is of such paramount importance that, though incidentally persons may be absolved from their engagements, the private must yield to the public interest. Such statutes rest upon a wholly different basis from that occupied by statutes whose aim is not to protect the public from harm, but, under the guise of fostering the public interest, is rather to secure private advantage even at the expense of destroying contract rights; and to the latter class belong the contracts relied on in this case. The distinction mentioned, if borne in mind, will dissipate doubts that may be engendered by *dicta* here and there found in decisions. And its observance will serve to remove any difficulty that may be produced by cases where a statute destroying a private contract is upheld for an apparently private purpose, when, in fact, it is for a public purpose, of such importance that private right must yield to it. These cases, instead of disregarding the doctrine that a public purpose must be intended, emphasize its governing influence.

As a condition to the exercise of the police power, in such manner as to burden a contract notwithstanding its obligations at its inception, public, as distinguished from private, purpose, is an essential foundation; yet even though the public purpose is intended to be accomplished, such intent will not justify the exertion of the police power, unless the public protection is secured by the subsequent statute, to the extent only of restraining the use of the contract in a way injurious to the public; that is as

it was at the time of its making. In other words, the principle underlying the maxim, *sic utere tuo ut alienum non laedas,* furnished the justification for the interposition of the police power so as to render contracts less valuable than when made. Judge Cooley, in his work on Constitutional Limitations, declares this to be the law in the statement that "The maxim *sic utere tuo ut alienum non laedas* lies at the foundation of the power." We believe that every case in which the police power has been sustained by the Supreme Court of the United States to the disparagement of existing contracts involves that feature, and this view is sanctioned by the cases of Atlantic Coast Line v. Goldsboro, 232 U. S., 549; Grand Trunk Western R'y Co. v. South Bend, 227 U. S., 544; Northern Pacific R'y Co. v. Duluth, 208 U. S., 583. Accordingly, while the police power embraces the promotion of the public convenience or general welfare as well as the promotion of the public health, morals or safety, yet we venture to assert that no case can be found where a statute operating injuriously upon an existing contract has ever been sustained as a legitimate exercise of the police power simply upon the ground that the public interest was fostered by increased prosperity. We feel quite sure that no such application of the police power, dependent as it is uponthe maxim *sic utere tuo ut alienum non laedas,* has ever been sanctioned by this court, as to justify legislation whose object and effect, as are the object and effect of the general office statute, are not only not for the protection of the public from injury, but are to create a right in a contracting party which he did not possess when a contract was made. The pertinency of this observation is found in the condition, to which we have previously adverted, that when the alleged contracts of

1872 and 1875, sued on herein, were entered into, the contracts, being purely of a personal nature, ceased, under the law as it existed when they were made, upon the sale under foreclosure of the mortgage of the properties and franchises of the mortgagor, whereas the general office statute, as construed, disregarding that condition, gave the contracts, which, when created, could not survive foreclosure sale, immortality, in spite of such sale.

The cases in which efforts to displace the prior liens of mortgages in favor of subsequent liens created by statute have failed, are numerous; but the citation of a few of them will suffice to illustrate the principle. In the case of Toledo, etc., R'y Co. v. Hamilton, 134 U. S., 299, it was held, in a controversy involving the respective rights of a mortgagee and a creditor claiming a mechanic's lien under a state statute seeking to give the latter priority over the former, that the statute violated the obligation of the mortgage contract, the court observing:

> "There was no statute in force at the time the mortgage was executed, giving any priority to subsequent mechanic's liens; and by the mortgage the mortgagee took its vested priority beyond the power of the mortgagor or the legislature thereafter to disturb."

In the case of Gunn v. Barry, 15 Wall., 610, the court held that the lien of a judgment creditor on land could not be diminished or destroyed by the enlargement by a provision of the State Constitution of the exemption of the property of the debtor, to the prejudice of the creditor whose claim, on which judgment was founded, existed before the provision of the Constitution was adopted, without the impairment of the obligation of a contract, on the ground that the legal remedies for the en-

forcement of a contract, which belong to it at the time and place where it is made, are a part of its obligation, and that though a State may change remedies, it can make no change involving the impairment of a substantial right. The doctrine of that case was reaffirmed in Edwards v. Kearzy, 96 U. S., 595, in an elaborate opinion. Ours is a stronger case, for not only is the remedy so affected as to involve the impairment of a substantial right, but the general office statute as construed operates injuriously upon the right itself created by the express mortgage contract.

The following cases of contracts, to which the State or a subdivision of the State has been a party, and in which it has been held that the State or a subdivision of the State would not be suffered to violate its contract, illustrate the principle that unless the protection of the public from injury is secured the contract obligation cannot be burdened or rendered less valuable by subsequent legislation; New Orleans Gas Light Co. v. Louisiana Light Co., 115 U. S., 650; Walla Walla Water Co., 172 U. S., 1; C. B. & Q. R. R. Co. v. Nebraska, 170 U. S., 57; N. Y. & N. E. R. R. Co. v. Bristol, 151 U. S., 556; Owensboro v. Cumberland Telephone Co., 230 U. S., 58; Boise Water Co. v. Boise City, 230 U. S., 84; Old Colony Trust Co. v. Omaha, 230 U. S., 100.

The appositeness of these authorities to the contracts between individuals is shown in the New Orleans Gas Light Company case, in which, referring to the obligation of contracts made with the State, it is said that:

> "The obligation of her contracts is as fully protected by that instrument (the Federal Constitution) against impairment by legislation as are contracts between individuals exclusively."

And the restriction of the power of the State with respect to destroying or burdening rights acquired under contracts with the State is stated in the following language:

> "The constitutional prohibition upon the State laws impairing the obligation of contracts does not restrict the power of the State to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with the State are subject to regulations for the protection of the public health, the public morals and the public safety in the same sense and to the same extent as are all contracts and all property whether owned by natural persons or corporations."

The same principle is asserted in the other cases we have cited. In the Walla Walla case the court, referring to the contract made with the municipality, observed:

> "A city council can neither bind itself nor its successors to contracts prejudicial to the peace, good order, health or morals of its inhabitants, but it is to cases of this class that these rulings have been confined."

In Chicago, Burlington & Quincy R. R. Co. case, referring to such contracts, the court said:

> "Contracts of the latter description are held to be within the supervising power and control of the legislature when exercised to protect the public safety, health and morals, and that clause of the Federal Constitution which protects contracts from legislative action cannot in every case be successfully invoked."

In New York & N. E. R. R. Co. v. Bristol, in the discussion of this question, occurs the following:

> "It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts or the deprivation of property without due process or of the equal protection of the laws by the States, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. The governmental power of self-protection cannot be contracted away nor can the exercise of rights granted nor the use of property be withdrawn from the implied liability to governmental regulations in particulars essential to the preservation of the community from injury."

This expression is quoted with approval in Northern Pacific R'y Co v. Duluth, 208 U. S., 583, where the court concluded its review of the authorities with the following statement:

> "The result of these cases is to establish the doctrine of this court that the exercise of the police power in the interest of public health and safety is to be maintained unhampered by contracts in private interests, and that uncompensated obedience to laws passed in its exercise is not violative of property rights protected by the Federal Constitution."

It should, in the light of all the authorities, be conceded that to the language of the cases, extracts from which have just been given, should be added contracts affecting the public welfare, meaning by the public welfare a condition in which the protection of the public from injury is demanded. Except upon the theory that contracts with the State or subdivisions of the State are exempt from impairment in all cases, save those in which detriment within the meaning of the maxim *sic utere tuo ut alienum non laedas,* would result from the contract, the Owensboro, Boise City and Omaha cases above referred to cannot be defended. In the Owensboro case it was held

that an ordinance requiring a telephone company to remove its poles and wires from the streets, notwithstanding the company had erected them under a previous ordinance still in force, was unconstitutional as impairing the obligation of the contract created by the passage of the ordinance granting the franchise and its acceptance followed by the expenditure of large sums of money in the erection of poles and wires. A significant point in that case was that the ordinance demanding the removal of the poles and wires contained an alternative provision that the company might continue to keep the poles and wires on the streets upon the payment by it to the city of a sum to be agreed upon subject to conditions prescribed by an ordinance, to which provision the court adverted as negativing a recital in the ordinance that the poles and wires were a nuisance, the court observing:

> "This repealing ordinance, though it purports to be an exercise of the police power in the 'Whereas' clause, proceeds immediately to contradict the assertion that the poles and wires are a 'nuisance' by the proviso giving the company an opportunity to purchase the right to continue to use the streets under conditions 'to be prescribed by ordinance upon request of said company.'"

The unavoidable implication is that however much the public might have been benefited by the repealing ordinance, that measure could not be upheld in view of the contract right of the company except upon the ground of the exercise of the police power to prevent harmful consequences to the city from the continued presence of the poles and wires in the streets. In the Boise City case the water company, having a franchise of perpetual duration under an ordinance accepted, acted on and constituting a contract, was protected by virtue of the contract

from the payment of a license fee of $300.00 per month exacted by a subsequent ordinance for the further exercise of its franchise after the imposition of a license fee. Undoubtedly the public interest would have been promoted if the city council could have added to the revenue of the city by the collection of the $300.00 license fee sought to be imposed.

In the Omaha case an electric company having a franchise by ordinance to supply light, power and heat, was protected from the repeal of the ordinance during the existence of the franchise which operated as a contract. In that case the trustee of a mortgage given by the electric light company asserted successfully the contract right of that company with its freedom from impairment. While no doubt the city would have profited by the repeal of the ordinance granting the franchise by its ability, in that event, to exact of the light company a large sum of money as a condition to the renewal of the franchise, it was not so much as hinted in that case that any benefit to the city from the repeal would be a warrant for violating the contract obligation.

It may here be observed that the cases of New Orleans Gas Light Co., 115 U. S., 650, the Walla Walla case, 172 U S., 1, and the C. B. & Q. R'y Co. case, 170 U. S., 57, were all cited approvingly in Grand Trunk Western R'y Co. v. South Bend, 227 U. S., 544, with respect to the ability of a State or a municipality to destroy or diminish the value of a contract to which it is a party.

Testing our case by the authorities restricting the exercise of the police power of the State so as to destroy or diminish contract rights to cases where the preservation of the community from injury is necessary, there is here the utter want of foundation for the exercise of the

police power, since in no sense can it be asserted that the protection of the public from injury by the removal of the offices, shops and roundhouses from Palestine is involved. On the contrary, as we have already shown, the location and maintenance of the offices, shops and roundhouses at Palestine were of no moment to the general public, but inured to the benefit of a particular community in the same way that the establishment of a factory or any other business enterprise would have been profitable to the community.

Both the Supreme Court and the Court of Civil Appeals at Texarkana expressed the view that the present plaintiff in error is not in a position to avail itself of the rights of purchaser of the property and franchises of a sold-out company on account of the provision of Article 6625, to the effect that "by such purchase and organization no right shall be acquired in conflict with the present Constitution and laws in any respect." The vice in this position is that it assumes that the general office statute of 1889, operating upon the alleged contracts out of which the rights of the defendants in error—if they have any—grew, had the effect of establishing forever at Palestine the offices, shops and roundhouses in question, when the very point in controversy is as to the competency of the legislature by that enactment to invalidate the contract of the mortgage and bonds of June 15, 1881. If, therefore, we have succeeded in showing, as we believe we have, that the general office statute of 1889 could not and did not have the effect ascribed to it without violating the contract clause of the Federal Constitution, that statute cannot be regarded as a law to be observed by the plaintiff in error, and accordingly there was no ground for conflict with any valid law.

The provisions of Article 6625, Revised Statutes of 1911, which amended in 1910 Article 4550 of the Revised Statutes of 1895, and which were in force when plaintiff took out its charter on the 10th day of August, 1911, for the purpose of acquiring, owning, maintaining and operating the properties and franchises of the sold-out International & Great Northern Railroad Company, plainly negative the idea that it was intended by that enactment to impose upon a new company, formed as plaintiff in error was in pursuance of that article, liability for the carrying out of such contracts as those alleged to have been made in 1872 and 1875. For there was by said Article 6625 a specific enumeration of the personal obligations of the sold-out company, subject to which the new corporation should take the properties and franchises, the language being:

> "That, notwithstanding such incorporation, the properties and franchises so purchased shall be charged with and subject to the payment of all subsisting liabilities and claims for death and personal injuries sustained in the operation of the railroad by the sold-out company and by any receiver thereof, and for loss of and damage to property sustained in the operation of the railroad by the sold-out company and by any receiver thereof, and for the current expenses of such operation, including labor, supplies and repairs; provided, that all such subsisting claims and liabilities shall have accrued within two years prior to the beginning of the receivership resulting in the sale of such property and franchises, or within two years prior to the sale, if said property and franchises be sold otherwise than under receivership proceedings, unless suit was pending on such claims and liabilities when the receiver was appointed, or when the sale was made; in which event claims and liabilities on which suits were so pending shall be protected thereby as though accruing within two years."

That enumeration, by a familiar rule of construction, excluded personal obligations not mentioned; and it is significant, too, that even the obligations placed on the new corporations were those accruing within the limited period of two years, except those on which suit had been brought before the appointment of the receiver or the sale. Following the language quoted, in the way of a proviso, was the provision that "by such purchase and organization no right shall be acquired in conflict with the present Constitution and laws in any respect," to which we have already given attention, but in respect to which we may add that, being separated from obligations of a personal nature, it manifestly referred to something other than personal obligations.

If we have succeeded in showing that the General Office Statute of 1889, as construed and applied in this case, violates the contract clause of the Constitution, there is no occasion for considering its effect under the due process clause of the Fourteenth Amendment. We submit, however, that irrespective of that question, by reason of the burden or servitude imposed by that statute on the contract of the mortgage of June 15, 1881, which burden or servitude did not exist when the contract was executed, and by reason of imparting to the contracts of 1872 and 1875 sued on herein the quality, which they did not possess when made, of surviving the sale under the foreclosure of the mortgage, and being fixed perpetually upon the railroad properties and franchises, in whosesoever's hands they might be, is the deprivation of property without due process, in contravention of the prohibition of the Fourteenth Amendment against such deprivation. It is necessarily true that, if the statute has the effect ascribed to it, such effect was created at the very moment of its

enactment, and thereby at once the value of the mortgage contract of 1881 was diminished.

V.

Having in view the same orderly presentation of the questions raised on the sales made in 1879 by virtue of decrees of the United States Circuit Court for the Western District of Texas to John S. Kennedy and Samuel Sloan, Trustees, that we had in mind in the presentation of the questions arising upon the subject of impairment of the obligation of contracts, we shall pursue the same order in treating the subject of the Kennedy and Sloan sales.

Propositions.

(a) The General Office Statute of 1889, as construed by the Supreme Court of Texas and the Court of Civil Appeals at Texarkana, is unconstitutional and void, in contravention of Subdivision 1, of Section 10, of Art. 1, of the Constitution of the United States, prohibiting any State from passing any law impairing the obligation of contracts, and in contravention of that part of the Fourteenth Amendment to the Constitution of the United States, providing that no State shall deprive any person of life, liberty or property, by depriving the plaintiff in error, which dervied its title under three sales made in 1879 to John S. Kennedy and Samuel Sloan of the railroads, properties and franchises by virtue of decrees of the United States Circuit Court for the Western District of Texas foreclosing four mortgages of the International Railroad Company, and of the Houston & Great Northern Railroad Company, afterwards merged into the Interna-

tional & Great Northern Railroad Company, of the benefits and fruits of said three sales, whose effect, under the law, was to relieve the railroads, properties and franchises of the sold-out companies from liability for any and all debts of said sold-out companies, and from any and all purely personal obligations of those companies, or either of them, including the alleged contracts sued on in this case.

(*b*) The giving to the General Office Statute of 1889 of such operation as to bring within its purview the completed transactions resulting from the three above-mentioned sales to Kennedy and Sloan in 1879, and from the passing of the title from them to the International & Great Northern Railroad Company by their deed of November 1, 1879, conveying to that company all of the railroads, properties and franchises acquired by them by virtue of said sales, with the effect, by giving said General Office Statute that operation, of depriving plaintiff in error of the fruits and benefits of said completed transactions, and the resuscitation of the alleged contracts of 1872 and 1875 sued on herein, notwithstanding their extinguishment in consequence of the sales of 1879 at which Kennedy and Sloan purchased, are violative of both Subdivision 1, of Section 10, of Article 1, of the Constitution of the United States, prohibiting any State from passing any law impairing the obligation of contracts, and of that part of the Fourteenth Amendment to the Constitution of the United States prohibiting any State from depriving any person of life, liberty or property without due process of law.

(*c*) The holding by the Court of Civil Appeals at Texarkana that the plan of organization of the International & Great Northern Railroad Company under which Ken-

nedy and Sloan purchased the railroads, properties and franchises of that company, and of the Houston & Great Northern Railroad Company and the International Railroad Company, at the three above mentioned sales, coupled with the conveyance by said Kennedy and Sloan to said International & Great Northern Railroad Company of said railroads, properties and franchises, after the purchase thereof by them at said sales, was not a good faith transaction, and was therefore void, so as to render the sales to Kennedy and Sloan subject to attack in this litigation, involves and necessitates the collateral impeachment of the decrees of the United States Circuit Court for the Western District of Texas, ordering said sales, as well as the decrees of said court confirming said sales, whereby the rights, titles, privileges and immunities secured to said Kennedy and Sloan and to said International & Great Northern Railroad Company, their vendee, and to this plaintiff in error, as successor in title, by said decrees, are denied, to the deprivation of this plaintiff in error of rights, titles, privileges and immunities specially set up and claimed by it under the Constitution and laws of the United States, and under an authority exercised under such Constitution and laws.

Statement Under Foregoing Propositions.

On April 15, 1879, in Suit No. 138, brought by John A. Stewart and William H. Osborne, Trustees, the United States Circuit Court for the Western District of Texas made and entered a decree foreclosing the lien of a mortgage executed April 1, 1871, by the International Railroad Company to said Stewart and Osborne, Trustees, it being shown that on April 1, 1879, there was due on the bonds, to secure which said mortgage was given, the sum

of $5,457,678.20, and by said decree the court directed that all railroads and properties described in said mortgage should be sold, including all corporate rights, privileges and franchises of the International Railroad Company, and of its successor, the International & Great Northern Railroad Company, among which was its franchise to be a corporation, the sale to be made by a Master appointed by the court. The decree ordered the property to be sold in one parcel, for not less than $500,000.00 in gold, the Master to make report to the court, and deed to be made on confirmation of the sale. (R., p. 932; also, 309.)

On August 4, 1879, the said court confirmed the sale made on July 31, 1879, of all the properties covered by said decree, by the Master, such sale having been reported as made to John S. Kennedy and Samuel Sloan, Trustees, as the highest and best bidders, for the sum of $500,000.00, and the court directed that deed be made to them conveying to them all properties purchased by them at the sale, and vesting in them, their heirs and assigns the road-bed, tracks, franchises and chartered powers and privileges of the International Railroad Company and of the International & Great Northern Railroad Company, its successor, upon their compliance with the terms of sale. (R., pp. 321 to 325; also, p. 933.)

On October 14, 1879, the Master, in accordance with the decree of sale and decree of confirmation, conveyed all the properties as directed by the decree of sale and the decree of confirmation to said Kennedy and Sloan, showing compliance by them with the terms of sale. (R., pp. 325-329; also, 933.)

On April 14, 1879, in Suit No. 137, brought by Moses Taylor and William E. Dodge, Trustees, the United

States Circuit Court for the Western District of Texas made and entered a decree foreclosing the lien of a mortgage executed February 15, 1872, by the Houston & Great Northern Railroad Company, to secure the payment of its bonds, amounting, on April 1, 1879, to the sum of $5,404,827.75, and the court directed, by its decree, that the railroads, properties and franchises of said company, and of its successor, the International & Great Northern Railroad Company, be sold by a Master appointed by the court for the purpose. (R., pp. 347-358, inc.; also, 935.)

On August 4, 1879, said court confirmed the sale of said property made on July 31, 1879, by the Master, to John S. Kennedy and Samuel Sloan, Trustees, who were the highest and best bidders, for the sum of $500,000.00, and by their decree the court directed that all the property purchased by Kennedy and Sloan at said sale be conveyed to them by deed vesting in them, their heirs and assigns the road-bed, tracks, franchises and chartered powers and privileges of the Houston & Great Northern Railroad Company and of the International & Great Northern Railroad Company, its successor, upon their compliance with the terms of sale. (R., pp. 358-362, inc.; also, p. 936.)

On October 4, 1879, the Master executed a deed to Kennedy and Sloan, Trustees, conveying to them the properties directed to be conveyed by the decree of sale and the decree of confirmation, it being shown therein that Kennedy and Sloan had complied with the terms of sale. (R., pp. 362-366, inc.; also, p. 936.)

By the decree entered April 15, 1879, in Cause No. 138, in which Stewart and Osborne, Trustees, were complainants, an upset price of $500,000.00 was fixed by the court,

and it was provided that the purchaser should pay at least the sum of $25,000.00, and that for the remainder any of the past due coupons and any of the bonds secured by the mortgage involved in that suit might be received by the Master, such coupons and bonds so received to be for such sum as the holder thereof would be entitled to receive under the distribution ordered by the decree, and according to the priorities therein adjudged. (R., p. 315.) In the decree in Cause No 137, wherein Taylor and Dodge were complainants, an upset price of $500,000 was fixed, and the same provision for receiving the past due coupons and bonds for the purchase price in excess of $25,000.00 was made as was contained in the decree in Cause No. 138. (R., pp. 352-3.)

On August 4, 1879, in Cause No. 132, brought by John S. Barnes and Thomas W. Pearsall, Trustees, the United States Circuit Court for the Western District of Texas made and entered a decree of foreclosure of two mortgages, each executed January 15, 1874, one by the International Railroad Company, and the other by the Houston & Great Northern Railroad Company, to secure the bonds of the said companies, aggregating, at the time of foreclosure, the sum of $8,297,226.97, and the court, by its decree, directed the sale of all the railroad property and franchises of both the International Railroad Company and the Houston & Great Northern Railroad Company, covered by said mortgages, by a Master appointed by the court for the purpose, subject to the prior mortgages to Taylor and Dodge, Trustees, and to Stewart and Osborne, Trustees, foreclosed in Suits 137 and 138, above mentioned. (R., pp. 329-339, inc.; also, 934.)

On October 14, 1879, the court made and entered a decree confirming the sale made on that day by the Master

of the railroads, properties and franchises sold, as reported by the Master, to John S. Kennedy and Samuel Sloan, Trustees, and ordered a deed to be made by the Master to the purchasers, vesting in them the true ownership of said roads, with all the powers, rights, franchises, privileges and benefits of the two companies executing said mortgages, as well as of the International & Great Northern Railroad Company, their successor. (R., pp. 342-346; also, 934.)

On October 14, 1879, the Master, in pursuance of the last mentioned decree of foreclosure and decree of confirmation, executed a deed conveying to said Kennedy and Sloan, Trustees, all of the railroads, properties and franchises covered by said decree of sale and decree of confirmation, it being shown that the purchasers had complied with the terms of sale by paying the sum of $10.00 bid by them for the property. (R., pp. 342-346; inc.; also, 935.)

The decree in the suit brought by Barnes and Pearsall as complainants, in Cause No. 132, did not fix an upset price, but there was a provision that ten per cent. of the whole purchase price should be paid in money, and that, on the delivery of the deed, for the remainder of the purchase price above the ten per cent. required to be paid in cash, the Master might receive any of the past due coupons and any of the bonds secured by the mortgages executed by the railroad companies as set forth in the bill of complaint, and that such coupons and bonds should be received for such sum as the holder thereof would be entitled to receive under the distribution therein ordered, and according to the priorities therein adjudged.

On November 1, 1879, John S. Kennedy and Samuel Sloan, as Trustees, executed a deed to the International

& Great Northern Railroad Company, dated November 1, 1879, reciting that a Special Master appointed by the United States Circuit Court for the Western District of Texas had conveyed, by three deeds to Kennedy and Sloan, as Trustees, the property described in their deed, and also reciting that the International & Great Northern Railroad Company had agreed to purchase the property from Kennedy and Sloan, and to issue therefor 5374 bonds of $1000 each, and 500 bonds of $500 each, secured by purchase money mortgage of even date, and 4474 bonds of $1000 each, and 500 bonds of $500 each, secured by purchase money mortgage of even date, and inferior to the first mentioned mortgage. Said deed provided that in consideration of $10,348,000.00, so secured, Kennedy and Sloan, as Trustees, conveyed to the International & Great Northern Railroad Company of Texas, its successors and assigns, in fee simple absolute, all of the properties of the International Railroad Company, including all its corporate rights and privileges and franchises, and including all franchises to be a corporation, and further including certain rolling stock and the franchises, charter powers and privileges of said International Railroad Company and of the said Houston & Great Northern Railroad Company, as well as of the International & Great Northern Railroad Company. (R., p. 848.)

As shown by the evidence that the stockholders of the International & Great Northern Railroad Company, two hundred and two in number, held on April 7, 1879, 53,859 shares of its stock, and that the same stockholders held the same number of shares of stock on Nov. 17, 1879, except that during the interval, 250 shares had been conveyed to certain persons named, the witness Evans testified as follows on cross-examination:

"I think it is a fact that the stockholders of the International & Great Northern Railroad Company remained the same following the sale of its railroad properties and franchises in 1879 to Kennedy and Sloan, its trustees, as they were before the sale, but I cannot be positive." (R., p. 974.)

The Supreme Court of Texas made no expression with respect to the sales made in 1879 to Kennedy and Sloan under the decrees of foreclosure of the United States Circuit Court for the Western District of Texas, for the reason that, in the case as then presented, there was nothing calling for any discussion that would embrace that subject. The Court of Civil Appeals at Texarkana, however, to which the question as to the effect to those sales was presented, did discuss the subject and disposed of it in the following statement:

"It is further contended by appellant that the foreclosure sale in 1879 had the legal effect to wipe out the contractual obligation of the International & Great Northern Railroad Company in respect to location of its offices, shops and roundhouses. Appellant pleaded that on October 14, 1879, the properties and franchises of the International & Great Northern Railroad Company were discharged from contract obligations by virtue of judicial sale under decree of foreclosure to John S. Kennedy and Samuel Sloan, as Trustees, who, on November 1, 1879, conveyed the properties and franchises unto the International & Great Northern Railroad Company for $10,348,000.00 in purchase money bonds. The appellees, in replication to this defense, pleaded that if John S. Kennedy and Samuel Sloan purchased said properties and franchises, they did so as trustees for the International & Great Northern Railroad Company and for its stockholders at the date of purchase, in consummation of an agreement between all parties at interest that such sale should not affect the stock ownership in said company nor the com-

> pany's title to said properties and franchises. Under these pleadings the question of a *bona fide* sale to any third person became issuable. The facts and circumstances warrant the inference of fact, which in support of the court's judgment we must assume that the court made, that there was not a *bona fide* judicial sale. Hence, in such finding of fact the legal effect of the sale and deeds to the trustees would not discharge admitted corporate obligations. Northern Pac. R. Co. v. Boyd, 228 U. S., 482, 33 Sup. Ct., 554, 57 L. Ed., 941."

We submit that the question of good faith in the sale of the properties and franchises of a corporation, in pursuance of a plan of reorganization, in which stockholders participate, can arise only when the rights of creditors of some description or of a minority of the stockholders are involved, and that the expressions frequently found in the authorities that fraud and collusion will vitiate a sale, and that the sale must be made in good faith, are used solely with reference to the rights of creditors or a minority of the stockholders. This is apparent from an examination of the discussion of the subject in Section 886, Volume 4, of Cook on Corporations (Seventh Edition), and from the extracts from numerous cases cited in the notes. It is to be conceded that, if a plan of reorganization, designed to secure an advantage to stockholders as against creditors, culminates in a foreclosure sale, having that effect, to the stockholders, the sale will not be upheld when properly and seasonably asserted, for, since a foreclosure sale may be employed as an instrumentality for the perpetration of fraud, the consummation of the wrong by that means should not be sanctioned, any more than its accomplishment in any other manner. We do not concede, however, that, though cases sometimes speak of such sales as void, the word is to be understood

in its absolute sense, but suggest that when so employed, it means merely relatively void. But granting, for the sake of an argument, that such sales are absolutely void, the indispensable condition is that the rights of creditors must be sacrificed for the benefit of the stockholders. That condition is wholly lacking in this case, for in no sense can the defendants in error be called creditors by virtue of their rights, if any they have, arising from the personal contracts for the location and maintenance of the general offices, machine shops and roundhouses at Palestine, whose character has been fully shown in that part of our argument devoted to the subject of the impairment of the obligation of the mortgage contracts of 1881. The beneficiaries of the alleged office-shops contracts sued on stand in no better position than would employes having unexpired contracts for personal service at the time of the foreclosure sales. Such being their attitude, the authorities establishing the well recognized superiority of the rights of creditors to those of stockholders as to the property of the sold-out corporation are utterly inapplicable.

The case of Northern Pacific Railway Company v. Boyd, 228 U. S., 482, which is cited by the Court of Civil Appeals as decisive of the invalidity of the foreclosure sales at which Kennedy and Sloan purchased, instead of sustaining the view that the trial court was warranted in the inference which, it is assumed, it drew, that the sale was not *bona fide,* makes no allusion to that subject. On the contrary, the court took the position—somewhat advanced, it may be admitted—that, regardless of good or bad faith, a foreclosure sale, as the result of a reorganization, by virtue of which the old stockholders reserved an interest in the property sold, was invalid as to unsecured

creditors, whose rights were treated to be subordinated to those of the stockholders by the arrangement originating in the scheme of reorganization and culminating in the sale. The reasoning of the court throughout was to establish, and the court expressly declared, "that the property was a trust fund charged primarily with the payment of the corporate liabilities." That position is fatal to the contention that the defendants in error, by reason of the alleged contracts of 1872 and 1875, had rights which were not cut off by the foreclosure sales of 1879 to Kennedy and Sloan, since it would be the palpable misuse of language, arising from an unsound mental conception, to say that a fund exists for the payment of an obligation when the obligation is not solvable in money.

In the Boyd case, there was a suit in equity directly attacking the sale, and there was no intimation that it would have been subject to collateral attack. It is true that the court spoke of the sale as void, on the authority, as the court stated, of the case of Louisville Trust Company v. Louisville Railway, 174 U. S., 674; but examination of that case discloses, not that such a sale is void in the absolute sense, but merely in a relative sense, since the object of that suit was to prevent the confirmation of the sale, and the judgment of the Supreme Court was that, if it should appear that there was an agreement between the stockholders and bondholders to preserve the rights of both and destroy the rights of unsecured creditors, the trial court should refuse to confirm the sale until the rights of unsecured creditors had been preserved; in other words, the sale was recognized as valid and entitled to confirmation upon the protection of the interests of unsecured creditors. The disposition of that case in the Supreme Court was in exact harmony with the

following declaration in the Boyd case: "As between the parties and the public generally, the sale was valid. As against creditors it was a mere form."

The attack now made on the sales to Kennedy and Sloan involves the collateral impeachment of the decrees of the United States Circuit Court, in obedience to which the sales were made, and upon the decrees of that court confirming the sales. This is evident, as appears from the foregoing references to the evidence, showing that the liens of four mortgages, two executed by the International Railroad Company, one dated April 1, 1871, and the other dated January 15, 1874, and two executed by the Houston & Great Northern Railroad Company, one dated February 15, 1872, and the other dated January 15, 1874, were foreclosed by the United States Circuit Court for the Western District of Texas, by decrees ordering the sales of the railroads, properties, franchises and rights of the mortgagors, as well as of the International & Great Northern Railroad Company, their successors, and a party defendant to each of said suits; that the sales were made pursuant to the decrees; that they were confirmed by the court, each decree of confirmation directing that the Special Master, upon compliance by Kennedy and Sloan with the terms of sale, to convey to them all the property purchased by them, including the roadbed, tracks, franchises and chartered powers and privileges of each of the mortgagors and of the International & Great Northern Railroad, their successor, and that deeds were executed by the Special Master to Kennedy and Sloan, reciting their compliance with the terms of each sale, and conveying to them the property, including the roadbed, tracks, franchises and chartered powers and privileges of the mortgagors and of the International &

Great Northern Railroad Company, their successor. That such impeachment will not be tolerated is too well settled to need the citation of authorities upon the proposition. Even if the defendants were in a position to assail those decrees by a direct attack, tha' they could not do so in 1914, when they pleaded the invalidity of the sales, after the lapse of the thirty-seven years, which intervened between the making of the sales in 1879 and the attack in 1914, is clear beyond controversy, as shown by the authorities, some of which are cited in the dissenting opinion in the Boyd case.

It is to be remembered that the sales to Kennedy and Sloan were made in 1879, ten years before the general office statute of 1889 was passed, and that, as shown by the authorities cited in our discussion of the subject of the impairment of the obligation of contracts, under the law as it existed when the sales were made, the purchasers at those sales took the properties and franchises of the sold-out corporation relieved from liability for debts and unsecured personal contracts of every description. Two of the mortgages under which the foreclosures, resulting in those sales, were made, were executed before the alleged contracts of 1872 were made, and the remaining two were excuted before the alleged contract of 1875 was made. This, while no doubt not a vital consideration, suggests the extraordinary retroactive operation it is necessary to give the general office statute in order to justify the wiping out of the sales of 1879.

To sanction now the operation of the general office statute so as to render nugatory the sales of 1879 would obviously be to deny to the purchasers at those sales and those claiming under them, including the present plaintiff in error, the rights, titles, privileges and immunities ac-

quired by them by virtue of their purchases under the protection of the decrees of the United States Circuit Court for the Western District of Texas, and thereby deprive such decrees of their efficacy and of the faith and credit to which they are entitled. And, additionally, since the personal contracts, upon which defendants rely, were extinguished by the foreclosure sales of 1879, to give the General Office Statute of 1889 the effect of reviving those defunct obligations, if they ever existed, would, as against the purchasers at those sales and persons claiming under them, including the present plaintiff in error, destroy the vested right to take the properties freed from such obligations. It is not perceived that, after the consummation of the sales to Kennedy and Sloan, it would have have been possible for them, if they had so desired, of which desire, however, there is no intimation in the evidence, to change the legal effect of the sales to them under the decrees of the United States Circuit Court. If there is any way of escape from the conclusion that to give the General Office Statute of 1889 the effect of invalidating judicial sales made ten years previously is a flagrant violation of the due process clause of the Fourteenth Amendment, it has eluded our observation. And it seems manifest that to give that statute the effect mentioned is to violate the obligation of the completed contracts consequent upon the making and confirmation of said sales, and the conveyance of the railroad properties and franchises in pursuance thereof.

We might conclude the discussion of this question at this point but for the position of the other side that there are features of the proceedings, terminating in the conveyance by Kennedy and Sloan to the International & Great Northern Railroad Company, of the railroad prop-

erties and franchises purchased by them at the foreclosure sales, that render the sales invalid. These features are that Kennedy and Sloan purchased the railroads, properties and franchises sold under the decrees of foreclosure, as trustees of the International & Great Northern Railroad Company; that Samuel Sloan, who was one of the purchasers, was, at the time of the purchase, president of the International & Great Northern Railroad Company, and that the stockholders of that company, 202 in number, and holding 53,859 shares of its stock, were the same on November 1, 1879, as on April 7, 1879, except that during that period 250 shares were transferred to other persons, and that on November 1, 1879, Kennedy and Sloan conveyed by deed of that date all of the railroads, properties and franchises, including chartered rights, acquired by them under the foreclosure sales, to the International & Great Northern Railroad Company. The facts establishing these points are not disputed, except that the testimony as to the capacity in which Kennedy and Sloan purchased is not conceded to show that, in the making of the purchases, Kennedy and Sloan acted as trustees of the International & Great Northern Railroad Company, the testimony on that subject having been given by the witness Evans, and being as follows: "I think it is a fact that the stockholders of the I. & G. N. R. R. Co. remained the same following the sale of its railroad properties and franchises in 1879 to Kennedy and Sloan, its trustees, as they were before the sale, but I cannot be positive." (R., Vol. 3, pages 974-75.) This statement is obscure, since apparently the witness' mind was directed to the status of the stock ownership before and after the sales to Kennedy and Sloan and the reference to the capacity in which they purchased was merely

incidental, and since, as appears from the decree of May 10, 1910, under which the railroads, properties and franchises of the International & Great Northern Railroad Company were sold to Nicodemus, Kennedy and Sloan were made trustees of the first mortgage bonds of the International & Great Northern Railroad Company of November 1, 1879, subject to which the decree of May 10, 1910, and the sale thereunder were made. (R., p. 643 and p. 694.) While the facts are not fully disclosed with respect to the arrangement under which Kennedy and Sloan made the purchases under the three several foreclosure sales at which they purchased, the inference is irresistible that the bondholders, in behalf of whom the foreclosure suits were brought and the indebtedness to whom on the bonds of the Houston & Great Northern Railroad Company and the International Railroad Company, aggregated nearly twenty million dollars, such indebtedness being secured by mortgage liens on several hundred miles of railroad, with a large amount of equipment, all of the value of several million dollars, were parties to the arrangement by virtue of which Kennedy and Sloan purchased, and were largely, if not mainly, the beneficiaries of the arrangement. On each of two of the sales to Kennedy and Sloan, the Master's deeds show the payment by them of the sum of $500,000 in cash, and on the third the deed shows the payment by them of the nominal sum of $10.00. Undoubtedly, with such large interests as they had, the bondholders were, considering the disparity between the value of the property and the total amount for which it sold, participants in the plan according to which Kennedy and Sloan purchased. The fact that in decree of April 15, 1879, in suit No. 138, which was brought by Stewart and Osborn, trustees, provision was made that

of the upset price of $500,000, only the sum of $25,000 was necessary to be paid in cash, and that for the remainder past due coupons and any of the bonds secured by the mortgage might be received by the Master, which mortgage in that case was that of the International Railroad Company (R., Vol. 1, page 315), and the fact that in decree of April 15, 1879, in suit No. 137, which was brought by Taylor and Dodge, trustees, the same provision was made for an upset price of $500,000, and the cash payment of $25,000 and for receiving bonds and coupons, the mortgage in the latter case being that of the Houston & Great Northern Railroad Company (R., Vol. 1, p. 352), and the fact that in decree of August 4, 1879, in suit No. 132, which was brought by Barnes and Pearsall, trustees, while no upset price was fixed, it was provided that ten per cent of the whole purchase price should be paid in cash, and that the remainder above the ten per cent. might be paid in any of the past due coupons, and any of the bonds secured by the mortgages there involved, they being mortgages executed by both the International Railroad Company and the Houston & Great Northern Railroad Company (R., Vol. 1, page 334), and the fact that in each instance the bonds authorized to be received by the Master should be taken for such sum as the holder thereof would be entitled to receive under the disposition ordered in the decree, and according to the priorities therein adjudged, unmistakably establish the connection of the bondholders with the plan according to which the sales were made and the properties purchased by Kennedy and Sloan.

Warranted as we are by the facts above related, in assuming that the sales to Kennedy and Sloan, trustees, under the decrees of 1879, were in pursuance of a plan of

reorganization to which both the bondholders and stockholders were parties, the plan was, tested by all the authorities, unobjectionable. Thus, in Cook on Corporations, Vol. 4, Sec. 886, we find:

> "The law favors such purchasers, inasmuch as they furnish a bidder at the sale, and enable the court to realize some kind of price for the property. Generally, a scheme of reorganization is formulated which allows such of the old stockholders and bondholders to participate as apply to come in within a specified time. The object in allowing the old stockholders to participate is to get an assessment in cash from them, and to discourage defenses in the suit of foreclosure. An ordinary foreclosure of a mortgage on land proceeds quietly to a sale of the property. But the large interests involved in a railroad foreclosure lead to strenuous opposition thereto. Accordingly, it is found to be expedient, during or previous to a railroad foreclosure suit, for the parties interested in the property, whether they be stockholders or bondholders, or mere outsiders, to formulate and propose to the bondholders and stockholders a plan of reorganization whereby, after the foreclosure sale, the purchaser of the property will allow the bondholders and other creditors, and often also the stockholders, to come into a new company which shall own the property so purchased. It has been found necessary, in most cases, to reorganize on some such plan, in order to quiet the defenses to the foreclosure, or to raise the funds required in the reorganization, or to obtain a charter from the State for the reorganized enterprise, or to preserve intact the system of railroads, branches, leases, and connections which give value to the property foreclosed. This method of effecting a reorganization is legal and valid, since it involves an ordinary foreclosure of a mortgage and an agreement of interested parties to purchase at the foreclosure sale."

And in the Boyd case, cited by the other side, we find the following:

> "The enormous value of corporate property often makes it impossible for one, or a score, or a hundred, bondholders, to purchase, and equally so for stockholders, to protect their interests. A combination is necessary to secure a bidder, and to prevent a sacrifice. Co-operation being essential, there is no reason why the stockholders should not unite with the bondholders to buy in the property."

If the fact were that Kennedy and Sloan acted for the stockholders alone, without the concurrence of the bondholders, the sales to them would nevertheless be valid, as shown by the authorities; thus we find in Section 6008 of Thompson that:

> "A majority of stockholders may in good faith purchase at a sale and reorganize a corporation; but there must be no collusion or fraud"

And in Cook, Section 886, it is stated that:

> "Stockholders are not debarred from purchasing at the sale. Fraud or collusion whereby the property at the sale brings less than its real value will, of course, render the sale subject to attack, but the fraud must be clearly proved. A purchase of corporate property by a majority of the stockholders at a foreclosure sale made in good faith is legal and valid."

We have already shown that, according to the Boyd case,the question of good or bad faith becomes immaterial, where, in disregard of the trust fund doctrine, stockholders acquire by a reorganization rights superior to those of the creditors with respect to the property of the reorganized company. However, granting that there may be a case, even where creditors are not concerned, of the want of good faith, which would invalidate a purchase in which the stockholders, either alone or in conjunction with

the bondholders, acquire the property of the corporation, we can think of no illustration of the principle itself except in a transaction in which a majority of the stockholders undertake to exclude the minority from any right in the property. We do not now urge, for the exigencies of the case do not necessitate our taking the position, that it is difficult, if not impossible, to reconcile the Boyd case with the authorities rendering the existence of bad faith or fraud or collusion necessary to the impeachment of a sale to stockholders alone or to stockholders and bondholders together.

The effect of the sales under decrees of foreclosure to Kennedy and Sloan was to make them, or those whom they represented, in effect new stockholders in the International & Great Northern Railroad Company, as declared in G. C. & S. F. R'y Co. v. Morris, 67 Texas, 700, in the following statement:

> "The law authorizes railroad companies to borrow money to construct, complete, improve or operate their roads, and to give mortgages therefor. (Revised Statutes, Article 4219.) These mortgages may be foreclosed through the courts, or sales may be made under powers contained in such mortgages, and title to the property will pass. They may become indebted, in the course of their business, and their property, including franchise, subjected to sale under judicial process to pay such indebtedness. But in such cases the corporation continues, and the purchasers become in effect new stockholders, the corporation property so purchased, however, being relieved from liability for debts not creating a prior incumbrance on the property sold. These are the means through which the laws of this State authorize the sales of railroads."

Again, in G. C. & S. F. R'y Co. v. Newell, 73 Texas,

338, the court, after having in a preceding portion of its opinion decided that the "corporate existence continues with the franchises neither enlarged nor restricted, as before," observed:

> "A person or corporation, however, who acquires the property and franchise of a railway corporation through sale under execution, takes it freed from all liability for its former indebtedness not secured by prior lien, and from all mere personal obligations assumed by the former owner."

The very fact that the purchaser takes the property absolved from the debts and merely personal obligations of the sold-out company, as recognized by the authorities cited, as well as by other authorities discussed in our argument of the question of the impairment of obligation of contracts, demonstrates that, notwithstanding the corporation continues, it does so only in a qualified sense. It was provided by the Act of February 19, 1857, quoted in our argument of the question of the impairment of the obligation of contracts, which act was in force as Article 4912 of Paschal's Digest of the Laws of Texas when the sales under the decrees of foreclosure of 1879 were made, that the purchaser or purchasers were to "be deemed and taken to be the true owners of said charter and corporators under the same, and vested with all the powers, rights, privileges and benefits thereof in the same manner and to the same extent as if they were the original corporators of said company." Undoubtedly, there was some significance in making the purchasers corporators under the old charter in the same manner and to the same extent as if they had been the original corporators, and unless they were to be endowed with the character of a new company operating under the old charter, which was

continued in force for that purpose, it is difficult to see that the language had any meaning, but, of course, it is to be given a meaning. That there is a new company, with powers and duties prescribed and measured by the charter of the sold-out company, is recognized in the case of Acres v. Moyne, 59 Texas, 623, in which, there having been a sale under judicial process when the same act was in force as was in effect when the sales to Kennedy and Sloan were made, the court declared:

> "The general laws of the State provide, when a railroad corporation is sold out, that the purchasers succeed to all the rights, powers, etc., etc., of the sold-out corporation, and such purchasers can still continue to exist and do business as a corporate body under the name of the sold-out company. (Pasch. Dig., vol. 1, art. 4912; R. S., art. 4260.) They can proceed, after such purchase, to transact business, as fully as the sold-out corporation could do before that event. No change of name is required by the general law on the subject. No notice or publication of the purchase or merger is necessary; nor is there any reason for such notice than there is that the public at large should know the various changes annually made in the *personnel* of a corporation by the transfer in the course of business of its stock to strangers, or the changes made by death or affected by the withdrawal of an old, or the issue of a new, series of stock certificates, or any like official action of the corporation.
>
> "The new company, by operation of the general laws of the State, becomes the successor of the sold-out corporation, and occupies to the public, in the future, the same relation the sold-out company did in the past. As to the creditors and the general liabilities of the old company, for that the general law makes special provision. (Pasch. Dig., vol. 1, art. 4916; R. S., art. 4264."

It is to be particularly observed that the Supreme Court

of Texas, in the appeal of this case from the order of the District Judge granting an interlocutory injunction, quoted approvingly the next to the last sentence above quoted from Acres v. Moyne, in which, referring to the company, as operated by the purchasers after the sale, it is characterized as the "new company." 156 S. W., 503.

That, as the result of the purchase under foreclosure proceedings of the property of a corporation by persons, who, by virtue of the purchase became corporators, a new company comes into being, appears to be a logical necessity from the proposition, asserted by the Supreme Court of the United States in United States v. Trinidad Coal Co., 137 U. S., 161, that "an incorporated company is an association of individuals acting as a single person and by their corporate name," supported by the statement there quoted from Baltimore P. R. Co. v. Fifth Baptist Church, 108 U. S., 317, that "private corporations are but associations of individuals united for some common purpose, and permitted by law to use a common seal, and to change its members without a dissolution of the association." That the court entertained the same idea in the Boyd case, with respect to the relation of the stockholders to a corporation, whose stock they hold, is evidenced by the statements that, "Being bound for the debts, the purchase of their property by their new company for their benefit put the stockholders in the position of a mortgagor buying at his own sale," and that "Though the Northern Pacific Railroad was divested of the legal title, the old stockholders were still owners of the same railroad, encumbered by the same debts. The circumlocution did not better their title against Boyd as a non-assenting creditor. They had changed the name but not the relation. The property in the hands of the

former owners, under a new charter, was as much subject to any existing liability as that of a defendant who buys his own property at a tax sale." It may be remarked that while the extracts we have given from the Boyd case indicate the view of the court, respecting the relation of stockholders to a corporation whose stock they own, in line with other authorities on that subject, it was not meant, nor even hinted, that there was any invalidity in the sale to the stockholders and their formation of a new corporation, except as to creditors. On the contrary, the court declared: "As between the parties and the public generally, the sale was valid." And in a former part of its opinion, the court observed:

> "Corporations, insolvent or financially embarrassed, often find it necesary to scale their debts and readjust stock issues with an agreement to conduct the same business with the same property under a reorganization. This may be done in pursuance of a private contract between bondholders and stockholders. And though the corporate property is thereby transferred to a new company, having the same shareholders, the transaction would be binding between the parties. But, of course, such a transfer by stockholders from themselves to themselves cannot defeat the claim of a non-assenting creditor."

As further evincing the purpose to create a new company, with the chartered powers of the sold-out company, attention is directed to a provision of the Act of December 19, 1857, which was incorporated in Paschal's Digest of the Laws of Texas as Article 4916, and which is as follows:

> "Art. 4916. Whenever a sale of the roadbed, track, franchise, and chartered powers and privileges is made, as hereinbefore provided (unless other persons shall be appointed by the legislature, or by some court

> of competent authority), the directors or the managers of the sold-out company at the time of the sale, by whatever name they may be known in law, shall be the trustees of the creditors and stockholders of the sold-out company, and shall have full powers to settle the affairs of the sold-out company, collect and pay the outstanding debts, and divide among the stockholders the money and other property that shall remain after the payment of the debts and necessary expenses; and the persons so constituted trustees shall have authority to sue by the name of the trustees of such sold-out company, and may be sued as such, and shall be jointly and severally responsible to the creditors and stockholders of such company, to the extent of its property and effects that shall come to their hands. And no suit pending for or against any railroad company at the time that the sale may be made of its roadbed, track, franchise and chartered privileges, shall abate, but the same shall be continued in the name of the trustees of the sold-out company."

It was to that provision that the court in Acres v. Moyne referred in the expression that "As to the creditors and the general liabilities of the old company, for that the general law makes express provision." And it was with respect to the same provision that the court, in H. & T. C. v. Shirley, 54 Texas, 125, stated that it was the plain intent of the statute "to remit creditors unsecured by lien to their remedy against such assets as pass to the trustees of the sold-out company." That, by prescribing that the directors of the sold-out company should be trustees of its creditors and stockholders, and should "have full powers to settle the affairs of the sold-out company and pay the outstanding debts, and divide among the stockholders the money and other property that shall remain after the payment of the debts and nec-

essary expenses," and making the other provisions contained in Article 4916, Paschal's Digest, including the carrying on in the names of the trustees suits pending for or against the sold-out company, a practical dissolution of the sold-out company was intended, except that its chartered powers in the future should be exercised by the new company, appears to have been clearly intended.

The fact that the stock book showed the same stockholders predominantly after the sales to Kennedy and Sloan as before does not affect the legal consequences of the foreclosure sales and the purchases by Kennedy and Sloan, for the purchasers could make any arrangement they desired as to the stock.

The reason for the execution by Kennedy and Sloan of a deed, conveying to the International & Great Northern Railroad Company the properties acquired by them at the foreclosure sales, no doubt was that it was deemed desirable to do so, in the interest of preserving written evidence of the connection of the company after the sales to Kennedy and Sloan with those sales. Under the law, in existence when the sales to Kennedy and Sloan were made, as construed in the cases of H. & T. C. Railroad Co. v. Shirley, 54 Texas, 125, and Acres v. Moyne, 59 Texas, 623, no conveyance from Kennedy and Sloan to the sold-out company was necessary, for, as held in those sales, the right acquired at the sales by Kennedy and Sloan and their associates was to operate the properties in the old corporate name under the original charter. That view is strengthened by the decision in Texas Southern R'y Co. v. Harle, 101 Texas, 170, where the purchasers at the foreclosure sale, instead of operating the railroad acquired by them in the name and under the charter of the sold-out company, organized a new company to take

over the property and franchises of the sold-out company; and, conceiving that a conveyance to the new company was necessary, they executed such conveyance. But the Supreme Court held that the conveyance was unnecessary, and consequently that it accomplished nothing. Certainly, if in that case the conveyance was of no avail, it was of none in the I. & G. N. case after the sales of 1879, since the purchasers at those sales acquired the charter of the sold-out company, and there was absolutely no reason for a deed to create or confer rights already possessed.

To make entirely clear the situation, with respect to the rights of purchasers at foreclosure sales, at the time the sales were made to Kennedy and Sloan, and subsequently a brief statement of the legislation covering both periods will be serviceable. From 1857, when the act, which became Article 4912, Paschal's Digest (afterwards Article 4549, Revised Statutes of 1895, and now, as amended in 1910, Article 6624 of the Revised Statutes of 1911), was enacted, until 1889, when the statute, which became Article 4550, Revised Statutes of 1895 (and now, as amended in 1910, Article 6625, Revised Statutes of 1911) was enacted, that is, for a period of thirty-two years, there was no method by which the purchaser and associates under foreclosure sale, deed of trust sale, or execution sale, had any right, resulting from the purchase of the property and franchises, to form a corporation, with the powers and privileges conferred by the laws of the State upon chartered railroads, though, as shown in the case of Texas So. R'y Co. v. Harle, 101 Texas, 170, special laws, prior to the enactment of the Statute of 1889, had been passed in aid of purchasers of such property and franchises, to enable them to act as a new or different corporation,

in exercising the rights and powers given. There was, thus, during the period of more than thirty years, the necessity for continuing the corporate existence of the sold- out company for the benefit of purchasers, in order to enable them to exercise the franchises acquired by them, without being subjected to the uncertainty of obtaining legislation that would enable them to enjoy the fruits of the purchase of the property and franchises of a sold-out railroad company.

We submit that the conclusion is inevitable that the conveyance from Kennedy and Sloan to the International & Great Northern Railroad Company was unnecessary and ineffectual for any purpose. It certainly could not, and did not, have the effect of reviving the extinguished debts and other personal obligations of the sold-out company. That they did not intend to wipe out and repudiate the title acquired by them under the foreclosure proceedings appears from the recitals in the deed they gave the International & Great Northern Railroad Company, showing the derivation of their rights under the proceedings. But we submit that if they had made an attempt to accomplish that result, it was not in their power to do so.

VI.

Proposition.

The Act of 1889 and the judgment herein construing and applying said act and giving to transactions long prior thereto, invalid when made, and unsustained by substantial proof, the force and effect of valid contracts, impressing upon the properties of plaintiff in error a perpetual lien and servitude which did not arise from the transactions when made, interferes with its liberty of

contract, and deprives plaintiff in error of its property without due process of law, contrary to Section 1, of Article XIV, of the Amendments to the Constitution of the United States, which declares that—

> **"No State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."**

The Act of 1889 depends for its application upon the proposition that a valid contract for the location of machine shops and general offices had been theretofore made. While the court below has found that such a contract existed, we do not conceive that if the facts found by the jury do not evidence a valid contract, that this court will be bound by such finding. In cases involving the impairment of the obligation of contracts, this court is not bound by the finding of the State Court that there was or was not such a contract. The State Court may find that there was a contract, but that the subsequent legislation did not impair it. This court, however, may find that the transactions alleged to have constituted the original contract did not make a contract, and, conversely, it may find that the transactions which the State Court found did not constitute a contract, did, in fact, make a contract, which was impaired by the subsequent legislation. H. & T. C. R. R. v. Texas, 177 U. S., 66; St. P. G. L. Co. v. St. Paul, 181 U. S., 143; Mulicker v. N. G. & H. R'y, 197 U. S., 544. Under the principles of C. B. & Q. v. Chicago, 166 U. S., 226, the mere preservation of the form of a trial by a court does not constitute due process of law. If, therefore, there is no substantial evidence which evidences a contract upon which the Act of 1889 can op-

erate, the arbitrary finding by the court that there was such a contract cannot constitute due process of law.

The transactions which are set up as contracts which will bring into operation the Statute of 1889, consist of an alleged oral agreement made between Galusha A. Grow, President of the Houston & Great Northern Railroad, and Judge John H. Reagan, who is alleged to have acted for the City of Palestine, on or about March 15, 1872, to the effect that if Judge Reagan would canvass Anderson County in favor of a proposition to be submitted to the electors of that county to issue $150,000.00 of county bonds to the Houston & Great Northern Railroad, that that company agreed to establish and perpetually maintain its machine shops, roundhouses and general offices at the City of Palestine, and it was further alleged that this contract was ratified by H. M. Hoxie, general manager of the consolidated International & Great Northern Railroad Company, in the early part of 1875, by a conversation occurring between Hoxie and certain citizens of Palestine to the effect that if they would erect houses to be rented to certain employes of the International & Great Northern Railroad Company, it would locate its shops, roundhouses and offices at Palestine in accordance with the Grow-Reagan contract.

Under the Act of April 12, 1871, Vol. 6, Gammel's Laws, page 831, authorizing counties, cities and towns to aid in construction of railroads and other works of internal improvements, it is required that before such bonds could be issued, there must be filed with the county authorities a written petition stating the consideration for the bonds, and that the order of the court calling the election shall state clearly the nature of the proposition. The petition for this election (R., Vol. II, p. 133) shows that

the agreement of the Houston & Great Northern Railroad was that it would construct its railroad through said Anderson County, from the northern line of Houston County, to its intersection with the International Railroad, to the town of Palestine, and establish and maintain a depot in one-half mile of the courthouse in the town of Palestine on or before the first day of July, 1873, and that as soon as this depot should be established within one-half mile of such courthouse, and cars should commence running regularly thereto, the bonds for $150,000 should be delivered to the Houston & Great Northern Railroad, provided these things were done by the first of July, 1873. The court, in ordering the election, specifically declared:

> "* * * Said donation to be made and said bonds to be issued upon the following conditions: that is to say, that the said Houston & Great Northern Railroad shall build their said railroad of the same class and style of the portion of said road which is now built from the northern boundary of Houston County to its intersection with the International Railroad, in the town of Palestine, in said Anderson County, and build and maintain a depot of its said road within one-half mile of the courthouse in said town of Palestine, and commence to run their cars regularly thereto by or before the first day of July, 1873."

The election was ordered for the first day of May, 1872. The County Court, in its order declaring the result of the election (Tr., Vol. II, pp. 138-139), again states the contract of the Houston & Great Northern Railroad in the terms above set out, and further orders (Tr., Vol. II, p, 139) that:

> "Upon the completion of said Houston & Great Northern Railroad by said company to its intersec-

tion with the International Railroad at said town of Palestine, of the same class and character as of the portion of said railroad now built, and upon the establishment of the depot of its said road within one-half mile of the courthouse of said town of Palestine, and upon the commencement of said railroad to run their cars regularly to their depot at said town of Palestine, then the said County of Anderson shall issue to Houston & Great Northern Railroad the bonds of said county, with coupons attached, in said sum of $150,000.00, payable in twenty years, under the provisions of the act of the legislature of the State of Texas authorizing counties, cities and towns to aid in the construction of railroads and other works of internal improvement, approved April 12, 1871," etc.

It further appears (Tr., Vol. 2, 141-145) that on January 29, 1873, Galusha A. Grow presented his petition to the County Court of Anderson County, stating that the Houston & Great Northern Railroad Company had fully complied with the conditions imposed upon it, and asked that the court satisfy itself as to the performance of such conditions, and deliver to him the bonds. Whereupon, the court made its order again referring to the petition for the election, the order for the election and the result thereof, and made the following finding and decree:

"And it further appearing that by the terms of said proposition said bonds were to be issued to said railroad company on the completion of their road from said northern boundary of Houston County to its intersection with the International Railroad Company at said town of Palestine, and on its compliance with other conditions contained in said proposition, and that said road was so completed and all of said conditions complied with by the said Houston & Great Northern Railroad Company prior to the 31st day of December, 1872. * * *"

That said railroad company was then entitled to said donation and to demand and have said bonds then issued to them. The order of the court then proceeds to order the delivery of the bonds to the company and to levy a tax for their payment.

That the matter may be relieved of all possible question, attention is called to the fact that when the County Court was called upon to deliver the bonds to Grow (Tr., Vol. II, p. 780), one John S. Shattuck filed a protest against such action, upon the following, among other, grounds:

> "That said railroad company has not built, nor has it laid any foundation to build, any machine shops at their proposed depot as promised by the agents and friends of said road, the same being the inducements held out to the people of said Anderson County, and on account of such promises and agreements to build a roundhouse and machine shops, the majority of those voting for the subsidy cast their votes for same."

It will be observed that no mention was made of general offices. The County Court overruling the protest by its decree ordering the issuance and delivery of the bonds, conclusively determines the issue as to whether the machine shops, roundhouses, etc., were any part of the bond contract, as it was the sole tribunal to which the law of 1871 committed that matter for adjudication.

In none of these proceedings therefore is it suggested that there was any contract of any character whatsoever with regard to the location of machine shops or general offices at Palestine, and the orders of the County Court show without contradiction that all agreements of the Houston & Great Northern Railroad had been fully complied with. It is elementary, of course, and is indeed a

part of the law of 1871, under which the bonds were issued, that this contract could not be varied, altered or contradicted by parol testimony.

It was further shown (Tr., Vol. III, p. 304) that in 1874 the County of Anderson brought suit against the Houston & Great Northern Railroad Company which sought to hold these bonds invalid in which suit no claim was made that the Grow-Reagan alleged contract was in any way connected with the contract with Anderson County, and no claim was made of non-compliance with such contract. The validity of the bonds was fully sustained by the Supreme Court of the State of Texas in Anderson County v. H. & G. N., 52 Texas, 228.

One of two propositions must be true: (1) The alleged Grow-Reagan contract, upon which defendants in error rely, must have been a part of the transactions with Anderson County; or (2) it must have been wholly independent thereof, and had no connection therewith. If it was an incident to and a part of the contract with Anderson County, then all of these transactions were merged in and became a part of that contract, and under the law of 1871 the proposition submitted to the electors of Anderson County was the only contract which bound either Anderson County or the Houston & Great Northern Railroad. That contract does not mention machine shops, roundhouses or general offices. It is merely to complete the road to Palestine within a given time, and to erect a depot within one-half mile of the courthouse of Palestine, within a given date, and the order of the court shows complete compliance with that contract by the Houston & Great Northern Railroad and the judgment of the court affirmed in 52 Texas, 228, is *res adjudicata* of that issue. If the second alternative is adopted,

and it is a wholly independent transaction, and to this defendants in error are inevitably forced, then the contract is void as made without authority.

Conceding under the findings of fact by the jury that this parol contract was made and entered into by Grow and Reagan, it is the admitted law of Texas that Grow was wholly without power to make such a contract, and it was without binding force upon the corporation. K. C. M. & O. R'y v. Sweetwater, 104 Texas, 329; Railroad Company v. Logue, 139 S. W., 11; M. K. & T. R'y Co. v. Faulkner, 88 Texas, 651.

Realizing the full force of this insuperable objection, the defendants in error seek to establish a ratification of this contract through a transaction in the early part of 1875, in which H. M. Hoxie, the general manager of the consolidated railway, stated that he, Hoxie, had a letter from Galusha A. Grow, in which he stated that he had agreed with Judge Reagan to locate the roundhouses, shops and general offices at Palestine, and that he wanted it done, and that if certain houses were built which would be rented to employes of the Houston & Great Northern, they wanted to come to Palestine at once. Several houses were built and rented to employes, and the general offices and machine shops were subsequently located at that point. This transaction relied upon to constitute a ratification of the contract is found in testimony of George A. Wright (Tr., Vol. II, 800-804), and is as follows:

> "Mr. Hoxie said he had a letter from Galusha A. Grow, in which Mr. Grow said he had agreed with Judge Reagan to locate the general offices at Palestine, as well as the shops and roundhouses, and that he wanted it to be done, and that Mr. Hoxie said, 'We want to come right now,' or something like that,

but he said, 'We want to know if you have any houses for our men that they could rent, or could you build such houses as are necessary, and how long will it take to do so, if we come right away, as we want to come now.' Mr. J. W. Ozment was Secretary and general manager of the Palestine Land & Building Company. That company was owned by different stockholders there in Palestine. There may have been ten or twenty interested in it right there in town. I was a stockholder of it at the time. J. W. Ozment was President. We told them we could build the houses, any amount they wanted. Mr. Ozment made that statement to Mr. Hoxie. Mr. Ozment wanted to know how many houses they wanted, and they began to sum up. First, they wanted one for themselves, good houses, one for Mr. Evans, and one for Mr. McCoy, who was General Freight and Passenger Agent. I do not remember whether or not the number of houses was stated there, but I do not think Mr. Hoxie indicated the number. Just wanted whatever they required. I think he said he would have about thirty-five or forty men, but the best things he wanted for the general offices and heads of the departments. We agreed to build the houses for them."

This witness then proceeded to state that several houses were built, which were rented to employes of the railway company.

J. W. Ozment testified on the same subject (Tr., Vol. II, 861) to the effect that Mr. Hoxie said he was very anxious to carry out the agreement and contract made with Judge Reagan with reference to establishing the general offices of the Houston & Great Northern Railroad Company at Palestine, but that the road had to have houses, and they would expect the people of Palestine to provide comfortable homes for the officers of the road, as well as all of the employes; that a little conference was held between witness and other citizens, and they said to Mr. Hoxie

they would be glad to proceed at once to build all the homes they needed, and Mr. Hoxie said that Captain Hayes, Dr. Smith and himself would live together, and would want a home built for their comfort; that Major Evans, Secretary of the road, would want a home, and so would Mr. McCoy, the General Freight and Passenger Agent; that they would want comfortable homes, and that the others would be for employes, and just four or five room houses would do, and need not cost much. The Palestine Land & Building Company, of which he, the witness, was manager, built a house for Mr. McCoy, which cost about $3500.00, remodeled the Reeves house at an expense of $1300.00, and this was occupied by some of the officers of the railroad company, and the Land & Building Company built another house, costing $2500.00, occupied by an employe named Wells. The Palestine Land & Building Company built two more houses, costing, say, $1550.00 each, and Wright and Whitesell built two houses costing about $1300.00 each.

This transaction between Mr. Hoxie, who, as well as Grow and all other parties connected with this and the original alleged contract, acting for the railway company, is dead, is relied upon as a ratification of the Grow contract. Mr. Hoxie was without authority to ratify, as well as Mr. Grow was without authority to make the contract. Conceding, for the purposes of the argument, that Hoxie had authority to ratify, this conversation has no element of a contract in it. Taken in its broadest terms, it consists merely of a statement that the International & Great Northern R. R. Co. wished to move its general offices to Palestine, and would do so if they could get places which could be rented to certain of their employes. Neither Mr. Wright nor Mr. Ozment nor the company of which

they were members, nor any other citizens promised or agreed that they would do anything, nor were they bound to do anything for any specific time, and the mere fact that the company subsequently removed its general offices to that point and rented several houses which were erected for that purpose, cannot constitute a ratification by an unauthorized agent of a contract made by an unauthorized agent. There is no fact in the record which shows or tends to show any ratification of this unauthorized contract by the International & Great Northern Railroad Company. The records of the Houston & Great Northern and the International Railroad Company and the consolidated company, were tendered to the defendants in error for examination, and no resolution of the board of directors could be found or was introduced ratifying these alleged contracts, nor is there any action of either of these companies shown which could be construed or held to be a ratification. To the contrary, the contemporaneous action of all parties negatives the existence of any such contract.

The testimony of David S. Smith (Tr., Vol. III, pp. 938-940) shows that he was in the employ of the International Railroad in 1871. When it was consolidated with the H. & G. N., he entered the employment of the I. & G. N.; that he was land agent for the International, and afterwards Treasurer and Paymaster. He lived at Hearne in 1871, and moved to Houston in the fall of 1872, and moved to Palestine in 1875, where he resided until 1881; that in 1875 the I. & G. N. Railroad moved its official headquarters to Palestine, being influenced to do this because it was the center of the system, and was more convenient and economical for the operation of the road; that he knew why the railroad was moved to Palestine,

as it was a general topic of conversation in the office, and discussed among the officers, including Mr. Hoxie and himself; that contract between Grow, President of the Houston & Great Northern, and the citizens of the County of Anderson, by means of which $150,000.00 in bonds of Anderson County were voted is of record and in writing, and speaks for itself; that he never heard of any contract between Hoxie, on the one hand, or any person or persons of Palestine, on the other, whereby the official headquarters of the I. & G. N. should be moved to Palestine and that the people of Palestine should put up rent houses to be rented to the employes of the I. & G. N. R. Co. at reasonable rentals. He never heard of any other contract than that under which the bonds were issued, verbal or written, between the people of Palestine or Anderson County, and the H. & G. N. or the International Road, or any of its officers, including Hoxie; that after the consolidation of the International & Great Northern he was Paymaster and Treasurer, and on intimate terms with officials of the I. & G. N., and would have been almost certain to be acquainted with any new or important policy to be adopted; that his relations with Hoxie were intimate, and that he lived in the same house with him during his ten years' stay in Texas, at Hearne, Houston and Palestine. He never heard of any parol agreement between Hoxie, Wright and Ozment. He was a director of the I. & G. N. He was Secretary, and kept its minutes. He must have been director after they moved to Palestine in 1875, and must have been Secretary after that time, and acted as such until some time after his removal to St. Louis, in 1881. That neither as Secretary or director or in any other way, did he ever hear of the parol con-

tract alleged to have been made by Grow with Reagan, or by Hoxie with Ozment, Wright and others.

Ira H. Evans (Tr., Vol. III, p. 941) stated that he was elected Secretary of the H. & G. N., and in 1874 Secretary of the International Railroad, and in July, 1874, was elected Secretary of the International & Great Northern Railroad Company, and was made a director of that road on April 5, 1875, and continued as director with the exception of two years, until November, 1909, and as Secretary until the beginning of 1880. Mr. Hoxie became General Superintendent of the I. & G. N. Railroad in 1874. He, the witness, was evidently associated with Grow, and not so intimately with Hoxie, but knew them both very well. The general offices of the H. & G. N. were maintained at Houston during his connection with the Company, and during its consolidation with the International under the title of I. & G. N., and were so maintained from the time of that consolidation until their removal to Palestine about August, 1875. He distinctly remembered the removal of the general offices from Houston to Palestine, and that so far as his recollection goes, they were so removed because Palestine was considered the most central part of the system, and the most pleasant for its operation; he had no recollection of hearing of any other reason given for the removal from Houston to Palestine. That this time Captain Hayes was Vice-President and General Manager, Hoxie General Superintendent, D. H. Smith, Treasurer, and witness, Secretary, and that they were all intimately associated in the conduct of the business, and he did not recall any other reasons for the removal of the offices. he had never heard until recently of the alleged contracts claimed by defendants in error in this suit. He

never heard of any contract, agreement or understanding between the H. & G. N. or the I. & G. N. and the people of Anderson County or Palestine in any way connected with the bond issue, other than the written contract between the H. & G. N. and the people of Anderson County for the extension of the road to Palestine, and the putting up of the depot within one-half mile of the courthouse; that as Secretary of the I. & G. N. he had intimate personal knowledge of all such matters, and as custodian of the records of the company was acquainted with all of its official acts. He became Secretary of the H. & G. N. in 1873. He stated that the records of the company will show when Grow ceased to be President of the I. & G. N. Railroad Company, and when R. S. Hayes became its Vice-President and general manager, which, he thinks, was some time in 1874, and that thereafter Hayes was chief executive official of the company, and that both Hoxie, as Superintendent, and witness, as Secretary, were under Hayes' order and direction, and further that it did not seem possible to him that any such action could have been taken by him on his own responsibility, or with the added approval of Captain Hayes, as Vice-President and general manager, without approval thereof of the board of directors, whose Secretary he was, and all of whose records he kept. He further said that as Secretary of the H. & G. N. and I. & G. N. he kept the minutes of the stockholders and directors, and had same carefully and correctly recorded in the records of the company, and that neither as Secretary or as director in these companies or in any way whatever, did he ever hear of the parol contract alleged to have been made by Grow with Reagan, or by Hoxie with Wright, Ozment and others, and that the first that he ever heard of such alleged

contract was after the removal of the general offices from Palestine to Houston, within recent years; that he did not think that Hoxie, as General Superintendent, had any authority to bind the I. & G. N. by contract to establish, keep or maintain the general offices, shops or any of them in the City of Palestine, or at any other place, without prior authority having been first given by the board of directors, nor could he ratify any such contract previously made by any other person in this record, in the absence of authority granted by the board of directors of the I. & G. N. R. R. Company.

The contemporaneous correspondence between Mr. Hoxie, Mr. Barnes, Mr. Hayes, Mr. Kennedy, and other officers of the railway company (Tr., Vol. III, 958-963), covering the very period involved from 1872 to 1875, shows that the question of the location of the general offices and machine shops of the company was under consideration, and that this question was being determined by consideration of cost, water supply, help, labor, etc., and nowhere is it suggested that there was any contract in existence which should influence their action. In December, 1872, Galusha A. Grow, President of the H. & G. N. R. R. Company, made a report to the stockholders of the company, in which he makes reference to the issuance of the $150,000.00 bonds, and nowhere in this report is any mention made of the alleged contract sued on in this case. It is shown in the evidence (Tr., Vol. III, p. 958) that defendants have made diligent search, and given instructions to Mr. Maury, the Auditor, to make search through the records of the companies, and to bring with him into court everything in the correspondence files that he could find, and did find, including all copies which might have any bearing upon the controversy in this

case, and that the defendants in error had been permitted to go through and investigate all such letters and correspondence, and that this had been done. The contemporaneous letters of Judge Reagan make no reference to any such contract. His letter of March 26, 1872 (Tr., Vol. III, 953), to Sanford B. Barnes, President of the International Railroad Company, refers to the petition to the County Court for the election upon the $150,000.00 bond issue. His letter of May 7, 1872, to Mr. Barnes (p. 954) reports the result of the election. His letter of November 20, 1874, referring to the suit of Anderson County challenging the validity of the bonds, is very suggestive. It states:

> "Other complaints are often made to me here. Upon the assurances of Mr. Barnes and Mr. Grow, successive Presidents of these roads, I urged on the people that one of the benefits to our community which would result from the junction of these roads here would be the establishment here of the companies' machine shops, and that this would give us an increase of population, business and wealth. And this argument was used to get the people of this county to vote the subsidy. A good while has gone by, and this has not been done, and the people tell me that I either suffered myself to be deceived, or aided the company in deceiving them. I told them it is still promised, but they answer me, 'It never comes.' You will understand the disappointment on this subject, and how it affects me."

It will be observed that nothing is here said as to the general offices. It will be further observed that Judge Reagan advances no contention that there was any contract to locate machine shops or roundhouses. Certainly, if there had been a contract in the very words necessary to meet the decision of this court in the cast of T. & P.

v. Marshall, 136 U. S., 393, subsequently made, "to forever maintain machine shops and general offices at Palestine," some reference would have been made to it, and the fact is that the frail and unsubstantial testimony of a few witnesses, after the lapse of more than forty years, have evolved a contract fitting with extraordinary nicety the decisions of the courts, when the contemporaneous records and correspondence upon the part of those most interested in the subject-matter fail to disclose the existence of such a contract. It is not strange, therefore, that there is an utter absence of testimony in this record which shows or tends to show in the slightest degree any ratification of the alleged oral contracts of Grow or of Hoxie. Had such a contract been made, it is submitted that it would have been void as against public policy.

Flynn v. Bank, 118 S. W., 848.
King v. Railroad, 147 N. E., 263; 60 S. E., 1133.
Mills v. Mills, 40 N. Y., 543.
Providence Tool Co. v. Norris, 2 Wall., 45.
Doane v. Railway, 160 Ill., 22.
Critchfield v. Company, 174 Ill., 466.
Houlton v. Nicholl, etc., 93 Wis., 393.
Richardson v. County, 59 Neb., 400.
Wilcox v. Puryear, 12 Ky. Law Rep., 566.

The contract with Judge Reagan, as alleged and shown, is that if he would use his influence with the electorate of Anderson County, to secure the vote of that electorate for the issuance of $150,00.00 in county bonds to the Houston & Great Northern Railroad Company, and canvass the county for that purpose, and succeed in his efforts, that the machine shops and general offices of the company would be forever located in the City of Palestine. The authorities quoted and many others that might be cited sustain the proposition that contracts to influence the

action of the electorate are void. It does not matter that the motives of the parties are entirely innocent. The consideration alleged by plaintiff is:

> "* * * For and in consideration of the promise and agreement then made upon the part of Judge John H. Reagan to make a thorough canvass of Anderson County to induce the electors thereof," etc.

Under the pleading and proof of defendants in error the agreement with Judge Reagan was one not disclosed upon the face of the record in the County Court, and it was in consideration of his efforts to influence the voters of Anderson county to make a donation of $150,000 to the Houston & Great Northern Railroad that that company would, for the especial benefit of Judge Reagan's town, there perpetually maintain its offices and machine shops. It is believed that the consideration from each party to the contract, if made, was against public policy, and void. It is submitted, therefore, that there is no substantial testimony in this record upon which a contract can be based which would bring the Act of 1889 into operation, and that the mere holding of the court that such a contract was made and ratified is a bare and arbitrary exercise of power and authority without legal basis, depriving plaintiff in error of valuable rights without due process of law. This proposition is made stronger from the fact that the Act of 1889 does not by its own terms apply to this plaintiff in error, Section 1 of the act clearly states:

> "And if no certain place is named in its charter where its general offices shall be located and maintained, then said railroad company shall keep and maintain its general offices at such place within this State where it shall have contracted or agreed, or

shall hereafter contract or agree to locate its general offices for a valuable consideration."

Now, the charter of plaintiff in error approved by the Attorney General of the State, and for the privileges of which it paid out in accordance with the Act of 1910 more than $1,000,000.00, specifically provides for the location of its general offices in the City of Houston, in Harris County, and that portion of the act relating to general offices, therefore, has no application whatever to it. That portion of Section 1 of the act relating to machine shops is as follows:

"And such railroads shall keep and maintain their machine shops and roundhouses, or either, at such place or places as they may have contracted to keep them for a valuable consideration received. And if said general offices and shops and roundhouses, or either, are located on the line of a railroad in a county which has aided said railroad by an issue of bonds in consideration of such location being made, then said location shall not be changed."

Now, it will be noted that this portion of Section 1 provides, first, that the machine shops and general offices shall be located in accordance with the contract, but it does not provide that they shall be perpetually maintained at such point. The last part of the section quoted provides that if there has been an issue of bonds in consideration of the contract to locate, then the location shall not be changed. There is nothing whatever in the act to compel the perpetual maintenance of either offices or machine shops under a contract unless there has been an issuance of bonds made upon that consideration. In the present case there was an issuance of bonds, but upon a wholly different contract, as shown by the petition, or-

der for election and order declaring the result of the election and directing the delivery of the bonds. So that, properly construed, there is nothing in the act to compel the perpetual maintenance of the offices and machine shops of plaintiff in error at Palestine, and, conceding the contract to have been made and ratified, for the purposes of this argument, the statute has no force or power to compel the perpetual maintenance of either shops or offices at Palestine.

T. & P. R'y Co. v. Marshal, 136 U. S., 393, was decided May 19th, 1890. It was there dcided, Justice Miller rendering the opinion, that a contract to permanently establish offices and maintain shops does not mean to perpetually maintain the same. He declares: "The word 'permanent' does not mean 'forever,' or lasting forever, or existing forever." The contract as construed by the City of Marshal is declared to be an "extraordinary obligation," which equity will not enforce, and while not decided, it is intimated that the contract as so construed is void as against public policy. Read in the light of this decision, so often reaffirmed, it is clear that the Statute of 1889 cannot, properly construed, have the effect to perpetually bind the general offices and machine shops of this company to the City of Palestine.

But there is another point of view from which this statute and this judgment violates due process of law.

The so-called contracts which are relied upon to bring into operation the terms of the Statute of 1889, were not made by plaintiff in error, nor by its immediate predecessor in title. They were made in 1872, seventeen years before the enactment of the statute, by the Houston & Great Northern Railway. They are conceded to be nothing more than general and unsecured claims,

without lien, which, under the general law, and especially by the Texas decisions, were extinguished by the mortgage foreclosures. They were eliminated by the foreclosure sale of 1879, foreclosing mortgages of date 1871 and 1874, antedating both the contract of 1872 and 1875. The purchaser took the property free of such claims, else, as said by this court in Hoard v. C. & O. R'y, 123 U. S., 222, there would be an end to purchases of railroads. When the predecessor of plaintiff in error acquired the properties, it was free of the obligations, if any, arising out of these transactions. Unless, therefore, the legislature had power to arbitrarily change the location of the general offices of plaintiff in error from Houston, where they were then located by its charter, and to compel a common carrier, where it once locates its machine shops and roundhouses at a particular place, to compel their eternal maintenance there, then, regardless of all changes of operating conditions, this case must fall.

We have seen that the Statute of 1889, properly construed, has no application to the general offices of a company whose general offices are fixed by its charter. We have seen that this statute does not undertake, even in the case of contracts to locate, to compel the perpetual maintenance of either offices or shops, except where there has been an issuance of bonds upon that consideration, which the record negatives, and therefore, properly construed, the statute has no possible application. Concede, however, for the purposes of this argument, that the terms of the statute had application, yet to compel this carrier, upon considerations shown upon the face of the legislative act, and upon the face of the proceedings, to be admittedly private, to operate its properties in a particular way, and from a particular place, regardless of all

public considerations, not for any reasonable time, but for all time, is an invasion of private right, and a denial of due process of law, such as will not be tolerated in a government of law.

In Donovan v. Pa. R'y Co., 199 U. S., 279, this court, speaking through Mr. Justice Harlan, said:

> "Although its functions are public in their nature, the company holds the legal title to the property which it has undertaken to employ in the discharge of those functions. And as an incident to ownership, it may use the property for the purpose of making profit for itself, such use, however, being always subject to the condition that the property must be devoted to public objects, and without discriminations among passengers and shippers, and not to be so managed as to defeat these objects. *Its property is to be deemed in every legal sense private property as between it and those who have no occasion to use it for transportation purposes.*"

This court has said that the public is not the general manager of a railroad. (I. C. C. v. C. G. W. R'y, 209 U. S., 118.) The police power means, in the last analysis, the public's right of self defense. The public health, the public safety, within limits, the public morals, in general, the right to defend against public evil—these considerations only justify invasion of private right, and even then the exercise of this public right is in subordination to constitutional guarantees. It is believed that no case can be found where this court has undertaken to protect a private right by an invocation of the police power. It is directly to the interest of the public that a great railroad should be operated as cheaply as possible, and that within the limits of reasonable and equal rates and practices, it be permitted to prosper. Except as to those duties in which the public, by reason of their nature, has an

interest, their property and conduct is in every legal sense private. Is it within the police power of the State, in order to protect the private rights of a few members of a single community, to deprive a railway company of its liberty of action, conduct and operation for all time to come? It is believed that no case can be found which goes to this great length. No strength can be added to the statute by invoking the right of the State to alter or amend charters of corporations. Even where this right is specially reserved, it does not confer the power to make organic changes in the charter contract, by which it is fundamentally altered. Under the Texas laws, no right is reserved to alter or amend railroad charters. This is significant by reason of the fact that this right is specifically reserved as to all ordinary corporations. Neither the Constitution of 1845, 1869, or 1876, nor any statute, reserves the power to the legislature to alter or amend railroad charters, the only power reserved by the Constitution of 1876 being to regulate tolls and charges. There existed then no power in 1889 to charge the International & Great Northern Railroad Company of that date with a burden subversive of its private rights, by reason of a private contract, made several years before, with the owners of the property which it had bought at foreclosure sale, and equally there existed no power to charge the present owner of these properties, in violation of private right, and of its charter, to charge it with the performance of a private contract for the benefit of private individuals, made more than forty years since by the remote owners of the properties purchased.

Woodward v Central R'y of Vermont, 168 N. E., 1051, Supreme Judicial Court of Massachusetts, opinion by Chief Justice Holmes, is in point. While the charters of

Vermont railway corporations were subject to the reserved right of amendment, it was held that the legislature of that State could not, consistent with due process of law, burden a corporation purchasing at foreclosure sale, with the payment of obligations of the foreclosed company inferior to the lien of the mortgagee, whose rights the purchasing corporation had acquired.

This court, in *Ex parte Virginia*, 100 U. S., 347, said:

> "A State acts by its legislative, its executive or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws."

In C. B. & Q. R'y Co. v. Chicago, 166 U. S., 226, it was said:

> "But a State may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts, and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law, regard must be had to substance, not to form. This court, referring to the Fourteenth Amendment, has said, 'Can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is effected under the forms of State legislation.' Davidson v. New Orleans, 96 U. S., 97. The same question could be propounded and the same answer should be made in reference to judicial proceedings inconsistent with the requirement of due process of law."

It was said in Kansas City So. R'y v. Albers Com. Co., 223 U. S., 591:

> "While it is true that upon a writ of error to a State Court, we cannot review its decision upon pure questions of fact, but only upon questions of law bearing upon the Federal right set up by the unsuccessful party, it equally is true that we may examine the entire record, including the evidence, if properly incorporated therein, to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter. That this is so is amply shown by our prior rulings."

This opinion cites Mackey v. Dillon, 4th Howard, 421; Dower v. Richards, 151 U. S., 658; Stanley v. Schwalby, 162 U. S., 255; Louisville Gas Co. v. Citizens Gas Co., 115 U. S., 683. See also Saunders v. Shaw, 37 Sup. Ct. Rep., 638; Home Tel. & Tel. Co. v. Los Angeles, 227 U. S., 278.

This case involves an attempt by an act of the legislature passed in 1889 to secure by a perpetual lien or servitude upon property, alleged personal contract made in 1872, which, when made, was admittedly personal. These alleged contracts are claimed to have been made with the Houston & Great Northern Railroad, whose properties were sold out by foreclosure proceedings in 1879, ten years prior to the passage of the statute under mortgages made prior to the alleged contracts. Under the Texas laws and decisions then in force and effect, this sale extinguished these personal obligations, and to burden the properties perpetually with the servitude created by this statute which becomes operative by reason of an alleged oral contract thus extinguished, not only impairs

the obligation of contracts, but takes property without due process of law. Certainly in this situation this court is not precluded from determining whether the facts constitute such a contract as will bring the statute into operation, or whether the statute properly construed can be given an effcet which for all time to come will deprive a great instrumentality of interstate commerce from exercising that liberty of action which is necessary for the proper discharge of its public duties. In order to reach the extraordinary results attained by the judgment herein complained of, by which to subserve rights and ends strictly private in their nature (People v. R'y, 9 N. E., 369), the constitutional rights of plaintiff in error are overridden, it has been necessary for the Texas Courts to disregard a long line of Texas decisions holding that personal contracts were extinguished by mortgage foreclosure, and under which decisions the rights here asserted were acquired. It was further necessary to disregard the decisions of the Texas Courts to the effect that neither did Grow have the authority to make such a contract, nor did Hoxie have the right to ratify it. Under the authority of the decisions cited it is submitted that this court has the undoubted right to determine that the facts proven do not establish such a contract as will bring into operation the Statute of 1889, and to find that this statute which gives such pretended contract made seventeen years before an effect which it did not have when made, when properly construed, does not apply to this plaintiff in error, and that this court is not bound by the action of the State Court in that regard. We ask this court to reverse a judgment without evidence to support it, upon a law improperly construed, made in defiance of all previous Texas decisions, which destroys vested

rights, which takes property for private use without compensation, and deprives plaintiff in error of its liberty of action for all time, within the sphere of its private rights.

VII.

Proposition.

The Act of 1889 and the judgment of the court herein, in compelling plaintiff in error, a railway corporation, engaged in interstate commerce, and an instrumentality of interstate commerce, to perpetually maintain its machine shops, roundhouses and general offices at a particular place, to wit, the City of Palestine, operates as a burden upon interstate commerce, in violation of paragraph four, Section 8, of Article 1, of the Constitution of the United States, which provides that:

> **"Congress shall have power to regulate commerce with foreign nations, among the several States, and with the Indian tribes."**

The railway of plaintiff in error embraces 1106 miles. It extends from Laredo, on the Rio Grande, through to Longview, from the port of Galveston, through the City of Houston, to Palestine, from Spring, on the Houston-Palestine branch, through Waco, to Fort Worth, with various important branches. Its principal office, by its charter, is fixed at Houston, the most important railway center in the State, a city of more than one hundred thousand inhabitants. Houston is a seaport, as well as is Galveston. It does a large foreign and interstate business. It is the principal cotton-carrying line in the State of Texas. One-half its revenues is derived from interstate and foreign commerce. It reaches practically every great city in

the State of Texas. Palestine is an inconsiderable town, of approximately twelve thousand inhabitants, situated far in the interior. The Act of 1889, as construed by the court in this case, perpetually binds, not only the machine shops of this company, but the offices of those charged with the direction and control of all of its activities, state and interstate, to this village, and this burden it must carry, whatever may be the change in ownership or the conditions of commerce and operation.

This court will take judicial knowledge of the location and operation of a great instrumentality of interstate commerce such as this.

Horace Booth, its General Freight Agent (Tr., Vol. III, page 965) testified that he had been a railroad traffic man in the service of the I. & G. N. for twenty years, and had been General Freight Agent since 1911; that his position required him to understand the problems of inter and intrastate commerce; that he is familiar with Palestine, and knows the railroad situation of the State of Texas generally, as it was his duty to keep up with and study the problems of rates and character of tonnage and freight business generally with connecting lines; that he was familiar with the railway connections of the defendant; that it did a large amount of interstate business, about fifty per cent. of the whole business being interstate; that through its connections it does a joint business extending throughout the entire nation, and with water lines does a large interstate and foreign business; that if all of the general offices were moved back to Palestine, and the general officers required to live there, this requirement would interfere with the operation of the road, and have a detrimental effect, because of the inaccessibility of Palestine, and the difficulty of keeping in

touch with business and with connecting lines; that the line of railroad as shown upon the map introduced in evidence extended to Fort Worth, to the Mexican border at Laredo, and that it had connections with the Iron Mountain and Missouri Pacific to St. Louis; with the Texas & Pacific for New Orleans, and interchanged business at Laredo with the National Lines of Mexico, with which prior to the present war a large interchange business was done at said point. At Fort Worth it connects with the Texas & Pacific, the Cotton Belt, F. W. & D. C., Frisco and Rock Island lines, with the Fort Worth & Rio Grande, Missouri, Kansas & Texas, and the G. C. & S. F. At San Antonio it connects with the Galveston, Harrisburg & San Antonio Railway Company, the San Antonio & Aransas Pass, the Missouri, Kansas & Texas, and the San Antonio, Uvalde & Gulf, all of which roads do an interstate business, the G. H. & S. A. being a continental road, as is also the Texas & Pacific. That Ft. Worth is 32 miles from Dallas, with which the I. & G. N. connects over the Texas & Pacific. It runs into Galveston over the Galveston, Houston & Henderson, of which it is a tenant line from Houston to Galveston, a little over 48 miles. Galveston is the greatest (cotton) seaport in the United States, and the International & Great Northern connects at Galveston with the water lines, and is the largest cotton carrier in Texas. Galveston is a large seaport for other business. The G. C. & S. F., M. K. & T., T. & B. V., I. & G. N., G. H. & S. A. and G. H. & H. are all important roads running into Galveston, and handle interstate and foreign commerce; that Houston is the largest railroad center in Texas, and is entered by the I. & G. N., M. K. & T., G. C. & S. F., G. H. & H., T. & B. V., B. S. L. & W., St. L. B. & M., H. E. & W. T., H. & T. C., T. & N. O.,

G. H. & S. A., and S. A. & A. P., all of which roads are engaged in interstate commerce; that the S. A. & A. P. has its general offices in San Antonio, the G. H. & H. and G. C. & S. F. in Galveston, the M. K. & T. at Dallas, and the St. L. B. & M. at Kingsville, and all the others have their general offices at Houston; that, with the exception of the St. Louis, Brownsville & Mexico, domiciled at Kingsville, and the Cotton Belt, domiciled at Tyler, all of the large roads have their general offices in large cities, to wit, Houston, Galveston, Dallas, Fort Worth and San Antonio, and not in small towns; that Houston, Dallas and San Antonio are the three largest cities in Texas, with a population of about one hundred twenty-five thousand each, and that at Palestine there is no railroad other than the defendant, except the Texas State Road, which runs from Rusk to Palestine, which is a very small railroad, with an insignificant business; that the interstate and foreign business of the I. & G. N. is nearly all obtained by interchange with water, and other rail lines in Galveston, Longview, Laredo, Houston, Fort Worth and San Antonio, these being the principal interchange points.

He further states that the I. & G. N. does a very large amount of import and seaboard carriage. The ship channel extends from Houston to Galveston, and will provide for ocean vessels by deep water up to Houston, which will directly affect interstate and interchange business and foreign business.

He further stated that the I. & G. N. has considerable frontage on this ship channel at Houston, and that this fact will build up connections with ocean-going vessels. It now does a considerable amount of inbound traffic out of the port of Galveston, which is increasing, and through

the operation of the Panama Canal will be much greater.

He stated that in his opinion it was absolutely necessary for the traffic department of the International & Great Northern Railway and the general manager's department to be in close touch and contact with these interchanges and connections, in order best to serve the public, and that it would be a very serious handicap if the railway were compelled to move these departments back to Palestine, because it was absolutely necessary in order to control the traffic for the entire line to keep in very close touch with important business centers, and with the connecting lines, from which this traffic comes, and to which it goes, and with the large business centers, where most of this business originates; that the competition between the Texas railroads for business was very intense, and he was of opinion that it was absolutely necessary for the traffic department and for the general departments of the railroad, in carrying on this competition, to be at the center, and as close as possible to their competitors.

He further stated (Tr., Vol. III, page 981) that the increase of freight revenue of the I. & G. N. during the first year of its operation with its principal office at Houston, compared with the last year of its operation, was more than $1,000,000.00, something over ten per cent. of the gross revenue, and the second year with the general offices at Houston showed an increase of $650,000.00 over the first year of the operation of the general offices at Houston. Ex-Governor T. M. Campbell (Tr., Vol. III, p. 358) stated that he had been Receiver of the I. & G. N. from January 26, 1891, until July 1892, and general manager of that road from July, 1892, to March, 1897, and was familiar with its lines and connections. He stated,

over objection of plaintiff in error, that questions asked called for an opinion, and that he had not shown qualifications as an expert, that he could not conceive of any burden upon interstate commerce if the line should be required to maintain its general offices at Palestine.

G. H. Turner (Tr., Vol. III, p. 993), who was General Freight Agent of the I. & G. N. in 1897, and is now a resident of the City of Palestine, said that he would consider Palestine the most logical point for the location of the general offices, because it is central for both general offices and shops, and a good point to live at, and healthy and cheaper and more comfortable than Houston.

A. L. Bowers (Tr., Vol. III, p. 996) testified that he had been employed by the I. & G. N. Railroad as General Superintendent, in charge of operation, which position he held for two or three years, and was Superintendent of Construction of the Fort Worth Division for four years, and had been for the last forty years acquainted with defendant's line, and its interchange of traffic in intra and interstate commerce, and did not think that the defendant would be burdened by requiring it to operate its road from the general offices at Palestine, instead of from Houston, and that in his opinion it was a great advantage to have machine shops and general offices at the same place, because best results could be obtained where all are kept in close touch with each other.

This is all of the testimony adduced upon this issue. Plaintiff in error requested the court (Tr., Vol. II, p. 520) to submit the following issue to the jury:

> "Do you, or not, find from a preponderance of the evidence that if the International & Great Northern Railway Company was required to have its general offices at Palestine forever, that thereby a burden will be placed upon interstate commerce?"

which was refused by the court. It was also requested to submit (Tr., Vol. II, p. 521) the following special issue to the jury:

> "Do you or not find from a preponderance of the evidence that in the event that the International & Great Northern Railway Company should be required to keep and maintain its shops at Palestine forever, that thereby a burden will be placed upon interstate commerce?"

which was also refused.

Defendant in error (Tr., Vol. II, p. 540) requested the court to submit the following issue:

> "Do you find from a preponderance of the evidence that in the event the International & Great Northern Railway Company should be required to keep and maintain its shops at Palestine forever no burden or injurious effect would thereby be placed upon or suffered by interstate commerce?"

The issue in this form, as requested by defendant in error, was submitted to the jury (Vol. II, p. 558), and in response to the issue thus presented the jury (Tr., Vol. II, p. 558) answered "Yes."

The decree of the court requires defendant in error to forever keep and maintain its general offices, machine shops and roundhouses for the operation of the International & Great Northern Railway Company in the City of Palestine, in the County of Anderson, and further orders that it be perpetually enjoined and restrained from changing the location of its machine shops and roundhouses as operated from the City of Palestine, and that it be perpetually enjoined and restrained from keeping or maintaining the general offices of the Vice-President and general manager, Secretary, Treasurer, Auditor, General

Freight Agent, General Manager, General Superintendent, General Passenger and Ticket Agent, Chief Engineer, Master of Transportation, Fuel Agent, General Claim Agent, Superintendent of Motive Power and Machinery, and Master Mechanic, engaged in the operation of the International & Great Northern Railway Company, at any other place than the City of Palestine.

While, therefore, it appears that the issue as to whether the location and perpetual maintenance of the machine shops and roundhouses at Palestine would operate as a burden upon interstate commerce, was submitted to the jury and by it determined against plaintiff in error, the issue as to whether the perpetual maintenance of the general office with the offices of the officials named in the decree at Palestine would be such burden was not submitted to the jury, and was not passed upon. Due exception to the action of the court in declining to submit this issue was reserved so that that issue has never been passed upon by the jury.

As to the issue as to whether the perpetual maintenance of the machine shops and roundhouses of a great railway system at Palestine has been concluded by this finding of the jury, we have to say that there is no conflict of fact, but only a conflict of opinion, and that this court has full power on the undisputed physical facts of record to determine whether or not a statute and a judgment which thus perpetually controls the operation and limits the activities of a great instrumentality of interstate commerce is a burden upon that commerce. While it may be true that there is, technically speaking, no public policy of the United States, it is, nevertheless, true that progressively since the passage of the Act to Regulate Commerce, Congress has assumed direct and imme-

diate control of the operation of interstate carriers. Through the Safety Appliance Act, the Hours of Service Act, the Car Supply Act, and many other statutory enactments too numerous to be mentioned here, Congress directly controls the operation of railways, the appliances upon cars, and the wages of its employes engaged in interstate commerce. Notwithstanding its obligation to have its cars properly equipped with safety appliances over the whole length of its 1106 miles of railway engaged in interstate commerce at all of the great cities and ports of the State, it is compelled to maintain to all eternity its machine shops, cars and locomotives at a comparatively insignificant locality, far removed from the great centers of use, and cars and locomotives engaged in a great commerce at Galveston, Houston, San Antonio, Laredo and Fort Worth, which should properly be repaired or constructed at either of these places, where material and skilled labor can be more easily and more cheaply obtained, must, under the terms of this law and this decree, be hauled hundreds of miles to a small town in the interior, to the continual loss and detriment to the entire service. These considerations apply as well to the undetermined issue of the location of the general offices. The City of Houston is the greatest commercial center and the greatest railroad center in the State—a seaport itself. The International & Great Northern Railway Company has unusual facilities by reason of its ownership of property upon the channel front. The line operates into the great seaport at Galveston. Within a few miles of Houston the Fort Worth branch of the line extends from Spring to Fort Worth. Practically all of the great lines of the State have found it necessary that their general offices, for the reasons indicated in the testimony of Mr.

Booth, should be located in large cities. These general offices must be, in order to successfully prosecute the business of the company, in close, accurate and immediate touch with, not only the great commerce to which a railway company looks for support, but in personal and immediate contact with the officers and business of their competitors, and with its controlling connecting rail and water lines, with which joint traffic arrangements are made. This law and this decree remove all of the general officers of the company who must procure its business and control its activities from the commercial life of the State, and isolates them in a country village, where there is no other railway. If contact with business is to be maintained, and the business life of the company protected, the expense of a double organization must be carried and this expense must be perpetuated for all time in order that the pardonable local pride of a small community may be indulged.

Let it be supposed that the legislature of the State, acting either directly or through the instrumentality of an administrative body, should undertake to determine that the machine shops of a great interstate carrier, where thousands of locomotives and cars are constructed and repaired every year, should be located at a point remote from the localities of its chief business, and that it should undertake to require that this unreasonable and burdensome condition should be maintained perpetually, can it be a subject of doubt that such a requirement would operate as an unreasonable burden upon interstate commerce of the company? If the legislature has this power, and has the power to control the location of those who must conduct the business and direct the operation of the interstate carrier, then it is within the power of the State

to so hamper its activities that it cannot engage in business upon equal terms with its competitors.

As an example of this character of legislation, the legislature of the State of Texas, in 1910, passed a law prohibiting railroad corporations having shops within the State from sending any car, coach, locomotive or other equipment out of the State to be repaired, renovated or re-built, and also requiring any railroad corporation to repair, renovate or re-build within the State of Texas all defective or broken cars, coaches, locomotives or other equipment, if it has repair shops in the State. This act further prohibits any railroad company from hauling any disabled equipment past any shop operated by the company, in order to reach some other repair shop, violation of these requirements being punishable by severe fine. So far as we are advised, no prosecution has ever been filed under this law, presumably for the reason that its conflict with the commerce clause of the Federal Constitution is obvious, and appears upon its face.

The Act of 1889 and the judgment thereunder rendered is of the same character. If interstate employes of an instrumentality of interstate commerce are hindered in their conduct of interstate business, and if a great instrumentality of interstate commerce is by a law of this character compelled for all time to carry a burden such as is sought to be placed upon it by this law and this judgment, it is impeded, hindered and obstructed in the conduct of its interstate business, and in its ability to meet changed conditions as they arise.

In Kansas City Southern R'y v. Quigley, 181 Fed., 203, which was a bill brought by the railway company to restrain suits upon an alleged contract to maintain division headquarters at a particular place, the defendants

filed a cross-action to enforce the contract. Judge Hook said:

> "Moreover, such a suit could never be maintained by the defendants if upon final hearing it was determined that to grant an injunction against the removal of complainants' central division from Mena would either impose a burden on interstate commerce, create a congestion of its traffic, impair its service, or inflict irreparable loss upon it, or prevent the enforcement of the act of Congress above refered to, known as the Eighteen-Hour Law."

Judge Taft, in Metropolitan Trust Company v. C. S. & H. R'y, 95 Fed., 18, said, in discussing a provision in a lease contract, that the lessee would never extend its line beyond its existing terminus:

> "Railroad companies, by the statutes of Ohio, are given the power to extend their lines either by their own construction or by the purchase or lease of other lines. These provisions are for the benefit of the public, and it may admit of serious doubt whether a railway company may, consistently with public policy, disable itself from exercising such power forever."

In Texas & Pacific Railway v. Marshall, 136 U. S., 406, the court quite clearly states that the enforcement of such a contract is not only against public policy, but is an interference with the duties of the carrier imposed by acts of Congress. It says:

> "On the other hand, the enforcement of the contract by a decree of the court requiring the company to restore in all its fullness the offices, the workshops,

> and whatever has been removed from the City of Marshal, and the continued and perpetual compliance with all those conditions by the company, to be enforced in the future, under the eye of a court of chancery, against the public interest, and perhaps manifestly to the prejudice and injury of the railroad company, exercising to some extent the public function authorized by the acts of Congress, or of the legislature of Texas, present difficulties far more formidable than the action at law."

In Seaboard Air Line R'y v. Blackwell, 37 Sup. Ct. Rep., 640, a Georgia statute requiring all trains to be brought under control within four hundred yards of a public crossing was held to impose an undue burden upon interstate commerce, as applied to an interstate train crossing one hundred and twenty-four highways in one hundred and twenty-three miles. Such statutes are generally held to be within the police powers of the State. Its application to such a state of facts, however, is clearly an undue burden upon its interstate comemrce. While statutes requiring general offices of a railroad, or even its machine shops, to be located on the line of the road, are doubtless within the police power of the State, a statute requiring an interstate carrier forever to maintain not only its general offices, but its machine shops and roundhouses, at a particular place, and a judgment which so locates them perpetually at a place inconsiderable in itself, remote from the business activities of the State, contrary to the business discretion of the officers of the company, must be held a direct burden upon interstate commerce.

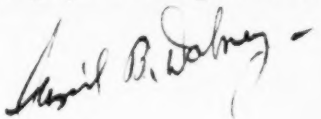
Plaintiff in error is a great highway of interstate commerce, and a great instrumentality of interstate commerce. Not only the entire State of Texas, but the shippers of the entire nation are interested that it shall not disable itself forever, from discharging its public duties. Can a carrier engaged in interstate commerce, either by statute or contract, be compelled for all time to come to operate its business and construct and repair its equipment at a remote and obscure village, far removed from the centers of that commerce, which is its duty to serve? In the face of great physical facts which this court cannot ignore, must it yield absolute subservience to the opinions of interested witnesses that to perpetually tie down the activities of this company to the village of their residence will not burden its interstate activities? Considered from a purely technical standpoint the refusal of the court to submit the issue as to whether the perpetual location of the general offices is a burden upon interstate commerce is error, for which the case should be reversed. The great underlying fact, however, is that no amount of opinion testimony can materially affect the outstanding proposition that a great interstate railway, eleven hundred miles long, reaching great ports, and the Mexican boundary, with half of its receipts from interstate and foreign commerce, cannot without burdening that commerce be tied forever in all its great activities to an interior and commercially unimportant locality.

In conclusion it is respectfully submitted that because of the manifold and grievous errors upon which they

are based and founded, the judgments of the Court of Civil Appeals and of the District Court should be reversed and the cause remanded. And with a prayer for this and for such other relief as may be adequate and appropriate, the plaintiff in error respectfully rests its case.

WILLIAMS & STEDMAN,
WILSON, DABNEY & KING,
BAKER, BOTTS, PARKER & GARWOOD,
ANDREWS, STREETMAN, BURNS & LOGUE,
Attorneys for Plaintiff in Error.

F. A. WILLIAMS,
N. A. STEDMAN,
SAM'L B. DABNEY,
H. M. GARWOOD,
FRANK ANDREWS,
Of Counsel.



APPENDIX

EXHIBIT A.

The General Office Act of 1853.

Section 4, Chapter XLVI, of the Act approved February 7, 1853, is as follows:

> "SEC. 4. Such corporation shall, as soon as convenient after its organization, establish a principal office at some point on the line of its road, and change the same at pleasure, giving public notice in some newspaper of such establishment and change; and all process against such company shall be served on the President or Secretary, or by leaving a copy at the principal office of the corporation." (General Laws of State of Texas, Second Session 4th Legislature, page 56.)

EXHIBIT B.

The General Office and Sale Act of 1857.

Sections 2, 5, 6, 7, 8 and 9 of an Act supplementary to and amendatory of an Act to Regulate Railroad Companies, approved February 7, 1853, approved December 19, 1857, also being Articles 4909 and 4912 to 4916, inclusive of Paschal's Digest of Laws of Texas:

"SEC. 2. That every railroad company heretofore incorporated, or which may hereafter be incorporated by the legislature of this State, shall be required to keep its stock books at the principal office of the company on the line of its road, in which books shall be entered all certificates of the capital stock issued by said company, and all transfers of stock shall be entered in such books, which, at all reasonable business hours, shall be open to the inspection of each stockholder, and to any agent or officer of the State, whose duty it may be to inspect such books; and all meetings of the directors of any railroad company for the transaction of business shall be held at the office of said company, as required to be kept by this section.

"SEC. 5. The road-bed, track, franchise and chartered rights and privileges of any railroad company in this State, shall be subject to the payment of the debts and legal liabilities of said company, and may be sold in satisfaction of the same; but the said road-bed, track, franchise and chartered powers and privileges shall be deemed an entire thing, and must be sold as such; and in case of the sale of the same, whether by virtue of an execution, order of sale, deed of trust, or any other power, the purchaser or purchasers at such sale, and their associates, shall be entitled to have and exercise all the powers, privileges and franchises granted to said company by its charter, or by virtue of the general laws of this State; and the said purchaser or purchasers and their associates shall be deemed and taken to be the true owners of said charter, and corporators under the

same, and vested with all the powers, rights, privileges and benefits thereof, in the same manner and to the same extent, as if they were the original corporators of said company; and shall have the power to construct, complete, equip and work the road upon the same terms and under the same conditions and restrictions as are imposed by their charter and the general laws of this State.

"SEC. 6. Whenever a sale of the road-bed, track, franchise and chartered rights and privileges of any railroad company is made by virtue of any deed of trust or power, the same shall be made at the time and place mentioned in the deed of trust or power, and in accordance with the provisions of the same, as to notice, and in other respects; and if the same be not specified, such sale shall be made as hereinafter provided for sales under execution or order of sale.

"SEC 7. Whenever judgment is rendered against any railroad company, the party in whose favor such judgment is rendered may have execution thereon directed to the sheriff of that county, in which the principal office of said company is kept; and if the said company fail to point out other property to satisfy said execution, said sheriff may, at the request of the plaintiff, levy the same upon the road-bed, track, franchise and chartered powers and privileges of said company, and said levy shall be held to embrace the whole road-bed, and track, and entire line of said railroad, whether situated in the same county or not, and he shall proceed to advertise and sell the same at the courthouse door of his county, as in other cases, making the same advertisement as is provided by law in cases of the sale of lands; and upon said sale shall execute to the purchaser a conveyance of the said road-bed, track, franchise, chartered powers, rights and privileges. And the provisions of this section shall be observed so far as they are applicable, in all cases where, by any decree of a competent court, a sale of the road-bed, track, franchise and chartered rights of any railroad company is directed to be made. And provided this section shall not be so

construed as to prevent the issuance of execution to another county than that in which judgment is rendered, without first selling the road-bed, track, franchise and chartered powers.

"SEC. 8. The sale of the road-bed, track, franchise and chartered rights as hereinbefore provided shall not be held to pass or convey to the purchaser any right or claim to recover from the former stockholders of said company, any sums which may remain due upon their subscriptions of stock, but the said stockholders shall continue liable to pay the same in discharge and liquidation of the debts by the sold-out company, as hereinafter provided.

"SEC. 9. Whenever a sale of the road-bed, track, franchise and chartered powers and privileges is made, as hereinbefore provided (unless other persons shall be appointed by the legislature or by some court of competent authority), the directors or managers of the sold-out company at the time of the sale, by whatever name they may be known in law, shall be the trustees of the creditors and stockholders of the sold-out company, and shall have full powers to settle the affairs of the sold-out company, collect and pay the outstanding debts, and divide among the stockholders the money and other property that shall remain after the payment of the debts and necessary expenses; and the persons so constituted trustees shall have authority to sue by the name of the trustees of such sold-out company, and may be sued as such, and shall be jointly and severally responsible to the creditors and stockholders of such company, to the extent of its property and effects that shall come to their hands. And no suit pending for or against any railroad company at the time that the sale may be made of its road-bed, track, franchise and chartered privileges, shall abate, but the same shall be continued in the name of the trustees of the sold-out company." (General Laws of State of Texas, 7th Legislature, pp. 25-27.)

EXHIBIT C.

The Act of 1889, Authorizing Incorporation for the Purpose of Acquiring Sold-out Railroads.

Chap. 24.—(S. H. B. No. 574.) An Act to amend Chapter 11, Title LXXXIV, of the Revised Civil Statutes of the State of Texas, so as to add thereto another article to be known as Article 4260a:

"SECTION 1. Be it enacted by the Legislature of the State of Texas: That Chapter 11, Title LXXXIV, of the Revised Civil Statutes of the State of Texas, be amended by adding thereto the following article:

"ARTICLE 4260a. That in case of any such sale heretofore or hereafter made of the road-bed, track, franchise, or chartered right of a railway company or any part thereof as mentioned in Article 4260, above, the purchaser or purchasers thereof and their associates shall be entitled to form a corporation under Chapter One of this title, for the purpose of acquiring, owning, maintaining, and operating the portion of the road so purchased as if such road or portion of the road were the road intended to be constructed by the corporation, and when such charter has been filed the said new corporation shall have all the powers and privileges conferred by the laws of this State upon chartered railroads, including the power to construct and extend: Provided, That, notwithstanding such incorporation, the portion of the road so purchased shall be subject to the same liabilities, claims and demands in the hands of the new corporation as in the hands of the purchaser or purchasers of the sold-out corporation: Provided, That, by such purchase and organization no rights shall be acquired under any former charter or law in conflict with the provisions of the present Constitution in any respect, nor shall the main track of any railroad once constructed and operated be abandoned or removed.

"SEC. 2. No railway company availing itself of any of the privileges herein provided shall claim

to be under the jurisdiction of the Federal Courts by reason thereof, and any railway company which may avail itself of the said privileges which shall claim to be subject to the jurisdiction of the Federal Courts in pursuance of this act, shall, *ipso facto*, forfeit its reorganization, and be remanded to the same condition as it was prior to said reorganization.

"SEC. 3. Whereas, there is in existence no law which sufficiently provides the manner in which a railroad company sold out under decree of the court or otherwise may form a corporation for the purpose of acquiring, owning and extending such sold-out property, and the lateness of the session, create an emergency and imperative public necessity authorizing the suspension of the constitutional rule requiring bills to be read on three several days, and that this act shall take effect and be in force from and after its passage; therefore it is so enacted.

"Approved, March 29, 1889." (General Laws of State of Texas, Regular Session 21st Legislature, pp. 19-20.)

EXHIBIT D.

The Office-Shops Act of 1889.

This act became part of Articles 4367 and 4368, Revised Statutes of 1895, and Articles 6423 and 6424 of Revised Statutes of 1911.

Chap. 106.—(H. B. No. 77.) An Act to require all railroad companies to keep and maintain permanently their general offices, machine shops and roundhouses within the State of Texas, at certain places, and to keep all books, accounts, etc., at said offices, and to provide penalties for failing to comply therewith:

"SECTION 1. Be it enacted by the Legislature of the State of Texas: That every railroad company chartered by this State, or owning or operating any line of railway within this State, shall keep and maintain permanently its general offices within the State of Texas, at the place named in its charter for the locating of its general offices; and if no certain place is named in its charter, where its general offices shall be located and maintained, then said railroad company shall keep and maintain its general offices at such place within this State where it shall have contracted or agreed, or shall hereafter contract or agree to locate its general office for a valuable consideration; and if said railroad company has not contracted or agreed for a valuable consideration to maintain its general office at any certain place within this State, then such general offices shall be located and maintained at such place on its line in this State as said railroad companies may designate to be on its line of railway. And such railroads shall keep and maintain their machine shops and roundhouses, or either, at such place or places as they may have contracted to keep them for a valuable consideration received; and if said general offices and shops and roundhouses, or either, are located on the line of a railroad in a county which has aided said railroad by an issue of bonds in consideration of such location

being made, then said location shall not be changed; and this shall apply as well to a railroad that may have been consolidated with another as to those which have maintained their original organization.

"SEC. 2. It shall be the duty of said railroad company to keep and maintain at the place within this State where its said general offices are located the office of its president or vice-president, also the office of its secretary, treasurer, local treasurer, auditor, general freight agent, traffic manager, general manager, general superintendent, general passenger and ticket agent, chief engineer, superintendent of motive power and machinery, master mechanic, master of transportation, train master, stock and fuel agent, claim agent, and each any every one of its general offices shall be so kept and maintained, by whatever name it is known, and the persons who perform the duties of said general offices, by whatever name known, shall keep and maintain their offices at the place where said general offices are required to be located and maintained, and the persons holding said general offices of a railroad shall reside at the place, and keep and maintain their offices at the place where the general offices of said railroad are required by law to be kept and maintained; and if the duties of any of the above named officers are performed by any person, but his position is called by a different name, it is hereby made the duty of said railroad company to have and maintain said offices at the place where its general Texas offices are kept and maintained as required by this act: Provided, That if the judgment of the court shall be to forfeit the charter, then it shall allow the railroad company six months from the date of the judgment within which to comply with the requirements of this act, and if said railroad shall comply within the said time, no forfeiture shall occur, but if the railroad company shall not comply then the judgment shall be final. The object and meaning of this statute being to require every railroad company owning or operating a line of railway within this State, to keep and maintain its general offices within this State at such place as required

herein, and the name of the above as general offices shall not be understood to allow the railroad company to have any of the offices usually known as general offices at any other place than the one it is required to keep its general offices at, and each and every railroad is hereby required to have and maintain its general offices at the place named herein.

"SEC. 3. Each and every railroad company chartered by this State, or owning, operating, or controlling any line of railroad within this State, which shall violate any of the provisions of this act, shall forfeit the charter by which it operates its railroad in this State to the State of Texas, and it is hereby made the duty of the attorney general of this State, upon the application of any disinterested party, or on his own motion, to proceed at once against every railroad company owning, operating or controlling any line of railway within this State by *quo warranto* to forfeit the charter of the railroad company so offending or violating any of the provisions of this law, shall, in addition to forfeiting the charter to that part of the railroad situated within this State, be subject to a penalty of five thousand dollars for each and every day it violates any of the provisions of this act, said penalty to be recovered in the name of the State of Texas by a suit which shall be filed by the attorney general in any court in this State having jurisdiction, and on the trial the court shall (if it finds that the railroad company has violated any of the provisions of this act) render judgment in the name of the State of Texas at the rate of the sum of five thousand dollars for each and every day said court shall find that said railroad company violated any of the provisions of this act. And any money recovered from any railroad company under the provisions of this act shall be paid over into the State treasury and become a part of the available public free school fund.

"Approved, March 27, 1889." (See General Laws of State of Texas, Regular Session 21st Legislature, pp. 130-131.)

EXHIBIT E.

The Act of September 1, 1910, Commonly Known as the I. & G. N. Bill.

Being Chapter 4 of General Laws Fourth Called Session of the Thirty-first Legislature of Texas. Amends Article 4549 and 4550 Revised Statutes of Texas of 1895, and is known as Articles 6624 and 6625, Revised Statutes of 1911:

"*Chapter 4.*

"AN ACT to amend Articles 4549 and 4550, Chapter Eleven, Title XCIV, of the Revised Statutes of the State of Texas, and prescribe the conditions upon which the purchaser or purchasers, and associates, if any, of the property and franchises of a railroad company, may become owners of its charter, or may organize a new corporation, and governing, regulating and limiting the stocks and bonds of the new corporation, and of the old corporation, after the sale of its property and franchises, and declaring an emergency.

"*Be it enacted by the legislature of the State of Texas:*

"SECTION 1. That Articles 4549 and 4550, of Chapter Eleven, Title XCIV, of the Revised Statutes of the State of Texas be so amended as to hereafter read as follows:

"Article 4549. In case of the sale of the property and franchises of a railroad company, whether by virtue of an execution, order of sale, deed of trust, or any other power, or by a receiver, acting under judgments, heretofore or to be hereafter rendered by any court of competent jurisdiction, the purchaser or purchasers at such sale, and associates, if any, shall acquire full title to such property and franchises, with full power to maintain and operate the railroad and other property incident to it, under the

restrictions imposed by law; provided, however, that said purchaser or purchasers, and associates, if any, shall not be deemed and taken to be the owners of the charter of the railroad company and corporators under the same, nor vested with the powers, rights, privileges and benefits of such charter ownership as if they were the original corporators of said company, unless the purchaser or purchasers, and associates, if any, shall agree to take and hold said property and franchises, charged with and subject to the payment of all subsisting liabilities and claims for death and for personal injuries, sustained in the operation of the railroad by the company, and by any receiver thereof, and for loss of and damage to property sustained in the operation of the railroad by the company and by any receiver thereof, and for the current expenses of such operation, including labor, supplies and repairs, provided that all such subsisting claims and liabilities shall have accrued within two years prior to the beginning of the receivership resulting in the sale of said property and franchises, or within two years prior to the sale, if said property and franchises be sold otherwise than under receivership proceedings, unless suit was pending on such claims and liabilities when the receiver was appointed or when the sale was made, in which event claims and liabilities on which suits were so pending shall be protected hereby as though accruing within the two years; such agreement to be evidenced by an instrument in writing signed and acknowledged by said purchaser or purchasers, and associates, if any, and filed in the office of the Secretary of State of the State of Texas; and, provided further, that such charter, together with the powers, rights, privileges and benefits thereof, shall pass to said purchaser or purchasers, and associates, if any, subject to the terms, provisions, restructions and limitations imposed and to be imposed by law; and provided further, that the amount of stock and bonds which may be held against said property and franchises, after the sale thereof, as well as the manner of issuance of

such stock and bonds shall be fixed, determined and regulated by the Railroad Commission of Texas, at its discretion, save that the total encumbrance secured by the lien on said property and franchises shall not exceed the amount allowed by Article 4584b of the Revised Statutes of Texas of 1895.

"Article 4550. In case of any sale heretofore or hereafter made of the property and franchises of a railroad company, within this State, the purchaser or purchasers thereof, and associates, if any, shall be entitled to form a corporation under Chapter One of Title XCIV, of the Revised Statutes of Texas, for the purpose of acquiring, owning, maintaining and operating the road so purchased, as if such road were the road intended to be constructed by the corporation, and when such charter has been filed, the new corporation shall have the powers and privileges then conferred by the laws of this State upon chartered railroads, including the power to construct and extend; provided, that notwithstanding such incorporation, the property and franchises so purchased shall be charged with and subject to the payment of all subsisting liabilities and claims for death and personal injuries, sustained in the operation of the railroad, by the sold-out company and by any receiver thereof, and for loss of and damage to property, sustained in the operation of the railroad by the sold-out company and by any receiver thereof, and for the current expenses of such operation, including labor, supplies and repairs; provided, that all such subsisting claims and liabilities shall have accrued within two years prior to the beginning of the receivership resulting in the sale of such property and franchises, or within two years prior to the sale, if said property and franchises be sold otherwise than under receivership proceedings, unless suit was pending on such claims and liabilities when the receiver was appointed or when the sale was made, in which event claims and liabilities on which suits were so pending shall be protected hereby as though accruing within the two years; and provided that by such purchase and or-

ganization, no right shall be acquired in conflict with the present Constitution and laws, in any respect, nor shall the main track of any railroad once constructed and operated be abandoned or moved; and provided, further, that the amount of stock and bonds which may be issued by said new corporation, as well as the manner of their issuance, shall be fixed, determined and regulated by the Railroad Commission of Texas, at its discretion, save that the total encumbrance secured by lien on said property and franchises shall not exceed the amount allowed by Article 4584b of the Revised Statutes of Texas of 1895.

"SEC. 2. This act shall not be construed to in anywise repeal or impair the provisions of Chapter Fourteen, Title XCIV, of the Revised Statutes of the State of Texas, except in so far as the same may be changed by the provisions of this act.

"SEC. 3. Whereas there is no provision in the laws of this State for any return from purchasers of railroad properties for valuable privileges, and no adequate regulation of stocks and bonds against sold-out railroad properties, there exists an imperative public necessity and emergency for the suspension of the rule requiring bills to be read on three several days in each House, and said rule is hereby suspended, and this act shall take effect and be in force from and after its passage, and it is hereby so enacted.

"Approved September 1, 1910.

"Became a law September 1, 1910."

(General Laws of State of Texas, 4th Called Session, 31st Legislature, pages 120-121.)

EXHIBIT F.

Articles 4549 and 4550 of the Revised Statutes of Texas of 1895, which were amended by the Act of September 1, 1910, printed herein as Exhibit E:

"ARTICLE 4549. In case of the sale of the entire roadbed, track, franchise and chartered right of a railroad company, whether by virtue of an execution, order of sale, deed of trust or any other power, the purchaser or purchasers at such sale and their associates, shall be entitled to have and exercise all the powers, privileges and franchises granted to said company by its charter, or by virtue of the general laws; and the said purchaser or purchasers and their associates shall be deemed and taken to be the true owners of said charter and corporators under the same, and vested with all the powers, rights, privilegs and benefits thereof, in the same manner and to the same extent as if they were the original corporators of said company; and shall have power to construct, complete, equip and work the road upon the same terms and under the same conditions and restrictions as are imposed by their charter and the general laws."

"ARTICLE 4550. In case of any such sale heretofore or hereafter made of the roadbed, track, franchise or chartered right of a railway company or any part thereof as mentioned in Article 4549, the purchaser or purchasers thereof and their associates shall be entitled to form a corporation under Chapter One of this title, for the purpose of acquiring, owning, maintaining and operating the portion of the road so purchased as if such road or portion of the road were the road intended to be constructed by the corporation, and when such charter has been filed the said new corporation shall have all the powers and privileges conferred by the laws of this State upon chartered railroads, including the power to construct and extend; provided, that notwithstanding such incorporation the portion of the road so purchased shall

be subject to the same liabilities, claims and demands in the hands of the new corporation as in the hands of the purchaser or purchasers of the sold-out corporation; provided; that by such purchase and organization no rights shall be acquired under any former charter or law in conflict with the provisions of the present Constitution in any respect, nor shall the main track of any railroad once constructed and operated be abandoned or removed."

SUBJECT INDEX.

Pages

Concise Statement of Case 1– 6

Argument for Defendants in Error:

(1) This suit was not within any reservations of exclusive jurisdiction in the decree of foreclosure, because it involved merely the enforcement of a continuing statutory duty of plaintiff in error..... 6–20

(2) The United States Circuit Court for the Northern District of Texas completely discharged the railroad and franchises of the sold-out Company from its possession, custody and control, actual and constructive, prior to the institution of this suit 20–36

(3) The General Office and Shops Statute came within the police power of the state as a valid regulation, for the promotion of the public interest of franchises granted by the State for the operation of railroads, and it must be obeyed by plaintiff in error as the purchaser of a railroad and its franchises, under foreclosure of a mortgage antedating the Statute, and it must be obeyed by plaintiff in error as a corporation organized under a law which expressly imposed upon it obedience to the Statute 36–71

(4) The Court of Civil Appeals having determined as a pure question of fact, not open to review here, that the properties and franchises of the International & Great Northern Railroad Company were sold in 1879 to mere trustees for the

debtor corporation, such sale could not discharge the personal obligation of the locative contracts,, and, in no event could such sale affect the statutory prohibition against changing the general offices and shops from Palestine....71–80

(5) The Statute is not void as a direct regulation of interstate commerce 80–85

LIST OF CASES.

	Pages
Acres v. Moyne, 59 Tex. 623	67
Atlantic C. L. R. Co. v. Goldsboro, 232 U. S. 549	39
Atlantic C. L. R. Co. v. Mazursky, 216 U. S. 32	83
Atlantic R. Co. v. Camp, 30 Ga. 1	53
Bacon v. Walker, 204 U. S. 502	39
Buck v. Colbath, 70 U. S. 334	27–36
C. & M. R. Co. v. Morris, 68 Tex. 49	67
C. B. & Q. R. Co. v. Ill., 200 U. S. 561	39
C. R. I. & P. R. Co. v. Arkansas, 219 U. S. 452	84
Conn. Mut. Life Ins. Co. v. Cushman, 108 U. S. 51	70
Cusack Co. v. Chicago, 242 U. S. 531	40
Dillingham v. Kelley, 27 S. W. 807	73
Dower v. Richards, 151 U. S. 658	71
Eagle Ins. Co. v. Ohio, 153 U. S. 455	57
Escanaba Co. v. Chicago, 107 U. S. 678	39
I. & G. N. Ry. Co. v. Anderson County et al, 174 S. W. 315, 316, 318	8-43-44-72-80
I. & G. N. Ry. Co. v. Anderson County et al, 156 S. W. 502	44–19
I. & G. N. Ry. Co. v. Anderson County et al, 150 S. W. 251	44
I. & G. N. Ry. Co. v. Anderson County et al, 106 Tex. 70	69
Jackson v. Luedling, 88 U. S. 616	73
Jones v. Portland, No. 3, U. S. Advance Opinions 130	49
Julian v. Trust Co., 193 U. S. 93	32
K. C. So. Ry. Co. v. Albers Com. Co., 223 U. S. 591	71
Long Sault Dev. Co. v. Call, 242 U. S. 272	40
L. & N. Ry Co. v. Higdon, 234 U. S. 600	84
L. & N. Ry. Co. v. Kentucky, 161 U. S. 702	58
Memphis & L. R. Ry. Co. v. Berry, 112 U. S. 609	38

Memphis & L. R. Ry. Co. v. Southern Exp. Co., 117 U. S. 1 46
M. K. & T. R. Co. v. Harris, 234 U. S. 412 84
Moran v. Sturgis, 154 U. S. 279 28
Mugler v. Kansas, 123 U. S. 623 73
New York v. Cook, 148 U. S. 397 38–67
N. Y. & N. E. Ry. Co. v. Bristol, 151 U. S. 567 59
Peoria R. Co. v. Hughes, 191 U. S. 488 84
Pittsburg Ry. Co. v. Loan & Trust Co., 172 U. S. 515 27
Reardon v. White, 87 S. W. 367 73
St. L. I. M. & S. R. Co. v. Arkansas, 240 U. S. 520 84
St. L. S. W. Ry. Co. of Texas v. Tyler, 212 U. S. 552 46
Shields v. Coleman, 157 U. S. 179 29–36
State v. S. P. Ry. Co., 24 Tex. 122 to 130 57
T. & P. Ry. Co. v. Johnson, 76 Tex. 431 29
T. & P. Ry. Co. v. Johnson, 151 U. S. 102 30
T. & P. Ry. Co. v. Manton, 164 U. S. 636 30
Tyler v. St. L. S. W. Ry. Co. of Texas, 99 Tex. 501, 502 45
Tyler v. St. L. S. W. Ry. Co. of Texas, 87 S. W. 245 53
U. P. R. Co. v. Boyd, 228 U. S. 501 78
U. P. R. R. Co. v. C. R. I. & P. R. R. Co, 163 U. S. 546, 564 45–46
U. P. R. R. Co. v. Mason City & Fort Dodge R. R. Co., 199 U. S. 160 45-48-59-72
Valley Steamship Co. v. Wattawa, 244 U. S. 204 84
Wabash Ry. Co. v. Adelbert College, 208 U. S. 35 32–36

IN THE

SUPREME COURT

OF THE UNITED STATES

October Term, 1917

No. 612 October Term, 1916.

No. 243 October Term, 1917

International & Great Northern Railway Company et al.,
Plaintiffs in Error.

vs.

Anderson County, City of Palestine, George A. Wright et al.,
Defendants in Error.

In Error to the Court of Civil Appeals, Sixth Supreme Judicial District, State of Texas.

BRIEF FOR DEFENDANTS IN ERROR.

Concise Statement of the Case.

The defendants in error, Anderson County, the City of Palestine, and George A. Wright, J. W. Ozment, A. L. Bowers, John R. Hearne, Z. L. Robinson, E. W. Link, R. C. Sewell, John M. Colley and P. H. Hughes, citizens of the City of Palestine, for themselves and all other citizens of said city, filed

this suit in the District Court of Anderson County, against the plaintiff in error, International & Great Northern Railway Company.

Its purpose was to compel the plaintiff in error, International & Great Northern Railway Company, to perform its statutory duty to keep and maintain, at Palestine, in Anderson County, the general offices, machine shops and round houses for the operation of the International & Great Northern Railroad.

The facts alleged, imposing this duty, were the following:

(1). A contract between the citizens of Palestine, acting by Judge John H. Reagan, and the Houston & Great Northern Railroad Company, acting by its President, Galusha A. Grow, about March 15, 1872, whereby said Company agreed to extend its line of railroad, from the north boundary line of Houston County, to intersect the International Railroad at Palestine, and to establish a depot within a half mile of the court house at Palestine, and to commence running cars regularly thereto by July 1, 1873, and to thereupon locate and forever thereafter maintain the general offices, machine shops, and round houses of the Houston & Great Northern Railroad, at Palestine, for and in consideration of an agreement by Judge Jno. H. Reagan to make a thorough canvass of Anderson County to induce the electors of that County to authorize the issuance of interest bearing bonds of the County in the principal sum of $150,000, and upon the further consideration that Anderson County, on authorization of its electors, should issue and deliver such bonds.

(2). The consolidation in 1873 of the Houston & Great Northern Railroad Company and the International Railroad Company, under the name of the International & Great Northern Railroad Company, and the approval of the consolidation, by special act of the legislature of Texas in 1874,

by which it was provided that all acts done in the name of either company should be binding on the consolidated company.

(3). A contract made in the year 1875 by the International & Great Northern Railroad Company with the citizens of the City of Palestine, to perform the contract of the Houston & Great Northern Railroad Company above mentioned, by at once locating at Palestine the general offices of the International & Great Northern Railroad, and by thereafter forever maintaining the general offices, machine shops and round houses of said railroad at Palestine, in consideration of the bonds of Anderson County, issued to the Houston & Great Northern Railroad Company, and the construction at Palestine, by its citizens, at their own expense, according to plans furnished by the International & Great Northern Railroad Company, of such houses as might be demanded by it for the occupancy of its officers and employes, at reasonable rentals, with performance of every obligation imposed by the contract on the citizens of Palestine; and thereby it was alleged that the International & Great Northern Railroad Company became bound to maintain the general offices, machine shops and round houses of that railroad at Palestine.

(4). The prompt location at Palestine of the machine shops and round houses of the Houston & Great Northern Railroad, and the continuous maintenance of such shops and round houses at Palestine, until the formation of the consolidated Company, in part performance of the first contract; and continuous maintenance at Palestine, thereafter to the present time, of the machine shops and round houses of the International & Great Northern Railroad, in part performance of both contracts, and the location, in 1873, at Palestine, of the general offices of the International & Great Northern Railroad, and the continuous

maintenance of same there until September 1, 1911, in compliance with both contracts.

(5). The incorporation, under article 6625 of the Revised Statutes of Texas, on August 10, 1911, of the plaintiff in error, International & Great Northern Railway Company, for the purpose of owning and operating the railroad formerly owned and operated by the International & Great Northern Railroad Company, whose franchises, privileges and property had been acquired by the incorporators of plaintiff in error, through a judicial foreclosure of a mortgage lien, created in 1881, by the International & Great Northern Railroad Company.

(6). The attempt by plaintiff in error, International & Great Northern Railway Company, about September 1, 1911, to change the location of all its general offices, except two, from Palestine to Houston, and to establish the general office of traffic manager in the City of New Orleans, in the State of Louisiana, and the removal of the general officers, save two, to Houston and New Orleans, with their subordinates and records, and the maintenance of so-called general offices in those cities, and the declared purpose of the plaintiff in error to change the location of the two general officers remaining at Palestine and of the machine shops and round houses, upon the institution of this or any similar suit.

(7). Irreparable damages, in large amounts, suffered and to be suffered, by defendants in error, through the depreciation of property in Palestine, acquired upon the faith of the contracts sued on, and disastrous consequences to persons and property and business, already sustained and to result, if the changes made and contemplated by plaintiff in error were permitted, and the lack of adequate remedy save injunctions, both preventive and mandatory. Record, pp. 46 to 68, Vol. I.

A temporary injunction was granted in Cham-

bers, prohibiting and restraining the Railway Company from changing the location of the machine shops and round houses from Palestine, as well as of the two general officers remaining at Palestine, and after the District Court of Anderson County had overruled plaintiff in error's exception and plea, asserting the privilege of trial in the District Court of Harris County, Texas, the venue was changed, on motion of plaintiff in error, to the District Court of Cherokee County, where a jury trial resulted in special findings, affirming the truth of every fact alleged by defendants in error. Record, pp. 553 to 558.

On these findings, judgment was rendered requiring the plaintiff in error to keep and maintain the general offices, machine shops and round houses, for the operation of the International & Great Northern Railroad at Palestine, where the Houston & Great Northern Railroad Company and the International & Great Northern Railroad Company had contracted and agreed to keep same, for valuable considerations received, including a bond issue of Anderson County, and perpetually enjoining and restraining the plaintiff in error from changing the location of said machine shops and round houses from Palestine, and from keeping and maintaining said general offices at any other place than Palestine; and, motion for new trial having been overruled, the plaintiff in error perfected an appeal to the Court of Civil Appeals of the Sixth Supreme Judicial District of Texas. Record, pp. 558 to 560; 561 to 621, Vol. I.

The judgment appealed from was affirmed by the Court of Civil Appeals, with an opinion found on pages 1001 to 1022 of the Record, Vol. III., and reported in 174 S. W. 305.

The Supreme Court of Texas approved the action of the Court of Civil Appeals by refusing to grant a writ of error to the Railway Company, and thereupon this writ of error was sued out to

have this Court review the judgment of the Court of Civil Appeals. Record, pp. 1071 to 1288, Vol. III.

ARGUMENT FOR DEFENDANTS IN ERROR.

First.

For two reasons there was no reservation of jurisdiction over this controversy by the United States Circuit Court for the Northern District of Texas.

The first is that this was a suit to enforce a continuing duty, imposed on plaintiff in error, by a general law, enacted in the regulation of the franchise for the operation of the railroad, and, as such, was plainly without any reservations in the decree of foreclosure.

The second is that since the railroads, properties and franchises of the International & Great Northern Railroad Company were finally discharged, on September 25, 1911, from the possession, custody and control of the United States Circuit Court for the Northern District of Texas, the exclusive jurisdiction of that Court was then at an end, and the state courts, trial and appellate, were thereafter at full liberty to adjudicate the rights of the parties to this suit, and their jurisdiction was rightfully invoked by both defendants in error and plaintiff in error.

The gist of the argument to sustain the exclusive jurisdiction of the foreclosing court is that this is a suit to establish that a liability contracted or incurred in favor of defendants in error by the sold-out railroad company in the operation of the railroad is secured by a lien "prior or superior to the lien of said mortgage dated June 15, 1881."

It would be difficult to state a greater misconception of this suit.

It is and ever has been conceded that the contract obligation of the sold-out Company, and of

the Houston & Great Northern Railroad Company, considered apart from the obligation of the regulatory statute, was purely personal and without lien or other security.

But, this suit is founded on a statutory duty, imposed by the State, on the International & Great Northern Railway Company, as it was formerly imposed on that Company's predecessors. All the confusion of thought here arises from the fact that these predecessors were bound by contracts as well as by statute, while the International & Great Northern Railway Company is bound by statute only.

The Court of Civil Appeals, in stating the nature of this suit, says:

"Properly construing the appellees' petition in the light of the facts given therein, and the prayer, the suit was in the nature of the prevention of the continuance of an illegal act, violation of a statute of the state, upon appellant's part, working injury without remedy at law and seeking to interrupt the continuance of such wrong by equitable interference at the hands of the court. Upon the facts stated in the petition as offered therein, in showing a violation of statute law by the appellant the prayer was for a decree "for a mandatory injunction commanding the defendant to at once desist and refrain from keeping or maintaining any other general offices in connection with the operation of said railroad at any other place than the City of Palestine, and commanding and requiring the defendant to keep and maintain all of the general offices for the operation of said railroad at the City of Palestine." If enforced according to the terms of the prayer, clearly the results of the suit belong to and inure to the public, as a duty owing to it. The defense of appellant and the right of appellee were entirely dependent upon whether a statutory provision of the state in respect to charter rights of appellant in location of its domicile was applicatory. The

decree was entirely dependent upon the statute, and not the enforcement of a private contract as such, for its vitality. The contract was only evidence in the line of facts going to prove the application of the statute, and did not operate or have the legal effect to create a lien in rem, or any other liability or claim in favor of appellees." International & Great Northern Railway Company et al vs. Anderson County et al., Rec. pp. 1017, 1018, Vol. III. 174 S. W. 316.

The duty sought to be enforced here is not the only one imposed by state law on the International & Great Northern Railway Company nor the only one which was imposed by law on its immediate predecessors. Many others might be mentioned: such as, not to change the line of the main track; and, such as, to keep and maintain sanitary closets at stations; and, such as, to erect and maintain union depots.

In a sense, every statutory duty of a railroad company, is "prior and superior to the lien of the company's mortgages," but such a duty demands obedience from the new company because exacted of the new company by the state and regardless of priorities between the holders of liens on the property of the old company.

It will require but slight consideration of the nature of the statutory duties which have just been specified, in order to convince one that the Circuit Court could not have meant to include the statutory duties of the new corporation within the terms "unpaid indebtedness or liabilities of the sold-out company, incurred in the operation of the railroad, prior or superior to the lien of the second mortgage."

Defendants in error can have no lien to secure the performance of the duty enforced by the judgment in their favor. The legislature may relieve from the duty, just as it imposed the duty, "by statute."

The Court of Civil Appeals recognized the power of the Legislature to relieve from the duty when it declared the effect of the judgment complained of, in the closing paragraph of its opinion, towit:

"The decision of the questions made on appeal has the result to affirm the decree of the trial court restraining appellant from changing the location of its general offices, shops and round houses from the City of Palestine, and from keeping and maintaining its general offices at any other place than Palestine, Texas, unless hereafter authorized by law so to do." Rec. p. 1022, Vol. III.

It is true that the duty enforced by this decision pertains to certain specific instrumentalities connected with a railroad. But, so does the duty to maintain and not to change a main line track. It is true that defendants in error are the peculiar beneficiaries of the duty involved here. But, so would be the citizens of any community which would be isolated by a change in the location of a main line track. Since no one would contend that a suit to prevent change in the location of a main track was within the reservations of the decree of foreclosure, no such contention should be here insisted upon.

However, the Supreme Court of Texas, when its jurisdiction was invoked by the Railway Company, so clearly defined defendant in error's rights and the Company's duty, that any further argument would seem unnecessary.

The Supreme Court states the nature of this suit thus:

"Substantially stated, this case involves the right of a Railroad Company, incorporated under Article 6625, R. S., 1911, for the purpose of owning and operating a railroad previously owned by another company, whose franchises, privileges, and

property had been acquired by the incorporators through a judicial foreclosure sale, to change the location of the general offices, machine shops, and round houses of the road, made by the former company under contract for a valuable consideration and in a county which, in consideration of such location, had aided it by an issue of bonds, and accordingly subject to the provisions of Article 6423, commonly known as the general office statute."

"This suit was filed in the District Court of Anderson County, by Anderson County, the City of Palestine, and certain citizens of that city, suing for themselves, and in a representative capacity, as plaintiffs. Its purpose was to require the defendant Company, the plaintiff in error here, to maintain at Palestine, in Anderson County, its general offices, machine shops, and round houses, where the petition alleged it was required by law to maintain them, * * *."

The Supreme Court further says: "The main question in this case is whether under the law the plaintiff in error was required to maintain its general offices at Palestine, in Anderson County, or possessed the right to establish them elsewhere by designation in its charter."

"Passing to the consideration of the main question, the petition alleges a state of facts that clearly imposed upon the International & Great Northern Railroad Company the obligation to maintain its general offices, machine shops, and round houses at Palestine, as in respect to the duty of that company in this regard the case made by the petition falls clearly within the provisions of Article 6423, R. S., 1911, which is as follows:

"Art. 6423 (4367). Every railroad company chartered by this state, or owning or operating any line of railway within this state, shall keep and maintain permanently its general offices

within the State of Texas, at the place named in its charter for the locating of its general offices; and, if no certain place is named in its charter where its general offices shall be located and maintained, then said railroad company shall keep and maintain its general offices at such place within this state where it shall have contracted or agreed, or shall hereafter contract or agree, to locate its general offices for a valuable consideration; and, if said railroad company has not contracted or agreed for a valuable consideration to maintain its general offices at any certain place within this state, then such general offices shall be located and maintained at such place on its line in this state as said railroad companies may designate to be on its line of railway. And such railroads shall keep and maintain their machine shops and round houses, or either, at such place or places as they may have contracted to keep them for a valuable consideration received; and, if said general offices and shops and round houses, or either, are located on the line of a railroad in a county which has aided said railroad by an issue of bonds, in consideration of such location being made, then said location shall not be changed; and this shall apply as well to a railroad that may have been consolidated with another as to those which have maintained their original organization."

"In the provision for forfeiture of the charter of any railroad company that violates any article of the chapter, there is here expressed, in unmistakable terms, a plain limitation upon the corporate franchise of any company that, in the matter of the location of its general offices, machine shops, and round houses, is subject to the terms of Article 6423. Obedience to its requirements is made a condition of the exercise of the company's corporate powers and the enjoyment of its corporate privileges. The right of the corporation to subsist is dependent upon their observance and its corporate franchise is

therefore impressed with their obligation. The duty to which the company is subject under Article 6423 being thus imposed upon its corporate franchise and made a condition of its exercise has all the force and obtains just as fully as though its assumption were made a condition of its grant. It is a qualification of its franchise and inseparable from it, a burden which accompanies its enjoyment, to be borne as a privilege of its use, and inheres in it with even more virtue than that of an original charter obligation because of the nature imparted to it by a general law. The charter duties and obligations of a railroad corporation, for whose violation its charter may be subjected to forfeiture, necessarily inhere in its franchise, because they operate as conditions upon which it may be exercised. For the stronger reason that a statute imports, duties or obligations imposed by a general law, the observance of which is by the same authority made a condition of the corporate existence, must be held to sustain to the corporate franchise a relation of the same continuing force. They are clearly not to be classed or regarded as merely of a private character. That they have been made the subject of general statutory provision distinguishes them from those duties and obligations which only affect individuals. The concern of the state in their performance, manifested by these enactments of its legislative department and the penalty prescribed for their violation, necessarily impresses them with a public nature. A duty laid by law upon a railroad corporation, for whose breach its charter may be forfeited at the suit of the state, can hardly be considered as a private duty. As its performance is by statute made a condition of the exercise of corporate rights and privileges which vitally affect the public, **it is essentially for the benefit of the public.** It goes to the essence of the contract between the corporation and the state in virtue of which such rights and privileges, constituting the

corporate franchise, are granted and enjoyed. It is founded upon considerations of public policy as expressed in a general law of the State, and must have been intended to subserve a public interest. For these reasons we are clearly of the opinion that the duty to which, according to the petition, the International & Great Northern Railroad Company was subject, under Article 6423, in respect to the maintenance of its general offices, machine shops, and round houses at Palestine, was a public duty."

"It has been heretofore held by this Court, and such we understand to be the law generally, that a purchaser of the corporate franchise and property of a railroad company under judicial process succeeds to all of its statutory and common-law duties to the public. Railway Co. v. Morris, 68 Tex. 49, 3 S. W. 457. In the opinion of Chief Justice Stayton in the case of Railway Company v. Newell, 73 Tex. 338, 11 S. W. 344, 15 Am. St. Rep. 788, is this language: 'By the sale made by the sheriff there was a change made in the ownership of the Central & Montgomery Railroad, and of its franchise, but the corporate existence continues with franchise neither enlarged nor restricted, as before. A railway company, in whomsoever may be its ownership, stands charged with every duty and obligation to the public imposed upon it by its charter and the nature of its business, and from those it cannot escape without legislative permission so long as its corporate existence continues."

"In Acres v. Moyne, 59 Tex. 623, in reference to the operation of the road by such purchaser in the name of the former company, it is said: 'The new company, by operation of the general laws of the state, becomes the successor of the sold-out corporation and occupies to the pubilc, in the future, the same relation the sold-out company did in the past.' "

"These decisions were rendered under former Article 4260, brought forward as Article 4549 in the Revision of 1895, and as amended by the act of 1910, now Article 6624. That article empowered the purchasers, at execution or foreclosure sale, of a railroad and the corporate franchise of a railroad company, to operate it in the same manner and to the same extent as though they were the original incorporators of the company, **'under the same restrictions as are imposed by their charter and the general laws.'** They were rendered before the adoption of the act of 1889, formerly Article 4550 in the Revision of 1895, and as amended by the act of 1910, now Article 6625, extending to such purchasers the privilege of incorporating a new company for the operation of the road. In respect to the statutory duties of the former company to the public, a new company, such as plaintiff in error, organized under Article 6625, stands in no more favorable position than that occupied by a purchaser under former Article 4260, since, as to such company and its ownership and operation of the railroad, it is provided by Article 6625 that **'by such purchase and organization no right shall be acquired in conflict with the present Constitution and laws, in any respect.'** By this provision such duties are as clearly transferred to it as they were to a purchaser under former Article 4260, and in relation to them these decisions control the question as plainly in one case as the other. In Elliott on Railroads, vol. 1, p. 753 (2nd Ed.), the text upon this subject is as follows: "Statutes providing for the reorganization of insolvent corporations do not ordinarily impose any additional liabilities upon the purchaser, but simply confer upon them and such persons as they choose to associate with them the power to exist as a corporation and to own and manage the property which they have acquired as a railroad corporation. The new corporation organized thereunder does not become liable for any debts or liabilities of the old com-

pany for which the purchasers would not be liable by the terms of their purchase if incorporated. **But it does generally become liable to perform the public duties imposed by law upon the old corporation."**

"The case of New York & Greenwood Lake Railroad Company v. State, 50 N. J. Law 303, 13 Atl. 1, involved the question of the obligation of a company, organized for the purpose of becoming the purchaser through a foreclosure sale of the franchises and railroad of another, to perform a charter duty of the latter to keep certain of its bridges in good repair."

"Under a statute imposing upon such purchasers no heavier burdens in respect to the charter obligations of the former company than Article 6625 lays upon a company organized thereunder in respect to the statutory obligations to the public of a company to which it succeeds, the Supreme Court held as follows upon the duty, under the act, of the purchasing company: 'It proceeded to exercise all the power with which the charter of the original company would invest them as purchasers, so far as the new company wished to exert those powers and privileges. **While it occupies this attitude, it cannot ignore those duties to the public which are coupled with the enjoyment of the corporate privileges.** So long as it holds this property and enjoys this franchise under a colorable title and under the corporate form which is the statutory outgrowth of that title, it must perform its duty to the public as an owner.'

"The duty to which the International & Great Northern Railroad Company was subject, under Article 6425, according to the allegations of the petition was not one common to all railroad companies in the state. The statute is not of that character, since the conditions which make it operative are those created only by the act of a railroad company. It was a continuing public

duty in relation to the maintenance of important instrumentalities connected with the operation of its railroad, which it in effect imposed upon itself in virtue of its own acts. Being of such nature the plaintiff in error could not succeed to the ownership of the railroad and the privilege of operating it without at the same time succeeding to the duty that similar rights imposed upon the former Company. The duty was more than the personal obligation of that company. It was also of a different character from the ordinary statutory duties that apply to all railroad companies. It affected its right to operate the road. It was not only a limitation upon the continuance of its corporate powers, but a limitation that pertained to the use and enjoyment of essential parts of the railroad property. It qualified their use and enjoyment by an abridgment of the important right of location, which otherwise the company would have possessed as an incident of ownership, and impressed their use with an obligation to maintain the location provided by the statute. As it inhered in the corporate franchise exercised by the former company, it necessarily subsists with the franchise in the hands of its present owner. The transfer to such owner of the right to own and operate the road also transferred the obligation attached to such right; and the enjoyment of the right must be in observance of the obligation."

"It must be remembered that the relation of the plaintiff in error to this railroad is not that sustained by a company to a railroad which has been constructed under its own charter, or which is unaffected by previous statutory or charter obligations. Its corporate life issues from the ownership of the franchise and property of a former railroad company, since Article 6625 conferred upon its incorporators the right of incorporation only in virtue of such ownership. The rights which it possesses and is permitted to exercise in respect to the railroad are founded upon

that franchise. It sustains its right of ownership of the property. **The plaintiff in error could not succeed to the property without it, since neither is alienable except by statutory consent, and under our statutes one may not be acquired without the other.** Sustaining this vital and inseparable relation to the railroad and the title by which it is now held, the plaintiff in error, in our opinion, could not acquire the franchise and may not exercise the rights in the property which result from its ownership freed from limitations to which it was subject in the hands of the former company. The obligation to which that company was subject, according to the petition, in respect to the location of its general offices, machine shops, and round houses, was clearly a burden upon the franchise, with which it is likewise charged in the hands of the plaintiff in error."

"The case is stronger in our opinion than that of Union Pacific R. R. Co. v. Mason City & Fort Dodge R. R. Co., 199 U. S. 160, 26 Sup. Ct. 19, 50 L. Ed. 134, in which, in an opinion rendered by Judge Brewer, it was held that a railroad company, as the purchaser of the corporate privileges and property of another under foreclosure sale took them subject to a statute enacted in government of the former company's use of a bridge. We quote from the opinion as follows: 'The final question is this: Is the status of the present Union Pacific Railroad Company, the appellant, so different from that of the company to which it is a successor as to render inapplicable the decision in the Rock Island case and to nullify the requirements of the act of 1871? * * *. We shall not stop to inquire whether this foreclosure and sale was anything more than a reorganization under the form of a judicial proceeding, nor whether, if it were in all respects a bona fide sale to an independent third party, such sale took the property out of the jurisdiction of Con-

gress and prevented that body from further legislation in aid of the purpose of the act, "namely, to promote the public interest and welfare." ' 'The question before us is whether an amendment to the act, purely administrative in the character of the burdens imposed, aimed to promote the public interest and welfare, enacted while the title to the property remained in the original company, a corporation chartered by Congress, which preserves intact all the pecuniary rights of the company, and whose privileges are accepted and acted upon by the company, is denuded of vitality by a sale to a new company under foreclosure of a mortgage prior to such legislation. That question must be answered in the negative * * *. This act giving authority for a large issue of bonds, thereby insuring the immediate construction of the bridge, was accompanied by a proviso that, upon reasonable compensation, the use of the bridge should be accorded to other companies. Availing itself of the privilege conferred, the company accepted the amendment in its entirety and is bound by its terms as fully as though it had embodied them in a contract. So long as the full facilities of the Union Pacific Company were not interfered with thereby, and a reasonable compensation was paid therefor, it cannot in any just sense be held that its rights were not duly regarded. And it cannot be tolerated that a private individual or a state corporation can, by the purchase at a judicial sale of the property, strike down all legislation of Congress passed subsequently to the mortgage for the promotion of the public interests. We cannot assent to the contention that the present owner of the property holds it free from obedience to all such legislation. Now, as before the foreclosure and sale, the public interests are to be regarded, and not simply private purposes, wishes, or prejudices."

"There is present in this case not only a plain

statutory duty in respect to essential instrumentalities of the railroad acquired by the new company, but an obligation that inhered in and attached to the franchise of the former company. If it be argued that the statute in that case created an easement in the bridge which ran with the property, it cannot be denied, we think, that the effect of our statute, in the requirement that the location therein provided of the general offices, machine shops, and round houses of a railroad company, subject to its operation, should be maintained, is to impress them as property or instrumentalities necessary to the use of property, with a character of servitude for the benefit of the particular community, from which they are not exempt in the hands of a purchasing company. The case has been presented with exceptional ability and has commanded our earnest consideration. We are fully mindful of the importance of the questions. For reasons that to our minds are conclusive they should be resolved as we have indicated."

"The judgment of the honorable Court of Civil Appeals is accordingly affirmed."

International & Great Northern Railway Company v. Anderson County et al, 156 S. W. Reporter, pp. 502, 503, 504, 505.

The opinion is decisive of the following matters:

(1) The general offices and shops statutes do not undertake to validate nor to enlarge contract rights nor to confer liens.

(2) These statutes declare the public policy of the State with respect to the location of railroad general offices, machine shops, and round houses, and impose public duties.

(3) These statutes not only have the force of general laws but have the same effect as amendments of the franchises under which the rail-

roads are operated, being enacted as regulations of such franchises.

(4) The statutes bound the sold-out company and bind the purchasing company as general laws enacted in the interest of the public and as amendments of the corporate franchise to operate the railroad. The statutes are none the less binding because the sold-out company was similarly bound by contract wholly unsecured.

Such being the nature of defendants in error's rights they are clearly beyond the scope of the reservations of the decree of foreclosure and wholly unaffected by the sale under that decree.

Besides, the United States Circuit Court had distinctly and expressly released any and all reservations of exclusive jurisdiction prior to the institution of this suit.

The decree of foreclosure of the mortgage of June 15, 1881 provided for the sale of "all the right, title, estate and equity of redemption of the defendant railroad company and of each and all of the parties to said equity case No. 2514, and all persons claiming or to claim under them or either of them, of, in or to the said premises, property and franchises," and said decree further provided that said sale be made subject to the first mortgage, and "subject also to any unpaid indebtedness or liability contracted or incurred by said defendant railroad company in the operation of its railroad which the Court may hereafter order or decree herein to be prior or superior to the lien of the said mortgage dated June 15, 1881, except such as shall be paid or satisfied out of the income of the property in the hands of the receiver herein under orders of the court entered or to be entered herein, and subject to such debts, claims, liens and demands of whatsoever nature heretofore incurred or created or which may hereafter be incurred or created by the receiver herein under orders of the court heretofore or hereafter

entered herein and which have not been or shall not hereafter be paid by said receiver under orders of the court heretofore or hereafter entered herein, or other parties in interest herein, or out of the proceeds of such sale as hereinafter directed. Certain specific portions of said property, and premises, viz: the San Antonio Passenger Station, the Colorado Bridge and certain equipment are respectively subject to, and shall be by said master commissioner sold subject to the existing recorded mechanics lien, the first mortgage Colorado bridge bonds, and the unsatisfied recorded equipment liens, specifically and respectively affecting the same."

The decree appointed a master commissioner to make the sale and to execute a deed, to the purchaser, to the property sold, upon confirmation of the sale and completion of the payment of the entire bid; and, the decree provided that thereupon the purchaser or his assigns should be entitled to receive possession of the property purchased from the parties holding possession of same, and the receiver was directed to deliver same into the possession of the purchaser or his assigns, said conveyance to pass title to said property subject to the charges above specified, and "the court reserves jurisdiction over said property notwithstanding such deed or deeds or delivery of possession for the purpose of enforcing such payment."

Said decree provided that the purchaser and his assigns "shall have the right within six months after the completion of the sale and delivery of the deed of the master commissioner to elect whether or not to assume or adopt any lease or contract made by the defendant railroad company, and such purchaser or purchasers, and his assigns, shall not be held to have assumed any of such leases or contracts which he or they shall so elect not to assume, such election shall

be shown by filing with the clerk from time to time within said period a description of said leases or contracts which he or they shall so elect not to assume."

It was further ordered that all questions not disposed of, "including the disposition of all claims heretofore filed herein, or hereafter to be so filed in accordance with the provisions of this decree, are hereby reserved for future adjudication and the court reserves jurisdiction of this cause and the property affected by this decree for the purpose of final disposition of all such questions and matters." Rec. pp. 631 to 634, 642 to 662, Vol. II.

The United States Circuit Court for the Northern District of Texas, on September 25, 1911, entered the following judgment, towit:

"Decree confirming Final Report of William H. Flippen, Master Commissioner, and Account and Report of Thomas J. Freeman, Receiver.

On this day came William H. Flippen, Master Commissioner, appointed by decree entered in this cause on May 10, 1910, and filed his final report, and exhibits "A" and "B" therewith, showing the payment of the entire purchase price of the properties and franchises of the International & Great Northern Railroad Company, sold under said decree, and the delivery of the deed therefor to the International & Great Northern Railroad Company, assignee of the purchaser at said sale.

And then came also Thomas J. Freeman, Receiver of the International & Great Northern Railroad Company, heretofore appointed by order of this Court entered in this cause, and filed his final account and report as such Receiver.

And then came also International & Great Northern Railway Company, grantee of said rail-

roads, properties and franchises and entered its appearance as party to this cause by Wilson & Dabney, its solicitors, and filed its motion in writing for a confirmation of the aforesaid report of said Master Commissioner and the aforesaid account and report of said Receiver and also filed a stipulation, agreement and consent in writing of the Farmers Loan & Trust Company, Trustee, by its solicitors; Thomas J. Freeman, as Receiver, by his solicitor; Frank C. Nicodemus, Jr., by his solicitor, and the International & Great Northern Railway Company, by its solicitor, and George J. Gould et al, by their solicitor, accepting and approving said report of said Master Commissioner, and accepting and approving said account and report of said Receiver, and consenting that the same be forthwith confirmed, without being required to lie or remain in the Clerk's office for exceptions, and waiving the provisions of any rules of Court or decree in that behalf.

And it appearing to the Court from the final report of the Master Commissioner aforesaid that the entire purchase price bid for the railroads, properties, and franchises of the International & Great Northern Railroad Company, sold on June 13, 1911, as heretofore reported to the Court and confirmed, has been duly paid in full by the purchaser at said sale on September 13, 1911, and that all the rights of the purchaser were duly assigned by instrument in writing filed with the Master Commissioner to the International & Great Northern Railway Company, a corporation organized under the laws of the State of Texas, and that a deed for said railroads, properties and franchises has been duly executed and acknowledged by said Master Commissioner and by all other parties required to execute and acknowledge same, by the terms of said decree of May 10, 1910, as in said decree provided, and that said deed so executed and acknowledged has been duly delivered to the International & Great

Northern Railway Company, assignee of the purchaser aforesaid:

And it further appearing to the Court from the report of Thomas J. Freeman, Receiver, this day filed as aforesaid, that on request of the International & Great Northern Railway Company, grantee of said deed, the said Thomas J. Freeman, Receiver, did on September 16, 1911, deliver to the International & Great Northern Railway Company, grantee as aforesaid, full possession of all the railroads, properties and franchises, including money on hand and current assets formerly owned by the International & Great Northern Railroad Company or said Receiver, and then in the possession, custody or control of said Receiver:

And it further appearing to the Court that the final accounts of the said Thomas J. Freeman, Receiver, are in proper form, it is therefore, on motion of the International & Great Northern Railway Company, and by consent of the various parties of record to this cause, as evidenced by the stipulation, agreement and consent in writing this day filed herein as aforesaid, adjudged, ordered and decreed as follows:

1. That the final report of William H. Flippen, Master Commissioner, showing the payment in full of the purchase price for the railroads, properties and franchises of the International & Great Northern Railroad Company sold on June 13, 1911, and the conveyance and transfer of same to the International & Great Northern Railway Company, assignee of the purchaser, which report has been this day filed as aforesaid, be and the same is in all respects approved and confirmed, and the action of the said Master Commissioner in accepting the settlement for the railroads, properties and franchises aforesaid, and executing, acknowledging and delivering to International & Great Northern Railway Company, assignee of the purchaser, a deed of con-

veyance of said railroads, properties and franchises, as in said report fully and detailed set forth, is hereby in all respects approved and confirmed.

2. That the report of Thomas J. Freeman, Receiver, this day filed, showing the delivery of possession of the railroads, properties and franchises in his possession or under his control, is in all respects confirmed, and the action of the said Thomas J. Freeman, Receiver, in delivering possession of the said railroads, properties and franchises, formerly owned by the International & Great Northern Railroad Company or said Receiver, and then in his possession, custody or control, to the International & Great Northern Railway Company, on September 16, 1911, as set out in detail in said report, is in all respects approved and confirmed, and it is hereby ordered and adjudged that the said International & Great Northern Railway Company, grantee as aforesaid, shall take and hold said properties, released and discharged from the possession and custody of said Receiver and of this Court from and after the 16th day of September, 1911.

3. That the final accounts of Thomas J. Freeman, Receiver of this Court as aforesaid, this day filed, be and the same are hereby accepted, approved and confirmed.

4. And it now appearing to the Court that the duties of said Thomas J. Freeman, as Receiver of this cause, have been fully performed and that proper and final accounts have been rendered by him of all property or moneys coming into his control as such Receiver and that said accounts have been duly confirmed, it is now adjudged, ordered and decreed that said Thomas J. Freeman, Receiver as aforesaid, be and he is hereby discharged as Receiver of this Court in this cause and that the said Thomas J. Freeman and any surety on any bond given by him as such Receiver are hereby discharged from further liability

on or account of any such bond; and all of the railroads, properties and franchises of the International & Great Northern Railroad Company or said Receiver formerly in the possession, custody or control of said Receiver are hereby finally discharged from the possession, custody and control of said Receiver and of this Court.

A. P. McCormick,

United States Circuit Judge.

Dated at Dallas, Texas, September 25, 1911." Rec. pp. 682 to 686, Vol. II.

This suit was filed Feb'y. 7, 1912. Rec. p. 1, Vol. I.

As shown by its brief and the opinion of the Court of Civil Appeals, the International & Great Northern Railway Company invoked the jurisdiction of four state courts, before challenging same, first, by appeal to the Galveston Court of Civil Appeals, (150 S. W. 239), second, by writ of error to the Supreme Court of Texas, (156 S. W. 499); third, by sworn plea averring that the District Court of Harris County, Texas was the Court "having jurisdiction of this cause": and, fourth, by sworn motion to change the venue to the District Court of Cherokee County. Record, pp. 33 to 43, Vol. I.; pp. 621 to 623, Vol. II., and pp. 45 to 46, Vol. I.

On the above record, it seems quite plain that whatever exclusive jurisdiction, actual or constructive, over the sold-out railroads, properties and franchises, and over liens against same, may have been reserved, by the court decreeing the foreclosure, such jurisdiction was expressly released and terminated on the 25th day of September, 1911, which was long before the filing of this suit.

It is elementary that jurisdiction attaches to either the persons or properties of litigants. It is not pretended that defendants in error were personally bound by the foreclosure proceedings to

which they were strangers. Pittsburg Ry. Co. v. Loan & Trust Co., 172 U. S. 515, 43 L. Ed. 535.

Hence they could only be bound, in so far as the Court exercised its jurisdiction over the railroads, franchises and properties in controversy. No question is made by defendants in error as to the power of the United States Circuit Court to take exclusive custody, possession, and control of these railroads, properties, and franchises. It is quite unnecessary to consider how far an express or implied reservation of constructive custody or possession or control, after sale and delivery, would bind strangers. For, it is surely undeniable that the very court undertaking to reserve to itself any character of custody, possession, or control, over property, may lawfully discharge that property from such custody, possession or control; and, when that is done, the authority of the court over causes of action and over parties, which is based entirely on the court's jurisdiction over the **res** must certainly be at an end. Hence, if the decree of foreclosure reserved any jurisdiction over the causes of action enforced by this suit, such jurisdiction was terminated when the Court expressly released its possession, custody, and control of the railroads, properties, and franchises, on which alone its jurisdiction was based.

The governing principle here is clearly enunciated by this Court in the case of Buck v. Colbath, 70 U. S. 334, 18 L. Ed. 360, where it is said, the italics being ours in this quotation, as elsewhere in this brief:

"That principle, is that whenever property has been seized by an officer of the Court, by virtue of its process, **the property is to be considered as in the custody of the Court and under its control, for the time being,** and that no other Court has a right to interfere with that **possession,** unless it be some Court which may have a direct supervisory control over the Court whose process has

first taken possession, or some superior jurisdiction in the premises * * *. This principle, however, has its limitations; or rather its just definition is to be attended to. It is only while the property is in possession of the Court, either actually or constructively, that the Court is bound, or professes, to protect that possession from the process of other Courts. Whenever the litigation is ended, or the possession of the officer or Court is discharged, other Courts are at liberty to deal with it according to the rights of the parties before them whether those rights require them to take possession of the property or not. The effect to be given in such cases to the adjudication of the Court first possessed of the property, depends upon principles familiar to the law; but no contest arises about the mere possession, and no conflict but such as may be decided without unseemly and discreditable collisions."

The eminent judge of the United States Circuit Court for the Northern District of Texas knew that when he discharged the railroads, properties and franchises in question from "the possession of the Court, either actually or constructively," the Court was no longer bound "to protect that possession from the process of other Courts," and, for that very reason no doubt, he explicitly adjudged, on September 25, 1911, that "all of the railroads, properties, and franchises of the International & Great Northern Railroad Company or said Receiver formerly in the possession, custody or control of said Receiver, are hereby finally discharged from the possession, custody and control of the said Receiver and OF THIS COURT," and further "that the International & Great Northern Railway Company, grantee as aforesaid, shall take and hold said properties released and discharged from the possession and custody of said Receiver AND OF THIS COURT."

In Moran v. Strugis, 154 U. S. 279, 38 L. Ed. 987, 989, the Court declares.

"It was held in Buck v. Colbath, 70 U. S. 334, 18 L. Ed. 257 to 261, that whenever the litigation in the Court where the property is first seized has ended, or the possession of such Court or its officers is discharged, the other Courts are at liberty to deal with it according to the rights of the parties before them, whether those rights require them to take possession of the property or not."

The principle is re-affirmed in Shields v. Coleman, 157 U. S. 179, 39 L. Ed. 664, in this language:

"While the validity of the appointment made by the Circuit Court, on June 6, 1892, cannot be doubted, yet, when that Court thereafter accepted a bond in lieu of the property, and discharged the receiver, and ordered him to turn over the property to the railroad and such surrender was made, in obedience to this order, the property then became free for the action of any other Court of competent jurisdiction. It will never do to hold that after a Court, accepting security in lieu of the property, has vacated the order which it has once made appointing a receiver and turned the property back to the original owner, the mere continuance of the suit operates to prevent any other Court from touching that property. * * * The property ceased to be **in custoda legis.** It was taken subject to any rightful disposition by the owner or to seizure under process of any Court of competent jurisdiction."

The Supreme Court of Texas recognizes in Texas & Pacific Ry. Co. v. Johnson, 76 Tex. 431, 432, that when a Court releases its custody and control of property, seized through a receivership, the basis is withdrawn for a claim of exclusive jurisdiction. In that case, Chief Justice Stayton said: "Both parties pleaded that the receiver was discharged and the property all returned to the company under the order of October 26, 1888, and that this was the effect of the

order there can be no question. **This ended the control of the Court over the property** and the asserted reservation of the right to again assume control amounts to nothing in the disposition of this case. The Court's **custody** went with the discharge of its receiver and **return of the property to its owner.**" 76 Texas 431, 432.

The conclusions of the Supreme Court of Texas in the case just cited were expressly affirmed in T. & P. Ry. Co. v. Johnson, 151 U. S. 102, 38 L. Ed. 87 to 89, and T. & P. Ry. Co. v. Manton, 164 U. S. 636, 41 L. Ed. 581 to 583.

It is a part of the legislative history of the State that a few days before the date upon which the railroads, franchises and properties of the International & Great Northern Railroad Company were advertised to be sold, under the decree of foreclosure of the second mortgage, of date May 10, 1910, the Legislature of Texas, on September 1, 1910, enacted Articles 6624 and 6625, of the Revised Civil Statutes of Texas, (1911), commonly known as the "I. & G. N. Bill," and, that following the enactment of these statutes the International & Great Northern Railroad Company, on September 7, 1910, as plead by plaintiff in error, secured an order postponing the sale, and thereafter secured other orders extending the date of sale to June 13, 1911, pending the consummation of a plan of reorganization and sale, under which the debts and liabilities of that Company were paid in full. See paragraphs 11, 13 and 14 of Section 1, and paragraphs 9 and 10 of Section 9, of plaintiff in error's First Amended Original Answer, in Record on pp. 76, 77 and 136, Vol. I.

It is also a matter of common and public knowledge that on Sept. 9, 1911, before the consummation of the sale and re-organization of the railroads, franchises and properties of the International & Great Northern Railroad Company, the Railroad Commission of Texas published a news-

paper letter, addressed to the Receiver, declining to authorize the issuance of the mortgage bonds required by the plan of re-organization, "until a decree shall first have been entered by the Federal Court in which the property was sold, which decree should finally confirm the sale and release the property so that liens can no longer be adjudged against it by the Court."

On September 25, 1911, under the decision to comply with the terms of the "I. & G. N. Bill," there was no longer any necessity to retain the reservations in the original decree of foreclosure. On September 25, 1911, under the ruling of the Railroad Commission, and eliminating that ruling from our consideration under the statutes of Texas, requiring the Railroad Commission to approve of liens to be created by domestic railroad corporations, in order to consummate any practicable re-organization of the sold-out Company's fiscal affairs, there was the most urgent necessity for the release of the reservations of jurisdiction in the decree of foreclosure.

Moreover, the International & Great Northern Railway Company was a party to the order of September 25, 1911, and did not complain or appeal from said order and it was not only a party to, but was the special beneficiary of the reservations in the foreclosure decree. Yet, the Railway Company within a few months from September 25, 1911, when this suit was filed, did not then invoke any reserved jurisdiction under the decree of foreclosure. Instead it invoked the exercise of that jurisdiction, which it now denies, and continued to invoke that jurisdiction until its every important contention had been rejected. Under these circumstances, how can it be questioned: (1) That the United States Circuit Court, has released its jurisdiction in plain language; and (2), that the Railway Company itself has construed the order which it procured, as authoriz-

ing the state courts to hear and determine the issues involved in this suit, until the highest state court determined, at the Company's own instance, every important issue against it?

The cases cited by plaintiff in error as "our leading cases" are: Julian v. Trust Co., 193 U. S. 93, and Wabash Ry. Co. v. Adelbert College, 208 U. S. 35 to 58, 52 L. Ed. 382 to 388.

The Adelbert College case is believed to remove all doubt as to the proper decision of the question under discussion.

In that case the main question was, as stated by counsel in that case, whether "the possession and exclusive control of the Wabash property ended in the United States Courts when the property was conveyed by the Master Commissioner to the purchasing committee and the receivers were discharged." This Court answered that question in the negative, upon the express ground that the unreleased reservations of the decrees under which the Wabash property was sold, did preserve to the United States Courts the custody and control of that property.

We fail to understand how Justice Moody could have made clearer than he did that the question of exclusive jurisdiction, in cases like this, does depend, where property has passed from a Court's actual possession, upon the express reservation of the Court of custody and control of the property.

Justice Moody began his discussion of the first question decided, after stating the facts on which it arose, by saying:

"Since the Federal Courts had parted with the physical possession of the property, they obviously could no longer exercise an exclusive jurisdiction respecting it, unless there was something in the decrees under which the property was sold and conveyed which preserved to the Courts the

control of the property for the purpose of giving full effect to its judgments."

After giving the history of the litigation involving the Wabash property, and the exact terms of the decrees under which the same was sold, the opinion proceeds:

"It is obvious, therefore, that the Court has parted with the possession of the property only conditionally, and that it has preserved complete control over it, and full jurisdiction over the claims which might be made against it. * * *."

"When the Court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other Courts. The latter Courts, though of concurrent jurisdiction, are without power to render any judgment which involves or disturbs the possession of the property while it is in the custody of the Court which has seized it. For the purpose of avoiding injustice, which otherwise might result, a Court, during the continuance of its possession, has, as incident thereto and as ancillary to the suit in which the possession was acquired, jurisdiction to hear and determine all questions respecting the title, possession or control of the property: * * *."

"These principles are of general application, and not peculiar to the relations of the Courts of the United States to the Courts of the states. They are, however, of especial importance with respect to the relation of those Courts, which exercise independent jurisdiction in the same territory, often over the same property, persons and controversies; they are not based upon any supposed superiority of one Court over the others, but serve to prevent a conflict over the possession of the property which would be unseemly and subvervise of justice * * *."

"The State Courts in the case at bar, in defer-

ence, it is said by counsel, to these well established principles, deferred action until after the property had been conveyed to the purchasers under the decree of foreclosure and the receiver discharged. Upon the termination of the receivership, it is urged, the exclusive jurisdiction of the Circuit Court ended, and the right of the State Court to resume its normal jurisdiction revived. As this suit was begun before the property was taken into the possession of the Circuit Court, and when therefore, the State Court had jurisdiction over it, and remained dormant, except for the addition of parties and the filing of pleadings and service of process, until after the receivers had been discharged and the property conveyed to the purchaser, this would be true, if, as in Shields v. Coleman, 157 U. S. 168, 39 L. Ed. 660, the possession of the Circuit Court and its relations to the res had come to an end."

"But, the Circuit Court attempted, in the decree of March 23rd, to prolong its control of the property beyond the conveyance to the purchasers and the discharge of the receivers up to the point of time when the claims therein stated should be ascertained, and the just remedy for them applied, and to reserve the right to retake the property for those purposes * * *."

"We are of the opinion that by the effect of the reservation in the decree of March 23, 1889, the exclusive jurisdiction of the Federal Court over the property therein dealt with has continued, notwithstanding the conditional conveyance, and that it still exists."

We submit that this opinion determines:

(1) That in a suit for the foreclosure of a mortgage upon a railroad placed in the hands of a receiver, the jurisdiction of the Court over the rights of those not parties to the foreclosure and receivership proceedings arises from the Court's possession of the railroad property, and contin-

ues "while the property is in the **custody** of the Court."

(2) That when a Court absolutely releases and renounces all **possession** actual and constructive, and all **control**, present and future, over property previously in its custody, its jurisdiction over that property is terminated and at an end.

The judgments in the College case did not end the Circuit Court's jurisdiction because it was held: (a) that those judgments "preserved to the Courts the **control** of the property" "beyond the conveyance to the purchasers and the discharge of the receivers," and (b) it was held that those judgments transferred to the purchaser, **"possession"** of the property **"only conditionally,"** leaving it still in the **custody** of the Court for the purposes of certain adjudications.

The judgment of the United States Circuit Court at Dallas did end that Court's jurisdiction because: (a) the last judgment finally discharged the foreclosed property from the control of that Court, following the conveyance of the property and the discharge of the receiver, no matter what control may have been reserved in the first judgment, and, (b), the last judgment transferred to the purchaser no conditional possession of the foreclosed property, but full possession, freed from the custody and control of the Court.

The College case declared that "upon the termination of the receivership" "the exclusive jurisdiction of the Circuit Court ended and the right of the State Courts to resume its normal jurisdiction revived," "if as in Shields v. Coleman, 157 U. S. 168, 39 L. Ed. 660, 15 Sup. Ct. Rep. 570, the possession of the Circuit Court and its relation to the **res** had come to an end." How can it be contended that a Court could more certainly surrender possession of railroads, properties and franchises or more clearly end its relation to same than by decreeing that such **"railroads, properties and franchises are hereby finally dis-**

charged from the possession, custody and control of this Court?" But, the Circuit Court for the Northern District of Texas was not content to stop there. As if fearful that some one might still say that the possession of the purchaser was only conditional, the Railway Company, on motion of its present able counsel, secured the further decree that the International & Great Northern Railway Company shall take and hold said properties **"released and discharged from the possession and custody of this Court from and after the 16th day of September, 1911."**

There is nothing inconsistent with our contention in the other leading case relied on by plaintiff in error. The Supreme Court say in the Adelbert College case: "The principle underlying the case of Julian v. Central Trust Co., 193 U. S. 93, 48 L. Ed. 629, which is material here, is that the jurisdiction over the **res**, could be continued by reservations, after the physical possession of the property had been abandoned."

That is unquestionably true, under the doctrine re-affirmed in the Adelbert College case, but it is very different from the proposition of plaintiff in error, which, stated in plain terms, is that a Court's exclusive jurisdiction **in rem** may be continued, notwithstanding the Court itself has expressly and finally discharged the **res** from its further possession, custody or control, actual or constructive.

The state courts have simply followed the unbroken line of decisions of this Court beginning with Buck v. Colbath, 70 U. S. 334, adhered to in Shields v. Coleman, 157 U. S. 179, and re-affirmed in Wabash Ry Co. v. Adelbert College, 208 U. S. 45 to 58, and hence the first federal question raised by plaintiff in error can hardly be called an open one.

Second.

The entire argument in behalf of plaintiff in

error on the impairment of the obligation of the contract created by the mortgage and bonds of June 15, 1881, may be fairly stated to be based on two propositions.

In its counsel's own words, the first is that "under the law existing at the time of the execution of the mortgage and bonds, the railroad company executing the same had the right under the law of Texas to establish its general offices, machine shops and round houses at such places as it deemed advisable and "the law which was in force at the time of the execution of the mortgage and bonds of June 15, 1881 constituted a part of such mortgage and bonds." Brief for plaintiff in error, pp. 123 and 107.

To again use the words of counsel for plaintiff in error, the second proposition is, that "since, at the time of the execution of the mortgage and bonds of June 15, 1881, the law was that merely personal contracts of railroad companies were terminated upon the sale of the property and franchises of the company by virtue of mortgage foreclosure proceedings, and since that law constituted a part of the contract when the mortgage lien was foreclosed by the decree entered on May 10, 1910, the contracts alleged to have been made in 1872 and 1875 * * * ceased to exist or operate." Brief for plaintiff in error, p. 110.

The law permitting the railroad to remove its general offices and shops to such place as it might deem advisable is characterized by counsel for plaintiff in error as a "general statute," and as "a part of the general railroad law of Texas." Brief for plaintiff in error, pp. 123, 124.

Hence, plaintiff in error's first and main contention, is nothing more than that the state legislature could not modify or repeal a general statute, regulating railroads, without impairing the obligation of a pre-existing bond and mortgage contract, because the general statute "con-

stituted a part of such mortgage and bonds." And yet, no doctrine has been more emphatically or consistently repudiated by this Court than that very doctrine.

In Memphis & Little Rock Ry. Co. v. Berry, 112 U. S. 609, 623, 28 L. Ed. 840 to 842, it is said: "It is a mistake, however, to suppose that the mortgage and sale of a charter by a corporation, in any proper sense which can be legally imparted to the words, necessarily conveys every power and authority conferred by it, at least, as to vest a title in them, as franchises irrevocable by reason of the obligation of a contract. In many, if not most, acts of incorporation, however special in their nature, there are various provisions which are matters of general law, and not of contract, and are therefore subject to modification or repeal. Such in our opinion would be the character of the right in the mortgage bondholders, or the purchasers at the sale under the mortgage, to organize as a corporation, after acquiring title to the mortgaged property, by sale under the mortgage, if, in the charter under consideration, it had been conferred in express terms, and particular provision had been made as to the mode of procedure to effect the purpose. It would be matter of law and not of contract."

In New York v. Cook, 148 U. S. 397, 37 L. Ed. 500 to 503, the Court announced: "There has been no violation of any contract. These mortgages, it is true, were all executed and the bonds issued long prior to the passage of the tax act of 1886. The franchises of the corporations were duly mortgaged, under the provisions of State Laws, by which it was provided that purchasers at foreclosure sale under such mortgage could, upon compliance with the law, file certificates and become incorporated bodies. But such acts were in no sense contracts on the part of the State with persons purchasing bonds secured by such mortgages, or with future possible purchasers at fore-

closure sales, that the provisions existing at the time of the mortgaging of the franchise for the incorporation of such purchasers should remain the same * * *. **They are merely matters of law, instead of contract,** and the right therein, conferred upon purchasers of the corporate properties and franchises sold under foreclosure of mortgages thereon, to re-organize and then become a new corporation, is subject to the laws of the State existing or in force at the time of such re-organization and grant of a new charter of incorporation."

Again, it is said in Atlantic C. L. R. Co. v. Goldsboro, 232 U. S. 549: "For it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise."

The labored argument to establish that the foreclosure sale discharged the obligations imposed by the personal contracts, always conceded by every state court and by counsel for defendants in error, (106 Tex. 68, 62), is simply not pertinent to the question which must be controlling on this writ of error, and that is, whether the judgment sought to be reversed enforces an obligation imposed by a valid statute.

The answer to this question depends, of course, on whether the statute comes within the police power of the State, and no one can now dispute that the ~~public~~ power embraces "regulations designed only to promote the public convenience or the general welfare." C. B. & Q. R. Co. v. Ill., 200 U. S. 561; Escanaba Co. v. Chicago, 107 U. S. 678, 683; Bacon v. Walker, 204 U. S. 502.

We recognize that in determining the validity

of the statute, this Court "is not limited to the mere consideration of the language of the opinion of the state court, but will consider the substance and effect of the decision," and that it will exercise its independent judgment in determining whether the bond and mortgage contract has been impaired by the statute as applied in the decision of the state court; nevertheless, as it has so recently reiterated in Long Sault Development Co. v. Call, 242 U. S. 272, 61 L. Ed. 299, 300, this Court "will give to that decision that respectful and sympathetic attention which is always due to the highest court of a state, (Fisher v. New Orleans, 218 U. S. 438), with the presumption always in mind that the state courts will do what the Constitution and laws of the United States require. Neal v. Delaware, 103 U. S. 370, 389, 26 L. Ed. 567, 571."

And, this Court will view the assailed statute with the disposition to favor its validity, since it comes within the class of "laws relating to matters completely within the territory of the state enacting them," and since this Court "so reluctantly disagrees with the local legislative authority, primarily the judge of the public welfare, especially when its action is approved by the hghest court of the state whose people are directly concerned, that it will interfere with the action of such authority only when it is plain and palpable that it has no real or substantial relation to the public health, safety, morals, or to the general welfare. Jacobson v. Massachusetts, 197 U. S. 11, 30, 49 L. Ed. 643, 651." Cusack Co. v. Chicago, 242 U. S. 531, 61 L. Ed. 475.

We submit that consideration of the language, substance and effect of the decision of the Court of Civil Appeals confirms the correctness of that decision.

We get the substance and effect of the decision, as affecting every serious constitutional claim asserted in behalf of plaintiff in error, in

the following language of the state court, viz: "While adhering to the conclusion that the facts of the record afford no ground for holding that any existing rights of appellant or of its predecessor have been invaded or violated, it is nevertheless believed that the act of 1889 is in all respects valid and subject to no constitutional objections, as a police regulation within the power of the state to make. It is an established rule that a corporation is a resident citizen of the state in which it is created, and must dwell within the state of its creation. Bank v. Earle, 13 Peters (U. S.) 519, 10 L. Ed. 274. And the state, having the power to create the corporation, has the right, it is not doubted, to fix by initial legislation the precise locality within the state for the location of the governing offices of the corporation. If the state has the power, as it has, to fix the location of the governing offices in the first instance, it rests upon the ground of public interest in that respect. The location of governing offices of a corporation is a subject-matter of public interest and regulation for purposes of jurisdiction, litigation affecting the corporation as such, state visitation, and taxation of personal property. And in the absence of legislation conclusively fixing the principal office of the corporation, the place where it has such principal office would lie entirely in matter of proof. As well is the location of principal shops and round houses on the line of road subject-matter of public interest, for they are but a part of the physical instrumentalities of necessary operation of the railway, and the public are affected in interest through proper operation of the road as a public carrier. Moreover, as the shops and round houses are a necessary part of the operation of the railway, the location of the same at the will of the company would not be an absolute right to it freed from legislative regulation in public interest and convenience. The company may not, as a right, establish its shops and round houses at a point either without

the state or off of and distant from its line of railway, because, conferring, as the state does, the right to the company of operation of the road through a given territory, and only a given route within the state, the company in so doing would be acting beyond a territorial privilege of operation. The power of the state to restrict the privilege of operation of the road to the particular territory or route authorized to be covered would necessarily include the right exercised in public interest and convenience of operation, of enforcing location at a particular point on the line of road of the given instrumentalities of operation. If the power exists in the state, as it does, to regulate and reasonably govern operation of the road in public interest and convenience, the necessity or expediency and economic reasons for so doing are purely questions for the legislature, and not for the courts. The location of the principal office, shops and round houses being a subject-matter of public interest, legislation in respect thereto would be within the police power of the state to promote public convenience or good. The police power of the state extends, reasonably exercised, to promote the public convenience. Ry. Co. v. Ill., 200 U. S. 561, 50 L. Ed. 596; Ry. Co. v. Ohio, 123 U. S. 292, 43 L. Ed. 704; Ins. Co. v. Ohio, 153 U. S. 446, 38 L. Ed. 780. And location of the principal office being within the police power of the state, previous regulation would not prevent the operation of the police power further exercised to promote the public convenience or good. In application of that principle the state, in Ry. Co. v. Kentucky, 161 U. S. 677, 40 L. Ed. 849, was held to have the power to forbid the consolidation of competing corporations, though the right to consolidate should be held to be given by the charter, and though the charter contained no reservation of power so to do. To the same effect is Pearsall v. Ry. Co., 161 U. S. 646, 40 L. Ed. 838. It was held in State v. Ry. Co., 24 Tex. 122, that it was within the constitutional power of the state

to impose the duty upon executive officers of the company to reside within the state, though the law was passed after the grant of the charter. The principle of law of this latter case has direct application to the instant legislative provision. A difference in principle is not perceived to be between requiring the president and a majority of the diretcors to have residence within the state, and requiring the governing officers of the corporation to have residence in a particular locality within the state on the line of railway. A legislative provision requiring location of general offices at a fixed locality, in its last analysis, means only that the executive and governing officers of the corporation as such shall have residence at a particular locality within the state on its line of railway. The same principle would have application to shops and round houses, which are but a part of the instrumentalities of operation of the railway. Holding, as we do, that the act is a regulatory one in public interest and within the operation of the police powers of the state, it is not therefore assailable as violative of the federal constitution upon the ground of impairing the obligation of charter contract." I. & G. N. Ry. Co. v. Anderson County, 174 S. W. 318; Record, pp. 1020, 1021, Vol. III.

The above language represents the concurring judgments of three appellate courts in Texas, and not merely one. The Supreme Court has approved the decision not once but twice, with a partly different personnel each time. The Supreme Court approved the language above quoted in refusing the petition for writ of error, which urged the very contentions under discussion. Before the above quoted language was uttered, the Supreme Court had announced the same conclusion in different language. And, before the Supreme Court had considered the case, plaintiff in error invoked the judgment of the Galveston Court of Civil Appeals on the statute, and thereupon obtained the decision that the effect of the

statute, as against the rights of bondholders and of purchasers at mortgage foreclosures, was to make the protected location "as fixed and unchangeable as that of the road-bed," the removal of which had been long forbidden in Texas International & Great Northern Railway Co. v. Anderson Co., 150 S. W. 251; 156 S. W. 499; 174 S. W. 318.

And every decision has been concurred in by every judge sitting.

Let us next examine the substance and effect and language of the Supreme Court's opinion, on writ of error from the decision of the Galveston Court of Civil Appeals.

The substance of that opinion was that the foreclosure sale, under the mortgage, which was executed subsequent to the locative contracts and prior to the statute, did not discharge the obligation imposed by the statute, to keep and maintain the general offices, machine shops, and round houses in controversy at Palestine: **because** the statute was a general law, declaring the public policy of the State, in subservance of the public interest, and regulating the franchises of domestic corporations, with respect to the exercise of corporate rights and privileges, in matters of vital public concern, such rights and privileges having been granted by the State and subject, from their very nature, to control and regulation by the State.

The opinion recognizes: first, that the foreclosure sale passed title to the properties of the sold-out corporation freed from the personal obligations of that corporation; and second, that the foreclosure sale could not and did not strike down or discharge the statutory obligation to keep and maintain the facilities in question at Palestine, for the reason that it is general law and settled in Texas by statute, that a new and distinct corporation, purchasing such properties, at a valid foreclosure sale, succeeds to all of the

statutory duties to the public of the sold-out corporation: because, as announced by this Court, it cannot be tolerated that a private individual or a state corporation can, by a purchase at a judicial foreclosure sale of property, strike down legislation passed subsequently to the foreclosed mortgage for the promotion of the public interest.

After demonstrating that Article 6423 plainly commanded the maintenance of the general offices, etc., at Palestine, under the facts plead, (which are now established by the verdict), the opinion declared that it was too well settled to admit of doubt that the new Company was not bound by the personal obligations of the old company, such as were created by its locative contracts, apart from the statute. The Court did not feel it necessary to state the truism that it withdrew nothing from a statutory obligation that it conformed to a pre-existing contractual obligation, though it did cite a case, wherein Judge Brewer construed a previous opinion of the United States Supreme Court as holding that where there was "a statutory duty," that was alone "enough to sustain a decree" in favor of the beneficiary of the statute, notwithstanding the claim of the beneficiary was also "founded directly upon contracts." Union Pacific R. R. Co. v. Mason City & Fort Dodge R. R. Co., 199 U. S. 160, 50 L. Ed. 134, construing Union Pacific R. R. Co. v. Chicago R. I. & P. R. R. Co., 163 U. S. 564, 41 L. Ed. 265.

It was all the more unnecessary for the Texas Supreme Court to declare that it furnished no ground of attack on the statute that it made permanent certain locations within the State, though they had been originally fixed by contract, since that Court had already declared in the case of City of Tyler v. St. Louis Southwestern Railway Company of Texas, 99 Tex. 501, 502, that the commands of Article 6423, (then Article 4367), must be given the force of a general law, declar-

atory of the public policy of the state, as attests the following language of Justice Brown, who is shown by the journals of the Legislature to have been one of the makers of the statute:

"It is claimed that the enforcement of such contracts as that sought to be enforced in this case would be against the public policy of the State. On the contrary, to enforce the statute of the State, as will be done in this case, will be to enforce the public policy of the State as declared by the Legislature in the enactment of Article 4367, (now 6423). There is no public policy nor public interest to which courts may give precedence over a valid statute enacted by the legislative department." 99 Tex. 501, 502.

This Court dismissed a writ of error sued out by the railway company in Tyler's case. St. L. S. W. Ry. Co. of Texas v. Tyler, 212 U. S. 552, 53 L. Ed. 649.

Plaintiff in error wants this Court to enforce defendants in error's rights under the contracts of 1872 and 1875 divorced from Article 6423. Defendants in error seek nothing more than the enforcement of their rights under Article 6423, as applied to a certain state of facts, towit: location of general offices and shops under contracts, for value received, and under a county bond issue, such statute expressing the public policy of the State of Texas.

In the case of U. P. R. R. Co. v. C. R. I. & P. R. R. Co., 163 U. S. 546, 41 L. Ed. 276, it was said, quoting from the earlier case of Memphis & L. R. R. Co. v. Southern Express Co., 117 U. S. 1: "The Legislature may impose a duty, and when imposed it will, if necessary, be enforced by the courts: but unless a duty has been created by usage, or by contract, or by statute, courts cannot be called on to give it effect."

When the Texas Supreme Court reached the qestion in this case as to whether the General Of-

fice Statute expressed the public policy of the state, in the interest of the general welfare, by way of reasonable regulation of franchises, which the state had created and bestowed, its conclusions were thus stated:

"The duty to which the company is subject, under Article 6423, being thus imposed upon its corporate franchise and made a condition of its exercise, has all the force and obtains just as fully as though its assumption were made a condition of its grant. It is a qualification of its franchise and inseparable from it, a burden which accompanies its enjoyment, to be borne as a privilege of its use, and inheres in it with even more virtue than that of an original charter obligation because of the nature imparted to it by a general law. The charter duties and obligations of a railroad corporation, for whose violation its charter may be subject to forfeiture, necessarily inhere in its franchise, because they operate as conditions upon which they may be exercised. For a stronger reason that a statute imports, duties or obligations imposed by a general law, the observance of which is by the same authority made a condition of the corporate existence, must be held to sustain to the corporate franchise a relation of the same continuing force. They are clearly not to be classed or regarded as merely of a private character."

"That they have been made the subject of general statutory provision distinguishes them from those duties and obligations which only affect individuals. The concern of the State in their performance, manifested by these enactments of its legislature department and the penalty prescribed for their violation, necessarily impresses them with a public nature. A duty laid by law upon a railroad corporation, for whose breach its charter may be forfeited at the suit of the State, can hardly be considered as a private duty. As its performance is by the

statute made a condition of the exercise of corporate rights and privileges which vitally affect the public, it is essentially for the benefit of the public. It goes to the essence of the contract between the corporation and the State, in virtue of which such rights and privileges, constituting the corporate franchise, are granted and enjoyed. It is founded upon considerations of public policy, as expressed in a general law of the State. and must have been intended to subserve a public interest. For these reasons, we are clearly of the opinion that the duty to which, according to the petition, the International & Great Northern Railroad Company was subject, under Article 6423, in respect to the maintenance of the general offices, machine shops, and round houses at Palestine, was a public duty."

Moreover, the Court declared that it considered this case stronger than that of Union Pacific R. R. Co. v. Mason City & Fort Dodge R. R. Co., 199 U. S. 160, 50 L. Ed. 134, where this Court had declared the supremely important principle that the contention would never be countenanced, much less sustained, that subsequent legislation "for the promotion of the public interest," could be defeated by a mere judicial sale following the foreclosure of a prior mortgage, but that after, "as before the foreclosure and sale, the public interests are to be regarded and not simply private purposes, wishes and prejudices."

While the declaration of the Supreme Court of Texas that the duty imposed by Articles 6423 to 6425 "was essentially for the benefit of the public," and was a reasonable regulation of the corporate franchise, "intended to subserve a public interest," is not conclusive here, nevertheless it cannot now be denied that this Court will accept that declaration unless the same is clearly not well founded. For, at its present term this Court has said: "The act in question has the sanction of the legislative branch of the state

government, the body primarily invested with authority to determine what laws are required in the public interest. That the purpose is a public one has been determnied upon full consideration by the supreme judicial court of the state, upon the authority of a previous decision of that court," and the Court, in the face of an attack on a State statute as violative of the 14th Amendment, said the decision of the highest state court "would be accepted unless clearly not well founded," notwithstanding the ultimate authority to determine the validity of the statute rested in this Court, citing Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 160, 41 L. Ed. 369, 389; Clark v. Nash, 198 U. S. 361, 369, 49 L. Ed. 1085, 1088; Strickley v. Highland Boy Gold Min. Co., 200 U. S. 527, 531, 50 L. Ed. 581, 583; Offield v. New York, N. H. & H. R. Co., 203 U. S. 372, 377, 51 L. Ed. 231, 236; Harriston v. Danville & W. R. Co., 208 U. S. 598; O'Neill v. Leamer, 239 U. S. 244, 253, 60 L. Ed. 249, 265. Jones v. Portland, No. 3, U. S. Ad. Op. 130.

The slightest consideration of the widely beneficient and useful objects of Article 6423 will confirm the soundness of the view of the Supreme Court that it deals with matters of vital public concern and greatly promotes the general welfare.

Article 6423 was and is intended first to prevent the principal physical instrumentalities, for the operation of railroads wholly within the State, from being located without the State, and second to make their location fixed and permanent within the State.

Strange as it may seem, it is a fact, known to all Texans, that immediately prior to 1889 most of the intrastate railroad mileage in Texas was operated from offices and shops without Texas, notwithstanding a constitutional clause, unaccompanied by penalties, requiring public offices to be kept in Texas "for the transaction of business, where transfers of stock should be made,

and where the directors should hold annual meetings." It requires no argument to show the detriment to the commerce and welfare and prosperity of Texas, and the public inconvenience, for plaintiff in error to be allowed to have its traffic manager, in charge of both freight and passenger business, at New Orleans, as it will have, until Article 6423 is enforced, through the judgment in this case. It requires almost as little argument to show the detriment from such a source to plaintiff in error's own true business interest and enduring financial prosperity.

It was not strange at all that prior to 1889, and before the wholesale removals from the State, as is common knowledge in Texas, the railroad corporations used and abused the power, derived from the State statute of 1853, permitting change of location in general offices at pleasure, and derived from the absence of any regulation of the location of general offices and machine shops, to build up or destroy cities and towns, to bring prosperity or ruin to trade, commerce and factory, in many and largely populated communities, to elevate or depress land values, and to make or mar the happiness of homes, with their inseparable local ties. Even worse was the use and abuse of this power in threatening or blandishing counties and cities and their governmental agents in matters of State, County, and City legislation and administration, and in promoting strife between communities possessing and communities desiring these instrumentalities. The state could not be endangered by more corrupt, insiduous, or dangerous evils.

The citizens of Texas are familiar with the conditions, which Governor Hogg described, in 1892, in the following language: "The head officers, treasuries and general offices were located beyond her, (Texas), limits, in New York, New Orleans, St. Louis and other outside cities. With the exception of four or five lines every railroad

had run down until it was dangerous to travel over it. Quite all the money received by the agents along the lines went as fast as steam could carry it to the treasuries and general offices of other States; and all claims against the companies, without respect to size or character, passed through "red tape" circles from within the State to beyond, for adjustment and final settlement through non-resident banks. Seldom was a single account or demand paid to an employe or to a citizen by the railway except from abroad or from a "pay train" as it came rattling over the road from remote headquarters. The presence then of a railway manager or president created a sensational thrill in the feelings of every citizen along the line of the road as the "special" came whizzing by. To portray these abuses and wrongs of railways absenteeism, and the strain on our commerce as a result, becomes unnecessary, for they are self-evident * * *. Within less than three years, (i. e. by 1890), after a heated contest fresh in the memory of most of you, the general offices of the roads were forced to return to points within the State. Their offices, employes, subordinates and cash were brought back to the proper places designated by law, (i. e. by the act of 1889), upon their several lines." Governor Hogg describes the effect of the public policy of freedom in location of offices and shops, for want of proper legislation with adequate penalties, antedating the act of 1889, upon the International & Great Northern Railroad as follows: "For the construction of this road the State donated to it 12,800 acres of land to the mile, and exempted that land and all the property of said Company from taxation for a period of twenty-five years from 1875. At first it was an excellent road and rendered good service to the commerce of Texas. It had its headquarters at Palestine, at which place it made the deposit of its earnings and paid the expenses of its operation. So long as it was thus managed, it added life and prosperity to

every section through which it ran. Absorbed, however, by the Missouri Pacific system, its officers, offices, and headquarters were removed out of the State, and as a result its road-bed, rolling stock, general equipment and depots became dilapidated and so out of repair as to render traveling over it in every way disagreeable, tardy and hazardous. The action brought against it had the effect of disclosing its relations to the Missouri Pacific system, removing its general offices and headquarters back to Palestine, and having its road-bed and rolling stock placed in such condition as to make it equal to any road in the State." Speeches and State Papers of James Stephen Hogg, pages 126, 28, 29.

There was but one remedy for such evils as those above referred to and that was the exercise of the state's police power. Performing a plain duty to the public, the state enacted the general law of 1889, whereby it henceforth became the public policy of Texas to perpetuate railroad general offices and shops, at certain locations, within the State, which the Legislature determined would best subserve the vital interests of the people and of the owners.

It should be observed that plaintiff in error contends that the act of 1853, empowering the railroads to determine the locations of offices and shops, was a wise exercise of the police power, and at the same time it contends that for the State itself to fix such locations was utterly beyond the police power.

It seems to us that adverse counsel come very near confessing the power of the Legislature to determine these locations when they say on page 71 of their brief: "Except for efficient operation, the general public is not interested in the location of the general offices and shops."

A plainer admission could not be made that the efficient operation of railroads does depend on the location of these facilities.

This admission very completely refutes plaintiff in error's entire attack upon the statute. For, if these instrumentalities should be conducted from those points most accessible and most convenient and advantageous to the public, then since the state, and not each railroad corporation, is the special guardian of the public convenience and the general welfare, it would seem rather obvious that the state, and not the railroad corporations, should exercise the power to fix the locations of these instrumentalities, and to require such locations to remain unchanged, until the state determines that changes will benefit, instead of injure, the public. The act of 1889, as enforced by the Court of Civil Appeals, does no more than this.

Nothing could be farther from the case at hand than to argue against enlarging or securing the obligation of existing voluntary contracts. The very first clause of Article 6423, instead of enlarging or securing, the obligation of existing, voluntary contracts, extinguished such obligation when in conflict with charter locations. This clause was valid against contract rights of communities or individuals, because a proper exercise of the police power, for the reason that, as stated by the Supreme Court of Georgia: "When one contracts with a railroad company in reference to those matters where the public is involved, the contract is made subject to the rights of the public." Atlantic R. Co. v. Camp, 130 Ga. 1, 60 S. E. 177, 15 L. R. A., (N. C.) 594.

Article 6423 might have even overridden bond contract locations: for, as pointed out in Tyler's case by Chief Justice Gill: "It is plain that, had a county, other than that through which the road was designed to run, secured such a contract, it would not have been aided by the statutory provision." City of Tyler v. St. Louis Southwestern R. Co. of Texas, 87 S. E. 245, 247.

Moreover, plaintiff in error has taken great pains to demonstrate, on pages 132 and 133 of its Brief, that the obligations of the contracts and of the statute are radically different.

It is true, in defining future locations of both offices and shops, where there were no charter locations and where locations secured through county bond contracts were on the roads' lines and within the state, the legislature followed, instead of disturbing, those locations which had been voluntarily selected by the owners, and fixed by private contract. We have already pointed out that it is peculiar logic which seeks to defeat a statutory duty because consonant with a contract duty or a predecessor's contract duty. The statutory duty must be obeyed because that is the will of the state about something with regard to which such will is supreme. There was no necessity for enlarging or securing contracts. The state merely expressed its will by a general law, for the public weal, which must be obeyed, regardless of pre-existing contract rights of towns, or of mortgagees, or of subsequent purchasers, all such rights having been acquired subject to such an expression of the will of the state.

The decision of the Court of Civil Appeals is believed to enforce a principle often announced by the Supreme Court of Texas and by this Court.

The act of December 19, 1857, "supplementary and amendatory of an act to regulate Railroad Companies, approved February 7, 1853," imposed the first restrictions upon the places of residence of railroad officials in Texas. Section 3 provided: "That at least a majority of the Directors and the President or Vice President, Treasurer and Secretary of every Railroad Company entitled to the benefits and privileges of an act entitled an act to encourage the construction of Railroads by donation of land, approved January 30, 1854, or of an act to provide for the investment of the special

school fund, passed August 13, 1856, shall reside within the State of Texas."

The Southern Pacific Railroad Company declined to comply with Section 3, and, when the State of Texas sued to forfeit its charter, the Company assailed the validity of the act.

The Supreme Court, in an opinion by Judge Roberts, thus disposed of the company's contentions:

"We think, also, that there is one good ground of forfeiture, properly alleged in the amended petition; that is, the failure of the president or vice president, and a majority of the directors of the railroad corporation, to reside in this State after the 19th of June, 1858, as required by the act of 1857 (7th Legislature, 26.)"

"By that act it is provided: 'That at least a majority of the directors and the president or vice president, treasurer, and secretary, of every railroad company, entitled to the benefits and privileges of an act entitled "An act to encourage the construction of railroads by a donation of land," approved January 30, 1854, or of "An act to provide for the investment of special funds," passed August 13, 1856, shall reside within the State of Texas.' The period of six months was allowed for this section of the act to be complied with; and if not complied with in that time, it was declared that the charter of said company should be forfeited."

"It has not been denied that this railroad company belongs to the class of roads referred to in this section, entitled to the benefits of the loan and donation of land under these statutes. The objection raised to this ground of forfeiture simply is, that the law of 1857, **imposing this duty upon the officers of the company is unconstitutional and void as to the company.** This law was passed, not only after the grant of the charter, but after the full organization of the company.

And it is contended that if effect be given to this subsequent act of the legislature, it would impair the obligation of the contract contained in the charter, made between the state and the Company. The same objection is taken to the first ground of forfeiture that the Company had failed, after notice, to make a report to the office of the comptroller of the state."

"This raises the question of how far railroad corporations may be regulated and controlled, by enactment of the legislature of the state, passed after the grant of the charter. There is nothing said in the charter about where the president, vice president or directors, shall reside, or about a report of the transactions of the company being made to the controller, or to any other officer of the state. The law requiring these things, it is contended, added new stipulations to the contract, which do not bind the company, as they have not consented to them. This is founded on the fallacious view that the charter is a contract, as between two private persons, containing all the terms of the agreement, and that the state has no right to do anything in relation to the terms or subject matter of the contract, which will require the company to do anything which is not required of it by the charter. The correct view of the subject is, that the charter is a grant of franchise by the state, and the rights granted to the company are limited by the charter. They have a right to be a corporate body; that is, a franchise; they have a right to construct a public railroad, and charge for its use (incidental powers are conferred to accomplish the objects); these constitute a franchise. These franchises are the private property of the company; as such, it is subject to general laws, as other property, unless the charter contains stipulation to the contrary; and as other property, it may be regulated, though not destroyed, by subsequent legislation. There is no restriction in the charter upon the power of the State to pass these laws: they do not destroy

or impair the right of property in the franchises; are not inconsistent with their general objects or free enjoyment; and are merely salutary regulations, as to the manner of enjoyment and exercising these franchises prescribed by the state, for the safety of its interests in this public work, and to insure a faithful performance of the high trust, reposed in the company by the grant. This is clearly within the constitutional rights of the state." State v. Southern Pacific Ry. Co., 24 Tex. 122 to 130.

Here we have a recognition by the Supreme Court of Texas of the very important principle, as applied to the question under discussion, that Article 6423, like the original act of Dec. 19, 1857, dealing with the place of residence of general officers, is "a regulation as to the manner of enjoying and exercising railroad franchises, prescribed by the state, for the safety of its interests in this public work." Surely, if that principle be sound, no further argument is needed to show that such a regulation cannot be stricken down, by a purchase, at judicial sale, of the very thing made the subject of regulation.

When the Supreme Court declared that both franchises and property of railroad companies were "subject to general laws as other property," and that subsequent legislation, regulating the exercise of franchises, in the operation of railroad property, was "clearly within the constitutional power of the state," that Court affirmed the validity of every prinicple applied in the act of 1889, as observed by the Court of Civil Appeals.

To the same effect and equally as conclusive in sustaining the exercise of the police power, which is here challenged, was the declaration of this Court in Eagle Ins. Co. v. Ohio, 153 U. S. 455, 38 L. Ed. 780, as follows: "Equally implied in our judgment is the condition that the corporation shall be subject to such reasonable regulations, in respect to the general conduct of its affairs, as the

Legislature may from time to time prescribe, which do not materially interfere with or obstruct the substantial enjoyment of the privileges the State has granted, and serve only to secure the ends for which the corporation was created. If this condition be not necessarily implied, then the creation of corporations, with rights and franchises which do not belong to individual citizens, may become dangerous to the public welfare, through the ignorance or misconduct or fraud of those to whose management their affairs are entrusted. It would be extraordinary if the legislative department of a government, charged with the duty of enacting such laws as may promote the health, the morals, and the prosperity of the people, might not, when unrestrained by constitutional limitations upon its authority, provide, by reasonable regulations, against the misuse of special corporate privileges, which it has granted, and which could not, except by its sanction, express or implied, have been exercised at all."

The case of L. & N. Ry. Co. v. Kentucky, 161 U. S. 702, decided: "Nearly all the railways in the country have been constructed under state authority, and it cannot be supposed that they intended to abandon their power over them as soon as they were finished. The power to construct them involves necessarily the power to impose such regulations upon their operation as a sound regard for the interests of the public may seem to render desirable. In the division of authority with respect to interstate railways Congress reserves to itself the superior right to control their commerce and forbid interference therewith; while to the states remains the power to create and to regulate the instruments of such commerce, so far as neecssary to the conservation of the public interests."

The general reason why the rights asserted by plaintiff in error, in this connection, cannot over-

ride the statute was given in N. Y. & N. E. Ry. Co. v. Bristol, 151 U. S. 567, 38 L. Ed. 272, 273, in these words: "The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted nor the use of property be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury."

The decisive question before this Court in Union Pacific Railroad Company v. Mason City & Fort Dodge Railroad Company, 199 U. S. 160, 50 L. Ed. 135 to 139, was whether a public duty, such as that impoesd by Article 6423, may be laid upon a railroad corporation and its franchises, for the promotion of the public interests, without violation of any provision of the Constitution, and further, whether such duty though imposed subsequent to the date of a mortgage of the property and franchise of the corporation, must be performed by the purchaser under a judicial foreclosure of such mortgage.

In that case, we find the following proposition in the brief of the eminent counsel for appellant, Mr. Maxwell Evarts and associates, viz: "The appellant under the foreclosure of the mortgage of March 1, 1865, acquired the properties of the old company, free and clear of any lien, charge, or duty, of or to the United States, under any act of Congress, except as specified in the decree of foreclosure." To which the equally eminent counsel for the appellee, Mr. Frank B. Kellogg and associates, replied: First, "The property was brought into existence by virtue of the privileges granted by Congress, and by the money raised by the City and County; and when the first mortgage bondholders claimed a lien upon it, foreclosed the mortgage, and took the property, they, of necessity, accepted that property burdened with the easements imposed by the donators and by Congress." Second, "To say that a railroad company having imposed upon it certain public

duties and obligations can relieve itself of those duties by a re-organization and foreclosure in pursuance of a plan of re-organization like this is, at least, an exceedingly radical doctrine."

In disposing of these contentions, the Court, by Justice Brewer, said:

"The Mason City Company contends that its right to the use of the bridge and approaches was determined by the decision of this Court in Union P. R. R. Co. v. Chicago, R. I. & P. R. R. Co., 163 U. S. 564, 41 L. Ed. 265, 16 Sup. Ct. Rep., 1173. And further, that if mistaken in this contention, it has that right under the statutes of the United Sates and by the terms of a contract between the Union Pacific Railroad Company, on the one hand, and the City of Omaha and County of Douglass, Nebraska, on the other. The case in 163 U. S. arose on two contracts; one between the Union Pacific Railway Company and the Chicago, Rock Island & Pacific Railway Company, and the other between the first-named company and the Chicago, Milwaukee & St. Paul Railway Company. The opinion of the Circuit Court (47 Fed. 15) considered only the contracts, sustained them, and entered a decree for the plaintiffs, awarding the joint use of the bridge and its approaches. That decree was affirmed by the Circuit Court of Appeals, (2 C. C. A. 174, 10 U. S. App. 98, 51 Fed. 309), and the case was thereupon brought on appeal to this Court. Here the decision was rested not simply on the contracts, but also on an obligation held to have been imposed on the defendant by the statutes of the United States, the Court saying, (p. 586, L. Ed. p., 273, Sup. Ct. Rep. 1181): For the provisions of the Pacific Railroad acts relating to the bridge over the Missouri River, its construction and operation, imposed on the Pacific Company the duty of permitting the Rock Island Company to run its engines, cars, and trains over the bridge and the tracks between

Council Bluffs and Omaha, and, we think that South Omaha was included."

"This was followed by several paragraphs pointing out the statutes imposing the duty. Counsel for the Union Pacific Company in the case at bar earnestly contended that so much of that opinion as referred to this statutory obligation was obiter dictum, that the statutes were misconstrued and also that the status of the present Union Pacific Company differs so much from that of the then defendant as to make the ruling inapplicable."

"We are unable to yield our assent to these contentions. While the claim of the plaintiffs in that case was founded directly upon contracts yet, if there were a statutory duty to let them into the joint use of the bridge and its approaches, that was enough to sustain a decree in their favor, and the contracts might be regarded as simply relieving the Court of the work of settling minor matters, such as methods of use, compensation therefor, and matter of control. Indeed, the alleged invalidity of the contracts was rested largely on the scope of the statutes, and the duties to the government and the public imposed thereby on the railroad company. Of course, where there are two grounds, upon either of which the judgment of the trial Court can be rested, and the appellate Court sustains both, the ruling on either is not obiter, but each is the judgment of the Court, and of equal validity with the other. Whenever a question fairly arises in the course of a trial, and there is a distinct decision of that question the ruling of the Court in respect thereto.can, in no just sense, be called mere dictum."

"Further, we see no reason to question the conclusion announced in the former opinion. Chap. 67 of the Laws of Congress, 1871 (16 Stat. at L. 430), granting power to issue bonds for the construction of the bridge, provided that 'for the use and protection of said bridge and property, the

Union Pacific Railway Company shall be empowered, governed, and limited by the provisions of the act entitled "An Act to Authorize the Construction of Certain Bridges, and to Establish Them as Post Roads," approved July twenty-fifth, eighteen hundred and sixty-six, so far as the same is applicable thereto.' "

"This act referred to in this quotation (14 Stat. at L. 244, Chap. 246) authorized the construction of nine bridges, as to the first of which, (a bridge across the Mississippi River at Quincy), it was stated that 'when constructed, all trains of all roads terminating at said river, at or opposite said point shall be allowed to cross said bridge for reasonable compensation, to be made to the owners of said bridge.' "

"To the seven provided for by succeeding sections authority is granted 'upon the same terms, in the same manner, under the same restrictions, and with the same privileges, as is prescribed for in this act in relations to the bridge at Quincy, Illinois.' "

"The remaining one of the nine bridges, (that over the Mississippi River at St. Louis), was to be constructed by the St. Louis & Illinois Bridge Company, 'subject to all the conditions contained in said act of incorporation and amendments thereto, and not inconsistent with the following terms and provisions contained in this act.' "

"It is insisted that the act of 1871 makes applicable to the Omaha bridge only the two or three provisions in the act of 1866 common to all the bridges named therein, and as the section authorizing the bridges at St. Louis contained no direction for its use by terminating railroads. that requirement, although imposed on all the other bridges, was not brought into the act of 1871, and is inapplicable to the Omaha bridge. Counsel for the Union Pacific Company have also called our attention to a few statutes authorizing the

construction of bridges, which contain no provision in respect to use by other railroad companies. As against this, counsel for the Mason City Company have cited over 350 acts, to be found in the several statutes of Congress, from the fifteenth to the thirty-second volume, in each of which there is a direction for use by other companies. Obviously, that was the general policy of Congress, and the few exceptions thereto were dictated by the peculiar circumstances of the cases."

"Bearing in mind this general policy of the government, we think it a fair construction of the act of 1871 that, incorporating, as it did, the provisions of the act of 1866, it must have intended to incorporate not merely those in terms applied to all the bridges, but also one in harmony with that general policy and applied to substantially all, and this, although, in reference to a single bridge, other and special directions were made. Aside, therefore, from any reliance upon the doctrine of stare decisis, the act of 1871 must be considered as requiring the Union Pacific Company to permit the trains of all roads terminating at the Missouri River at Omaha to use its bridge up to the fair limits of capacity, and on payment of reasonable compensation."

"It may be remarked in passing that it is expressly conceded in this case by the Union Pacific Company that there is no question of the reasonableness of the compensation tendered, or the capacity of the bridge and approaches for the service asked by the Mason City Company."

"The final question is this: Is the status of the present Union Pacific Railroad Company, the appellant, so different from that of the Company to which it is a successor as to render inapplicable the decision in the Rock Island case, and to nullify the requirements of the act of 1871?"

"What are the facts? The acts of Congress,

July 1, 1862 (12 Stat. at L. 489, Chap. 120), July 2, 1864 (13 Stat. at L. 356, Chap. 2163), creating the Union Pacific Railroad Company, authorized it to mortgage its road for $16,000 a mile (increased to $48,000 a mile in the mountainous districts), and loaned the credit of the United States for an equal amount, secured by a second lien on the property. The initial point of the main line of the Union Pacific Railroad was fixed on the Iowa bank of the Missouri River, opposite the City of Omaha, Union P. R. Co. v. Hall, 91 U. S. 343, 23 L. Ed. 428. On March 1, 1865, the Union Pacific Railroad Company executed its first mortgage conveying its entire line from the western boundary of the State of Iowa, to its western terminus. This mortgage in terms included the road 'heretofore constructed or hereafter to be constructed.' The act of 1871 authorized a mortgage of not exceeding two and a half million dollars to raise money for the construction of the bridge. This mortgage was executed, the money raised, and the bridge built. The act of 1862, paragraph 18, provided that 'the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line * * *, Congress may, at any time, having due regard for the rights of said companies named herein, add to, alter, amend, or repeal said act.' The act of 1864, which was an amendment of the act of 1862, in paragraph 22, preserved the right of Congress to at any time, 'alter, amend or repeal this act.' It also, in paragraph 9, gave express authority to the company to maintain ferries or construct bridges over the Missouri River. The mortgage of 1865 was foreclosed, and the present appellant, the Union Pacific Company, a corporation organized under the laws of Utah, became the purchaser. The contention now is that, as this mortgage antedated the act of 1871, the purchaser at the foreclosure thereof took the property freed from any burdens or obligations imposed by that

act. It held the bridge as a part of its line, under no obligation to permit its use by any other company.

"We shall not stop to inquire whether this foreclosure and sale was anything more than a re-organization under the form of a judicial proceeding, nor whether, if it were in all respects a bona fide sale to an independent third party, such sale took the property out of the jurisdiction of Congress, and prevented that body from further legislation in aid of the purpose of the act, 'namely to promote the public interest and welfare.' The question before us is whether an amendment to the act, purely administrative in the character of the burdens imposed, aimed to promote the public interest and welfare, enacted while the title to the property remained in the original company, a corporation chartered by Congress, which preserves intact all the pecuniary rights of the company and whose privileges are accepted and acted upon by the company, is denuded of vitality by a sale to a new company under foreclosure of a mortgage executed prior to such legislation. The question must be answered in the negative."

"The first transcontinental railroad, to-wit, the Union Pacific Railroad was a great public undertaking. Private capital was believed to be, and was in fact, unwilling to attempt it. Congress felt that the public interest required its construction. It sought to interest private capital in the enterprise, and believed that the work could be better done through the instrumentality of a corporation. At the same time it became practically the sponsor for the enterprise by large donations of government credit and public lands. In so doing it was not seeking to aid a purely private enterprise. What it did was in the furtherance of the public interests, and it reserved to itself the right to alter, amend, or repeal the act in so far as was necessary to promote those interests

limiting its action by the single proviso that due regard must be had to the rights of the company. Everyone who purchased bonds of the company or gave it credit did so with full knowledge that this was a quasi-national enterprise, and that, if deemed necessary by Congress, the interests of the public might be promoted by additional legislation, in so far as the pecuniary rights of the company and its creditors were not sacrificed. The construction of the bridge, doing away, as it did, with the delay and annoyance of transportation across the river by a ferry, added largely, not merely to the value of the entire property, but also to the great convenience of the traveling and shipping public. The act giving authority for a large issue of bonds, thereby insuring the immediate construction of the bridge, was accompanied by a proviso that, upon reasonable compensation, the use of the bridge should be accorded to other companies. Availing itself of the privileges conferred, the company accepted the amendment in its entirety, and is bound by its terms as fully as though it had embodied them in the contract. So long as the full facilities of the Union Pacific Company were not interfered with thereby, and a reasonable compensation was paid therefor, it cannot in any just sense be held that its rights were not duly regarded. And it cannot be tolerated that a private individual or a State corporation can, by the purchase at a judicial sale of the property, strike down all the legislation of Congress passed subsequently to the mortgage, for the promotion of the public interests. We cannot assent to the contention that the present owner of the property holds it free from obedience to all such legislation. Now, as before the foreclosure and sale, the public interests are to be regarded, and not simply private purposes, wishes, or prejudices."

Since "it cannot be tolerated that a private individual or state corporation, can, by a purchase at judicial sale of the property, strike down all the

legislation of Congress passed subsequently to the mortgage, for the promotion of the public interests," why should the contention be tolerated with respect to the legislation of a sovereign state?

When we consider the very statutes through which plaintiff in error derives its title to this railroad and its franchise to operate same, we think it becomes manifest that this case admitted of no other decision than that under review.

Plaintiff in error contends that Section 5, of the Act of December 19, 1857, "constituted a part of the foreclosed mortgage and bonds." The contention is erroneous, as already pointed out, under New York v. Cook, 148 U. S. 397, and repeated decisions of this Court. But, if the contention were sound, the franchise to operate this railroad passed subject to the regulations of the General Office Statute. For, Section 5, of the Act of December 19, 1857, provides that the power, right and privilege of a purchaser to operate a sold-out railroad must be exercised upon the same terms and under the same conditions and restrictions as are imposed by the charter and the general laws of the State, as shown on pages 224 and 225 of the brief for plaintiff in error.

Construing Section 5, of the Act of December 19, 1857, afterwards Article 4912 Paschal's Digest, and then Article 4260 Revised Statutes, the Supreme Court of Texas expressly held in Acres v. Moyne, 5 Tex. 623, with reference to the operation of a sold-out railroad by purchasers: "The new company by operation of the general law of the state, becomes the successor of the sold-out corporation and occupies to the public in the future the same relation the sold-out company did in the past;" and the Supreme Court of Texas expressly held in Central & M. R. Co. v. Morris, 68 Tex. 49, that a purchase of the property and franchises of a railroad company, under judicial pro-

cess, "would work a transfer to the purchaser of its statutory and common law obligations to the public;" and the Supreme Court of Texas expressly held in G. C. & S. F. Ry. Co. v. Newell, 73 Tex. 338, that a railway company in whomsoever might be its ownership, stood charged with its every duty to the public.

Reviewing these cases, the Supreme Court of Texas says in its opinion in this case: "These decisions were rendered under former Article 4260, brought forward as article 4549 in the revision of 1895, and as amended by the Act of 1910, now article 6624. That article empowered the purchasers, at execution or foreclosure sale, of a railroad and the corporate franchises of a railroad company to operate it in the same manner and to the same extent as though they were the original incorporators of the company, "under the same restrictions as are imposed by their charter and the general laws." They were rendered before the adoption of the Act of 1889, formerly article 4550 in the revision of 1895, and, as amended by the Act of 1910, now article 6625, extending to such purchasers the privilege of incorporating a new company for the operation of the road. In respect to the statutory duties of the former company to the public, a new company, such as the plaintiff in error, organized under article 6625, stands in no more favorable position than that occupied by purchasers under former article 4260, since, as to such company and its ownership and operation of the railroad, it is provided by article 6625 that 'by such purchase and organization no right shall be acquired in conflict with the present Constitution and laws, in any respect.' **By this provision such duties are as clearly transferred to it as they were to a purchaser under former article 4260,** and in relation to them these decisions control the question as plainly in one case as the other."

"It must be remembered that the relation of

the plaintiff in error to this railroad is not that sustained by a company to a railroad which has been constructed under its own charter, or which is unaffected by previous statutory or charter obligations. Its corporate life issues from the ownership of the franchise and property of a former railroad company, since article 6625 conferred upon its incorporators the right of incorporation only in virtue of such ownership. The rights which it possesses and is permitted to exercise in respect to the railroad are founded upon that franchise. It sustains its right of ownership of the property. The plaintiff in error could not succeed to the property without it, since neither is alienable except by statutory consent. and under our statutes one may not be acquired without the other. Sustaining this vital and inseparable relation to the railroad and the title by which it is now held, the plaintiff in error, in our opinion, could not acquire the franchise, and may not exercise the rights in the property which result from its ownership, freed from the limitations to which it was subject in the hands of the former company." I. & G. N. Ry. Co. v. Anderson Co., 106 Tex. 70, 72. See also opinion of the Court of Civil Appeals to this same effect on pages 1005 to 1007 of the Record.

Of course, the argument is utterly fallacious, as applied to regulations in the public interest, of franchises for the operation of railroads, that a mortgagee "loses a property right" unless he can acquire the railroad "without the assumption by him of a burden which did not exist when his right originated."

When the rights here asserted originated, this railroad was not burdened with safety appliance acts, nor with regulations by state and interstate commissions, nor with hours of service laws, nor with car shed and union station acts, nor with numberless other "burdens" of the same nature as that enforced by the Court of Civil Appeals. No

purchaser ought now to expect to be relieved of any such "burdens," no matter how ancient the mortgage, through which he may derive his asserted rights.

Besides, this Court very plainly announced in Conn. Mut. Life Ins. Co. v. Cushman, 108 U. S. 51, 27 L. Ed. 653, that such rights of a prospective purchaser at the foreclosure sale as are here asserted were not of the essence of the mortgage contract, when it said: "The rights of the purchaser at the decretal sale, if one was had, were not of the essence of the mortgage contract, but depended wholly upon the law in force when the sale occurred. The Company ceased to be a mortgagee when its debt was merged in the decree, or, at least, when the sale occurred. Thenceforward its interest in the property was as purchaser, not as mortgagee. And to require it, as purchaser, to conform to the terms for the redemption of the property as prescribed by statute at the time of purchase, does not in any legal sense, impair the obligation of its contract as mortgagee. It assumed the position of a purchaser subject, necessarily, to the law then in force defining the rights of purchasers."

We cannot refrain from observing that it would be difficult to conceive of a case involving a greater strain to find a pretended legislative "burden."

For the power to fix the location of these general offices and shops could not have been exercised, in 1889, more favorably to the mortgagees and owners of the properties and franchises of the International & Great Northern Railroad Company. It cannot be doubted that the legislature might have required changes involving large expenditures of money, and might have required changes, in direct conflict with the choice of the corporate directors.

Here the complaint, in its final analysis, is that the owners and the mortgagees of this railroad have been greviously burdened, because, when the legislature came to designate the fixed and permanent location of these essential instrumentalities, it selected one involving no financial outlay, and selected one approved by years of satisfactory operation, and selected one acquiesced in as suitable by the Company for nearly thirty years before the whim arose to claim an impairment of contract obligation.

We submit that the attack on the decision of the Court of Civil Appeals is without substance, and is wholly unfounded under the settled law as often declared by this Court.

Third.

The questions presented with respect to the sales of 1879 are answered by the admission that "upon a writ of error to a state court," this Court "cannot review its decisions upon pure questions of fact." Kansas City So. Ry. Co. v. Albers Com. Co., 223 U. S. 591; Dower v. Richards, 151 U. S. 658.

The Court of Civil Appeals plainly declares that the pleadings presented an issue of fact as to whether the properties and franchises of the International & Great Northern Railroad Company were sold in 1879 to a third person or were sold to mere trustees for that debtor corporation.

In the language of the court: "Appellant pleaded that on October 14, 1879, the properties and franchises of the International & Great Northern Railroad Company were discharged from contract obligations by virtue of judicial sale under decree of foreclosure to John S. Kennedy and Samuel Sloan, as trustees, who on November 1, 1879 conveyed the properties and franchises unto the International & Great Northern Railroad Company for $10,348,000 in purchase money bonds. The appellees in replication to this de-

fense pleaded that if John S. Kennedy and Samuel Sloan purchased said properties and franchises they did so as trustees for the International & Great Northern Railroad Company and for its stockholders at the date of purchase, in consummation of an agreement between all parties at interest that such sale should not affect the stock ownership in said company nor the company's title to said property and franchises." I. & G. N. Ry. Co. v. Anderson County, 174 S. W. 315, par. (11), Record, page 1016, Vol. III.

The Court of Civil Appeals then find "that the facts and circumstances warrant the inference of fact, which in support of the court's judgment we must assume that the court made, that there was not a bona fide judicial sale." Record, p. 1016, Vol. III.

Hence we find that there is no real foundation for all that is said about the effect of the 1879 sales. The assumed foundation is sales of these properties and franchises to some third person. The fact finding of the trial and appellate courts, warranted by the evidence, is that no such sales were made.

But adverse counsel say the finding of the court was merely against sales having been made bona fide to third persons. It is true the court used the phrase "bona fide sale," but so did this Court when it wished to draw a contrast between judicial proceedings which transfer a title to a third person as purchaser and between mere re-organization agreements designed to avoid any transfer, though consummated under court decrees.

Thus, in Union Pacific Railroad Co. v. Mason City & Fort Dodge Railroad Co., 199 U. S. 160, this Court observed that it would not stop to inquire whether that foreclosure sale was "anything more than a re-organization under the form of a judicial proceeding" or whether it was "a bona fide sale to an independent third party."

However, it would be idle to consume more time of this Court in demonstrating that the issue of fact decided by the Court of Civil Appeals was the issue shown to have been joined between the parties, viz: whether Kennedy and Sloan purchased as trustees "in consummation of an agreement between all parties at interest that such sale should not affect the stock ownership in said company nor the company's title to said properties and franchises."

No collateral attack is here involved on the foreclosure proceedings. On their faces those proceedings undertook to vest title in Kennedy and Sloan in trust for undisclosed beneficiaries. The pleadings and proof of defendants in error disclosed those beneficiaries to be the debtor corporation and its old stockholders. Record, pp. 376, 377, 378, Vol. I; pp. 974, 975, Vol. III; and pp. 735, 849, 850, Vol. II.

No doctrine could be more dangerous than one which would deny to every court, state or federal, the power to determine, in the exercise of its jurisdiction, the effect of decrees of other courts, through which rights are sought to be maintained or defeated. Reardon v. White, 87 S. W. 367; Dillingham v. Kelley, 27 S. W. 807.

Even if Sloan and Kennedy had not been designated as mere trustees on the face of the judicial proceedings, the facts in this record would have prevented such proceedings from discharging the personal obligations under consideration.

For, as this court declared in Jackson v. Luedling, 88 U. S. 616: "A sale may have been conducted legally in all its processes and forms and yet the purchaser * * * may hold the property as a trustee." And, as said in Mugler v. Kansas, 123 U. S. 623: "The courts are not bound by mere forms nor are they to be misled by mere pretence."

The opposing brief seems to repeatedly con-

cede that under the Boyd case, these proceedings could not discharge personal obligations in favor of unsecured creditors.

But it is strenuously insisted that proceedings which would not discharge unsecured debts did discharge the personal obligations of these locative contracts. The reason for the attempted distinction appears to be "that it would be the palpable misuse of language, arising from an unsound mental conception, to say that a fund exists for the payment of an obligation when the obligation is not solvable in money." Plaintiff in error's conception of the obligation of these personal contracts as not solvable in money evidently changed after defining that obligation on page 132 of its brief as one "without security" and "for breach of which only an action of damages would lie," and after defining that obligation on page 90 as a "liability contracted by the I. & G. N. R. R. Company and its constituents in 1872 and 1875."

We submit that all unsecured personal obligations and liabilities of a debtor stand on the same plane. As long as property, which is not exempt, belongs to a debtor it may be subjected to the payment of his personal obligation or liability. A bona fide sale relieves the property simply because one man's property may not be taken to satisfy another's personal obligation or liability. But, no matter what form a transaction may take, as long as non-exempt property remains that of the debtor, it stands charged with his personal obligations and liabilities.

The Boyd case is so decisive here that we are content to close this discussion by merely quoting its language, as follows:

"The appellants attack the ruling from various standpoints based upon many facts in the voluminous record. But, having been summarized in the statement, they will not be discussed in

detail, inasmuch as the case, though presenting various aspets, is controlled by a single proposition. For although Boyd was not a party to the foreclosure, and was not made such by the publication notifying creditors to prove their claims, yet the original and supplemental decrees were free from any moral or actual-fraud, and were, in form and nature, sufficient to have passed a title good against him, unless the contract of reorganization, reserving a stock interest in the new company for the old shareholders, left the property still subject to the claims of non-assenting creditors of the Northern Pacific Railroad."

"Corporations, insolvent or financially embarrassed, often find it necessary to scale their debts and readjust stock issues with an agreement to conduct the same business with the same property under a reorganization. This may be done in pursuance of a private contract between bondholders and stockholders. And though the corporate property is thereby transferred to a new company, having the same shareholders, the transaction would be binding between the parties. **But, of course, such a transfer by stockholders from themselves to themselves cannot defeat the claim of a non-assenting creditor.** As against him the sale is void in equity, regardless of the motive with which it was made. For if such contract reorganization was consummated in good faith and in ignorance of the existence of the creditor, yet when he appeared and established his debt, the subordinate interest of the old stockholders would still be subject to his claim in the hands of the reorganized company. San Francisco & N. P. R. Co. v. Bee, 48 Cal. 398; Crenell v. Detroit Gas Co., 112 Mich., 70, 70 N. W. 413. There is no difference in principle if the contract reorganization, instead of being effectuated by private sale, is consummated by a master's deed under a consent decree."

"It is argued that this is true only when there is fraud in the decree,—the appellants insisting that in all other cases a judicial sale operates to pass a title which cuts off all claims of unsecured creditors against the property. They rely on Wenger v. Chicago & E. R. Co., 51 C. C. A. 660, 114 Fed. 34; Farmers' Loan & T. Co. v. Louisville, N. A. & C. R. Co., 103 Fed. 110; Pennsylvania Transp. Co.'s Appeal, 101 Pa. 576; Kurtz v. Philadelphia & R. R. Co., 17 Pa. 59, 40 Atl. 988; Paton v. Northern P. R. Co., 85 Fed. 838; Shoemaker v. Katz, 74 Wis. 374, 43 N. W. 151; Bame v. Drew, 4 Denio 278; Ferguson v. Ann Arbor R. Co., 17 App. Div. 336, 45 N. Y. Supp. 172; MacArdell v. Olcott, 104 App. Div. 263, 93 N. Y. Supp. 799, s. c. 189 N. Y. 368, 82 N. E. 161; Candee v. Lord, 2 N. Y. 269, 51 Am. Dec. 294. Some of these cases hold directly and others inferentially, that, in the absence of fraud, as here, a judicial sale is binding upon non-assenting creditors even though the decree was entered and the sale was made in pursuance of a contract, to which the stockholders were parties, and by which they were to retain a stock interest in the purchasing company. This makes the creditor's legal right against the shareholders' interest depend upon the motive with which they act and the method by which they carry out the scheme. If they do so by means of a private contract, though in ignorance of the existence of the creditor, the property remains liable for his debts. If they do so by means of a judicial sale under a consent decree, and in like ignorance or disregard of his existence, the result is said to be different, although the shareholders should reserve exactly the same interest and deprive the creditor of exactly the same right."

"Any device, whether by private contract or judicial sale under consent decree, whereby stockholders were preferred before the creditor, was invalid. Being bound for the debts, the purchase

of their property, by the debts, the purchase of their benefit, put the stockholders in the position of a mortgagor buying at his own sale. If they did so in good faith and in ignorance of Boyd's claim, they were none the less bound to recognize his superior right in the property, when, years later, his contingent claim was liquidated and established. That such a sale be void, even in the absence of fraud in the decrees, appears from the reasoning in Louisville Trust Co. v. Louisville, N. A. & C. R. Co., 174 U. S. 683. 43 L. Ed. 1134, 19 Sup. Ct. Rep. 874, where, assuming that foreclosure proceedings may be carried on to some extent, at least, in the interests and for the benefit of both mortgagee and mortgagor (that is, bondholder and stockholder), the Court said that 'no such proceedings can be rightfully carried to consummation which recognize and preserve any interest in the stockholders without also recognizing and preserving the interest, not merely of the mortgagee, but of every creditor of the corporation * * *.' Any arrangement of the parties by which the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation * * *."

"In saying that there was nothing for unsecured creditors, the argument assumes the very fact which the law contemplated was to be tested by adversary proceedings, in which it would have been to the interest of the stockholders to interpose every valid defense If, after a trial, a sale was ordered, they were still interested in making the property bring its value, so as to leave a surplus for themselves as ultimate owners. Even after sale they could have opposed its confirmation if the bids had been chilled, or other reason existed to prevent its approval. In the present case all these tests and safeguards were withdrawn. The stockholders, who, in lawfully protecting themselves, would necessarily have pro-

tected unsecured creditors, abandoned the defense that the foreclosure suit had been prematurely brought. The law, of course, did not require them to make or insist upon that defense if it was not meritorious, nor does it condemn the decree solely because it was entered by consent. But the shareholders were not merely acquiescent. They, though in effect defendants, became parties to a contract with the creditors, who were in effect complainants, by which, in consideration of stock in the new company, they transferred their shares in the railroad to the railway. The latter then owning the bonds of the complainant and controlling the stock in the defendant, became the representative of both parties, in interest. In such a situation there was nothing to litigate, and so the demurrer to the bill was withdrawn. An answer was immediately filed, admitting all the allegations of the bill. On the same day, 'no one opposing,' a decree of foreclosure and sale was entered. Two months later the property was sold to the agreed purchaser at the upset price named in the decree. In a few days and by consent that sale was confirmed. As between the parties and the public generally, the sale was valid. As against creditors, it was a mere form. Though the Northern Pacific Railway Company was divested of the legal title, the old stockholders were still owners of the same railroad, encumbered by the same debts. The circumlocution did not better their title against Boyd as a non-assenting creditor. They had changed the name, but not the relation. The property in the hands of the former owners, under a new charter, was as much subject to any existing liability as that of a defendant who buys his own property at a tax sale." U. P. R. Co. v. Boyd, 228 U. S. 501.

We have purposely discussed thus far only the effect of the 1879 sales on the personal obligations of the locative contracts. We have pursued this course because of the stress laid on the sup-

posed discharge of these personal obligations in 1879 by the able counsel for plaintiff in error.

But, as we have already indicated, the sale of 1911 completely discharged these properties and franchises from the personal obligations of the locative contracts, and the judgment under review enforces not such personal obligations but the statutory obligations imposed by the Legislature of Texas.

And, even if the personal obligations had been discharged in 1879, such discharge could not prevent the enforcement of the statutory obligation.

Because it is quite too plain for serious controversy that when the statute was enacted "the general offices and shops and round houses" were "located on the line of a railroad in a County which had aided said railroad by an issue of bonds in consideration of such location being made," Record, p. 1015, and, on such facts the command of the statute is that "then said location shall not be changed."

The opinion of the Court of Civil Appeals makes this plain when it says:

"Intending, as the Legislature did, to establish a fixed locality for the general offices, shops, and round houses of a railway company, and prevent their being movable at the will of the company, the language of the act should be given that reasonable construction which would accomplish the purpose and intentions of the law. By expressly declaring, in the second paragraph of the article, that the principal offices shall not be changed from the locality where they "were located on the line of railroad in a county which has aided said railroad by issuance of bonds in consideration of such location being made," it was evident that at the time the act went into effect the then place in which the offices were "located on the line," in consideration of a bond

issue of such county, would be the only locality thereafter allowable to such railway company at which to fix and keep the same." International & Great Northern Railway Co. v. Anderson County, 174 S. W. 312, Record p. 1010, Vol. III.

Fourth.

The temptation is great to review the facts in order to show from the record, that corporate obligations were never more deliberately authorized and ratified, and were never founded on more abundant and liberal considerations than those which bound the predecessors of plaintiff in error to maintain these offices and shops at Palestine.

But all this, together with the statutory obligation, appears so clearly and abundantly from the findings of fact in the opinion under review on pages 1010 to 1014 of the Record, that we do not feel justified in making further answer to Section VI of the opposing brief than to refer to those pages of the opinion.

Fifth.

This brings us to the last proposition in the briefs, which is that the statute is void because a direct regulation of interstate commerce.

The facts plead by plaintiff in error as a basis for this contention were simply that the Railway Company was engaged in interstate and intrastate traffic, that Houston was ten times as large as Palestine, and that Palestine had no large industrial or clerical population, while there was a large supply of trained and clerical assistants obtainable at Houston. The conclusion was averred that plaintiff in error could best serve the public and its own interests through offices at Houston. Record, pp. 138, 139, 140.

Plaintiff in error introduced the deposition of one witness, Ira H. Evans, who had been connected with the Company as general officer or

director from 1873 to 1909, and who had served the Company at both Houston and Palestine. He testified as follows: "I state that in my opinion Palestine was, in 1875, and has ever since been, the logical and best location for the I. & G. N. general offices and shops, because it is the most central point on its system of railroad for such purposes. It is located on high ground, in a healthy country, where, in my own time, we found, by experience, that we could work with much more efficiency than we could at tide water at Houston; and it was generally agreed, by all officers of the company at the time of the removal, that such removal was very desirable from every point of view, not only because of the central location, but also because of the healthfulness and elevation of Palestine above sea level. Apparently, in my judgment, the I. & G. N. R. R. Company made a great mistake, from the standpoint of its own interest, in the operation of the railroad and the efficiency of its office force, in removing the general offices from Palestine to Houston." Record, p. 974, Vol. III.

Ex-Governor T. M. Campbell testified that he had supervision of the traffic over the I. & G. N. Railroad for an aggregate of six years as general manager and receiver, and that "he could not conceive of any burden whatever," which would be put on the road, if it should be required to keep its general offices at Palestine, but that he "believed and has always believed that Palestine is the logical point for the general offices and shops, from the standpoint of efficient operation, for traffic, and from every other standpoint." Record, p. 992, Vol. III.

A. L. Bowers testified that he had been acquainted with the Railway Company's lines and its interchanges of traffic in intrastate and interstate commerce for the last forty years, having formerly been Superintendent of the Company, and he did not think that "the defendant would

be burdened by requiring it to operate its road from general offices at Palestine instead of Houston." Among his many reasons for his opinion were that Palestine was on the main line of this railroad and Houston was not, that clerk hire and living expenses were higher in Houston than at Palestine, that Palestine was just as accessible as Houston, and that it was a great advantage to have the machine shops and general offices at the same place because best results were obtained when all were kept in close touch. Record, pp. 996, 997, Vol. III.

It is true that one witness, Horace Booth, gave a contrary opinion, but he admitted that the traffic manager of plaintiff in error, though called by a changed name, was neither at Houston nor at Palestine, but was at New Orleans. Record, pp. 968 to 972.

Mr. Booth's former superior was G. H. Turner. Mr. Turner testified that: "Booth was his assistant at Houston, and there were assistants at all the different large cities. It was Booth's business to look after business in the Houston territory, and it was left largely to him. The witness visited Houston as often as he could, and Galveston and other points, but in the main the local representatives looked after the traffic business, and were responsible therefor in their several territories. That, in his opinion, it would not make any difference or add any burden on the company, or its property, or on interstate commerce, to operate the defendant from Palestine instead of Houston; that the defendant still has a freight office in Houston, which Booth used to fill, and a Division Freight Agent there; and that this man was responsible for the Houston business; that the defendant was supposed to have similar men at Ft. Worth, Waco, Dallas and San Antonio and the larger cities, and that the General Freight Agent went around and visited them and conferred with them; that he

would consider Palestine the most logical point for the location of the general offices and shops and a good point to live at, and healthy, and cheaper, and more comfortable than Houston, and just as convenient. The General Freight Agent ought to be out on the road a good deal, wherever his office is." Record, pp. 993. 994, Vol. III.

It was undisputed that Palestine was the best location for shops and the jury so found.

The very question attempted to be raised by the pleadings, viz: from what place could general offices best serve the public, shows that the statute had a real relation to the public convenience. It was the peculiar province of the Legislature to determine that question, and the conflict of opinion disclosed by this record but demonstrates the propriety of legislative action.

It would seem that if anything is the especially appropriate subject of state law, it is the domicile of a corporation, whose existence and powers are derived from state law.

This is conceded to be true as to the requirement that "the domicile of the corporation should be within the sovereignty which created it." But, the contention is that the state is not the right repository of the power to determine how the public interest may be best promoted as between locations wholly within the state. To state this contention is to refute it.

But this last objection of plaintiff in error to the statute is completely and thoroughly answered by the proposition that if Congress possesses any authority here it has never attempted to exercise it, and that in so far as the statute may affect interstate commerce, it does so only indirectly and remotely.

As was said in Atlantic C. L. R. Co. v. Mazursky, 216 U. S. 132, 54 L. Ed. 417, "the statute does not

attempt to regulate interstate commerce and imposes no tax or burden thereon. It is supported by the general principle, declared in Sherlock v. Alling, 93 U. S. 99, 104, 23 L. Ed. 819, 820, and enforced in Smith v. Alabama, 124 U. S. 465, 31 L. Ed. 508, and Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. Ed. 352, that State legislation, relating to the rights, duties and liabilities of citizens and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within the territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit."

Again, in Peoria R. Co. v. Hughes, 191 U. S. 488, 48 L. Ed. 272, the rule governing here was briefly put in these words: "It is well settled that a State may make valid enactments in the exercise of its legislative power to promote the welfare and convenience of its citizens, although in their operation they may have an effect upon interstate traffic." This rule is referred to as one "oft-repeated" in M. P. R. Co. v. Larabee Flour Mills Co., 211 U. S. 622, 53 L. Ed. 360.

That this rule, as frequently applied by this Court, sustains this statute from the attack that it regulates interstate commerce, is regarded as too well settled to justify further argument. To that effect may be cited C. R. I. & P. R. Co. v. Arkansas, 219 U. S. 452-467; M. K. & T. R. Co. v. Harris, 234 U. S. 412; L. & N. R. Co. v. Higdon, 234 U. S. 600; St. L. I. M. & S. R. Co. v. Arkansas, 240 U. S. 520; and Valley Steamship Co. v. Wattawa, 244 U. S. 204.

We submit that the judgment of the Court of Civil Appeals enforces the public policy of the State of Texas, in the prevention of oppression and corruption, through the exercise by railway companies of the power to keep their offices and shops migratory, and that the fixed location made by the state legislature as the guardian of the

public convenience and welfare should be sustained. Wherefore, defendants in error respectfully pray that the judgment of the state court be in all things affirmed.

Respectfully submitted,

F. D. McKENNEY,
A. G. GREENWOOD,
W. C. CAMPBELL,
JNO. C. BOX,
THOS. B. GREENWOOD,
Attorneys for Defendants in Error.

4

Office Supreme Court, U. S.
FILED
APR 1 1918
JAMES D. MAHER,
CLERK.

In the Supreme Court of the United States

OCTOBER TERM, 1917.

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
ANDERSON COUNTY, ET AL., Defendants in Error.

No. 243.

ANSWER TO QUESTION OF JUSTICE PITNEY TO MR. DABNEY ON CLOSING ARGUMENT FOR THE PLAINTIFF IN ERROR.

Here is stated the answer made to the question of Justice Pitney, explained by bringing to one point statements in arguments and briefs, but not in any particular going outside thereof.

The question of Justice Pitney was this:

Might not the railroad be bound by accepting a charter in 1911, issued under the conditions of the Act of the Legislature of Texas of 1910; not because of any contract obligation theretofore resting on it or its property, but because of the implication in the statute (if any there was) that it should keep the shops and offices at the place where some predecessor in title had contracted to keep them? Might not the railway be so bound as a condition of obtaining the charter?

nated by the foreclosure proceedings of 1879, that then the plaintiff in error, chartered in 1911, became bound. This, of course, raises a fundamental Federal question, for the Federal statute guarantees the rights, titles and immunities derived under these decrees of 1879 of the United States Court, and besides it is fundamental in jurisprudence that no court can set aside the decrees of another court.

Besides we consider such construction of the Statute of 1910 would have been unconstitutional on many grounds set out.

Respectfully,

BAKER, BOTTS, PARKER & GARWOOD,
H. M. Garwood.

ANDREWS, STREETMAN, BURNS & LOGUE,
Frank Andrews.

DABNEY & KING,
Samuel B. Dabney.

N. A. STEDMAN,
F. A. WILLIAMS,
Attorneys for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911

No. 243

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY ET AL., PLAINTIFFS IN ERROR,

v.

ANDERSON COUNTY, CITY OF PALESTINE, GEORGE A. WRIGHT ET AL.

IN ERROR TO THE COURT OF CIVIL APPEALS, EIGHTH SUPREME JUDICIAL DISTRICT, STATE OF TEXAS.

SUPPLEMENTAL STATEMENT AND SUGGESTIONS AS TO ABSENCE OF ANY SUBSTANTIAL FEDERAL QUESTION FOR DECISION.

FREDERIC D. McKENNEY,
A. G. GREENWOOD,
W. C. CAMPBELL,
JNO. C. BOX,
THOS. B. GREENWOOD,
Attorneys for Defendants in Error.

TABLE OF CONTENTS.

	Page.
The record presents no substantial Federal question for decision by this Court	1
The concurring judgments of the State courts are rested upon non-Federal grounds broad enough to sustain them	1
Summary statement of principal facts and concrete issue between the parties	2
Entire matter one of purely local concern dependent for solution upon construction and application of State laws	4
History of proceedings in State courts and pertinent excerpts from opinions delivered in the course thereof	5
Action by Court of Civil Appeals on first appeal to it	8
Excerpts from opinion of Supreme Court of Texas on first appeal to it	9
No Federal question attempted to be raised to this point	11
Special verdict of jury	12
Excerpts from opinion of Court of Civil Appeals on second appeal to it	12
Application to Supreme Court of Texas for writ of error denied	18
Argument	19
Opinion of Court of Civil Appeals establishing non-Federal base for its decree and denying the presence of any Federal question	22

CASES CITED.

Adams *vs.* Russell, 229 U. S., 353, 358	27
Bi-Metallic Invest. Co. *vs.* B'd of Equalization, 239 U. S., 441	29
Howe *vs.* Scott, 233 U. S., 658	28
Chicago Junction R. Co. *vs.* King, 222 U. S., 222	28
Enterprise Irrig. Dist. *vs.* Canal Co., 243 U. S., 157, 164	27
Eustis *vs.* Bolles, 150 U. S., 361	27
Fisher *vs.* New Orleans, 218 U. S., 438, 440	28
Harrison *vs.* Myer, 92 U. S., 111	29
New Orleans Water Co. *vs.* Easton, 121 U. S., 388	28
Packer *vs.* McLain, 237 U. S., 469	29
Perryman *vs.* Woodward, 238 U. S., 148	29

	Page
Pierce *vs.* Illinois, 238 U. S., 446	29
Portland, &c., Co. *vs.* R. R. Com'n, 228 U. S., 397	28
Railway Co. *vs.* Fitzgerald, 160 U. S., 556	27
Rankin *vs.* Emigh, 218 U. S., 27	28
Stewart *vs.* Kansas City, 239 U. S., 14	29
Southern Railway Co. *vs.* Puckett, 244 U. S., 571	28
St. Louis Southwestern Ry. Co. *vs.* City of Tyler, 212 U. S., 552.	27
Texas & Pacific R. Co. *vs.* R. R. Com'n, 232 U. S., 338	28
Washington *vs.* Miller, 235 U. S., 422	29
Waters Pierce Oil Co. *vs.* Texas, 212 U. S., 26, 116	27, 28

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 243.

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

ANDERSON COUNTY, CITY OF PALESTINE, GEORGE A. WRIGHT ET AL.

IN ERROR TO THE COURT OF CIVIL APPEALS, SIXTH SUPREME JUDICIAL DISTRICT, STATE OF TEXAS.

SUPPLEMENTAL STATEMENT AND SUGGESTIONS AS TO ABSENCE OF ANY SUBSTANTIAL FEDERAL QUESTION FOR DECISION.

The Record presents no substantial Federal Question for decision by this Court.

The concurring judgments of the State courts are rested upon non-Federal grounds broad enough to sustain them.

The writ of error should be dismissed for want of jurisdiction.

The International and Great Northern RAILWAY Company, plaintiff in error here and sole defendant in the court of first instance, hereafter called the Railway Company, was incorporated August 8, 1911, by the purchaser and associates at foreclosure sale of the properties of the International and Great Northern RAILROAD Company, hereafter referred to as the Railroad Company, under an act of the legislature of the State of Texas approved September 1, 1910, commonly known as the International and Great Northern Act and now designated as articles 6624 and 6625, Revised Statutes (Texas) 1911, which prescribed the conditions upon which such purchasers of the property and franchises of a railroad company sold out by a receiver acting under order of any court of competent jurisdiction might organize a new corporation for the purpose of maintaining and operating same and other property in connection therewith "under restrictions imposed by law." It is expressly declared by that law, that the charter of the sold-out company, together with the powers, right, privileges and benefits thereof, shall pass to such purchasers and associates, if any, "subject to the terms, provisions, restrictions and limitations imposed and to be imposed by law," and *"that by such purchase and organization, no right shall be acquired in conflict with the present Constitution and laws in any respect,"* * * * (Italics supplied).

As recited in and by its articles of incorporation (R., 701-707) the properties of the RAILROAD Company were purchased by the RAILWAY Company June 13, 1911, at a judicial sale, pursuant to decree of foreclosure and sale passed May 10, 1910, by the United States Circuit Court for the Northern District of Texas. Among other things it is certified in and by said articles of incorporation that the RAILWAY Company "shall have all of the powers and privileges conferred by the laws of the State of Texas upon chartered railroads" and that its general offices and principal business

office shall be established and maintained in "the City of Houston, in Harris County, State of Texas" (R., 703).

At the date of said decree of foreclosure (May 10, 1910), as well as at the date of sale and purchase (June 13, 1911), and also at the date of incorporation of the RAILWAY Company (August 8, 1911), there was on the statute books of Texas a law approved March 27, 1889, commonly called "The Office-Shops Act of 1889," now designated as articles 6423 and 6424, Revised Statutes (Texas) 1911, whereby "every railroad company chartered by this State (Texas), or owning or operating any line of railway within" the State was required to keep and maintain permanently its general offices within the State * * * "at such place within this State where it shall have contracted or agreed * * * to locate its general office for a valuable consideration;" * * * and "shall keep and maintain their machine shops and roundhouses, or either, at such place or places as they may have contracted to keep them for a valuable consideration received; *and if said general offices and shops and roundhouses, or either, are located on the line of a railroad in a county which has aided said railroad by an issue of bonds in consideration of such location being made, then said location shall not be changed; and this shall apply as well to a railroad that may have been consolidated with another as to those which have maintained their original organization.*" (Italics supplied.)

For more than thirty (30) years prior to August 8, 1911, the date of incorporation of the RAILWAY Company, as likewise prior to May 10, 1910, the date of decree for foreclosure, the general offices, shops and roundhouses of the RAILROAD Company had been located and maintained on the line of its road at Palestine, Anderson County, Texas, in part consideration of and for a bond issue of $150,000 voted by the electors of Anderson County "early in 1872," and delivered by Anderson County to the RAILROAD Company Janu-

ary 29, 1873, pursuant to a contract or agreement whereby the RAILROAD Company, in consideration of such issue and the building of certain rent houses for use of its officers and employees, agreed that it would locate and keep its general offices, machine shops and roundhouses at Palestine (R., 1012-1013).

Whether in view of these facts and the express terms of The General Office-Shops Act of 1889, in force at the time of the purchase of the railroad properties and the organization of the RAILWAY Company, the latter, notwithstanding its intention, as expressed in its articles of incorporation to establish and keep its general offices, machine shops and roundhouses at Houston, Texas, can and should be required to continue same at Palestine as heretofore, is the single issue of practical moment presented for decision by the pleadings in this cause. We submit with deference that the issue is one of purely local interest, affecting only citizens and bodies politic and corporate of the State of Texas, and the relations of the parties litigant as well as the right of the plaintiffs to the relief prayed by their bill depend entirely upon the applicability in the circumstances of provisions of purely local law.

SUMMARY STATEMENT.

History of proceedings in State courts, and pertinent excerpts from opinions delivered in the course thereof.

This action was commenced in the District Court of Anderson County, Texas, by petition filed February 7, 1912, by Anderson County itself, and certain individuals residents of said County and of Palestine, its county seat (defendants in error here), against the International and Great Northern Railway Company, plaintiff in error here (R., 1).

The purpose of the action was to compel compliance on part of said Railway Company with its statutory duty under the above indicated laws of the State of Texas to continue to maintain at Palestine, aforesaid, its general offices, machine shops and roundhouses, in accord with the obligatory provisions of two contracts made in the years 1872 and 1875, respectively, between the citizens of Palestine and certain Railroad Companies, predecessors in corporate interest of the plaintiff in error.

By the contract of 1872 the Houston and Great Northern Railroad Company, a Texas corporation (R., 2), agreed to extend its line of railroad to intersect the International Railroad Company, another Texas corporation (R., 3), at Palestine and to there locate and establish, and forever thereafter keep and maintain the general offices, machine shops and roundhouses of the Houston and Great Northern Railroad at said city, in consideration of the issuance and delivery by Anderson County, duly authorized so to do by its electors, of $150,000 par of interest-bearing bonds, upon the completion of said extension to the intersecting point, the estab-

lishment in the vicinity of a depot, and the operation of trains thereto (R., 3, 4).

The issue of bonds was duly authorized, and the railroad company, having completed its extension, built its depot and commenced operating its cars thereto, on January 29, 1873, and thereafter applied for and received said bond issue, first reiterating its agreement "to establish and forever maintain" and representing that it "had already begun to establish and would thereafter forever maintain" its general offices, machine shops and roundhouses at Palestine (R., 4-7).

In September, 1873, the Houston and Great Northern Railroad Company and the International Railroad Company "united, consolidated and merged" their respective properties and franchises; so forming a new company under the name or title of the International and Great Northern Railroad Company. This merger was specifically ratified and confirmed by special acts of the Legislature of Texas approved April 24, 1874, and March 10, 1875, respectively. By the act of 1874 it was expressly provided "that all acts theretofore done in the name of either of said companies should have the same binding force and effect upon the International and Great Northern Railroad Company" that they had had upon either of the merged companies (R., 8).

Previous to the merger and consolidation of the two companies the Houston and Great Northern Railroad Company, in further part performance of its said contract had established at Palestine its machine shops and roundhouses, and so maintained same until said merger and thereafter.

In 1875 the International and Great Northern Railroad Company, for itself, expressly contracted with the citizens of Palestine, to at once locate and thereafter forever maintain at Palestine, the general offices, machine shops and roundhouses of the consolidated company, in consideration of the bond issue previously authorized and delivered by Anderson County to its predecessor, Houston and Great Northern

Railroad Company, and the immediate construction by citizens of Palestine, at their own cost, of "any and all houses, at Palestine, Texas, which might be demanded by the International and Great Northern Railroad Company, in accordance with such plans and specifications as might be furnished by the Company, through its officers, for occupancy, at reasonable rentals, by employees of said Company and their families, and especially by general officers of Company, their families and clerks (R., 9). All of such houses as demanded by the Railroad Company, were constructed by said citizens and were put to the use for which intended (R., 10), and in 1875 the Company established and until September 1, 1911, continuously maintained its general offices as well as its machine shops and roundhouses at Palestine (R., 11).

Notwithstanding the existence of such contract obligations and the express provisions of the local law which purported to protect and compel performance of same, the RAILWAY Company, on or about September 1, 1911, undertook to remove certain of its general offices from Palestine to Houston and to establish the office of its Traffic Manager in the City of New Orleans, and declared its purpose under certain conditions to similarly alter the location of its machine shops and roundhouses (R., 20, 21).

Petitioners prayed injunction to prevent threatened removal, and to compel the return to Palestine of the offices which had been removed to Houston or elsewhere (R., 23).

Upon a consideration at Chambers, relief was afforded in both aspects by the District Court of Anderson County, Texas, and the writ of injunction issued as prayed (R., 27-31).

In opposition the Railway Company appeared "for the sole purpose of objecting to the jurisdiction of said District Court (R., 33) and such objection having been overruled (R., 45) a change of *venue* was taken to Cherokee County (R., 45).

On appeal from the order of the District Judge, made in Chambers, the Court of Civil Appeals of Texas, reciting at great length the facts set up in the pleadings and the affidavits filed in support thereof, and upon consideration of the statutes relied upon by the respective parties, ruled that under the circumstances the *venue* of the action had been properly laid in Anderson County; that the contracts of 1872 and 1875 were valid when executed and rendered consideration of the Act of 1889 in the circumstances unnecessary; that the provisions of Art. 4367 of the Revised Statutes of Texas, "is not permissive but mandatory" and that the contracts "for the maintenance of machine shops, roundhouses and general offices of the International & Great Northern Railway Company at Palestine cannot be regarded as a mere personal obligation of that Company, but was (is) an obligation or duty imposed by law which followed the road into the hands of the purchaser and may not be disregarded by the appellant company, which holds the road and property of the old company subject to the same liability that attached to it in the hands of the purchaser at the foreclosure sale." Concluding, notwithstanding the above, that no sufficient emergency justifying the issuance, without notice to defendant, of the mandatory portion of the order complained of, which required the return of certain of the Railway Company's general offices from their then location to the City of Palestine, the court ordered the decree for injunction to be reformed by omitting such portion and as so reformed to be affirmed.

International & Great Northern Ry. Co. *vs.* Anderson County, 150 Southwestern Reporter, p. 239.

That decision was rendered June 20, 1912, and an elaborate petition for rehearing immediately thereafter filed by the Railway Company, was denied October 17, 1912.

On appeal from such order of affirmance the Supreme

Court of Texas (106 Texas Reports, 60), speaking through Mr. Justice Phillips, stated (p. 63) that

> * * * "This case involves the right of a railroad company, incorporated under Article 6625, Revised Statutes, 1911, for the purpose of owning and operating a railroad previously owned by another company whose franchises, privileges and property had been acquired by the incorporators through a judicial foreclosure sale, to change the location of the general offices, machine shops and roundhouses of the road, made by the former company under contract for a valuable consideration and in a county, which, in consideration of such location, had aided it by an issue of bonds, and accordingly subject to the provisions of article 6423, commonly known as the GENERAL OFFICE STATUTE.

After elaborately first stating (p. 65) at considerable length the pleadings and the course of the case to the then date, the court declared the questions presented for decision to be

> "1. Was the *venue* of the suit properly laid in Anderson County?
> "2. Are the obligations and duties that lay upon the International & Great Northern Railroad Company in respect to the maintenance at Palestine of the general offices, machine shops and roundhouses of the railroad, likewise enforceable against the plaintiff in error, a distinct corporation and the owner of the road through purchase at foreclosure sale?"

Holding that the rule of the State practice permitting "the allegations of the petition to govern the *venue*" had application in the premises, it was concluded that "the question of the legal domicile of the plaintiff in error is inseparable from the main issue to be determined" (R., 67).

Upon the main issue the court declared itself to be of opinion that the requirements of Article 6423 (Revised Statutes, 1911)

* * * "expressed in unmistakable terms a plain limitation upon the corporate franchise of any company that in the matter of the location of its general offices, machine shops and roundhouses is subject to the terms of Article 6423. Obedience to its requirements is made a condition of the exercise of the company's corporate powers and the enjoyment of its corporate privileges. The right of the corporation to subsist is dependent upon their observance, and its corporate franchise is therefore impressed with their obligation. The duty to which the company is subject under Article 6423 being thus imposed upon its corporate franchise and made a condition of its exercise, has all the force and obtains just as fully as though its assumption were made a condition of its grant. It is a qualification of its franchise and inseparable from it;" * * * "The concern of the State in their performance, manifested by these enactments of its legislative department and the penalty prescribed for their violation, necessarily impresses them with a public nature. A duty laid by law upon a railroad corporation, for whose breach its charter may be forfeited at the suit of the State, can hardly be considered as a private duty. As its performance is by statute made a condition of the exercise of corporate rights and privileges which vitally affect the public, it is essentially for the benefit of the public." * * * "For these reasons we are clearly of the opinion that the duty to which, according to the petition, the International & Great Northern Railroad Company was subject, under Article 6423, in respect to the maintenance of its general offices, machine shops and roundhouses at Palestine, was a public duty." (p. 69) * * *

Citing and quoting at some length from *Union Pacific R. R. Co. vs. Mason City & Ft. Dodge R. R. Co.*, 199 U. S., 160, wherein "it was held that a railroad company as the purchaser of the corporate privileges and property of another under foreclosure sale, took them subject to a statute enacted in government of the former company's use of a bridge," the court in the instant case concluded its opinion as follows:

"There is present in this case not only a plain statutory duty in respect to essential instrumentalities of the railroad acquired by the new company, but an obligation that inhered in and attached to the franchise of the former company. If it be argued that the statute in that case created an easement in the bridge which ran with the property, it cannot be denied, we think, that the effect of our statute, in the requirement that the location therein provided of the general offices, machine shops and roundhouses of a railroad company subject to its operation, should be maintained, is to impress them as property or instrumentalities necessary to the use of property, with a character of servitude for the benefit of the particular community, from which they are not exempt in the hands of a purchasing company."

* * * "The judgment of the Honorable Court of Civil Appeals is accordingly affirmed."

This decision was rendered May 7, 1913.

To this point in the proceedings it is entirely certain that no Federal Question had been attempted to be raised or seemingly even thought of by any party to the cause. Subsequently the matter came on for the taking of testimony and for further proceedings before the District Court, and the plaintiffs having amended their petition in certain particulars, non-federal in character (R., 46), the defendant filed its amended answer (R., 69), wherein among other matters it asserted that to further litigate this (pending) cause in the State court would be to invade the jurisdiction and decrees of the United States Circuit Court for the Northern District of Texas, thereby presenting a Federal question, in that the matters tendered for litigation whether barred or not by the decree of the United States Circuit Court are "only for the adjudication of that court and not for the adjudication of this court" (R., 81), and it therefore invoked "the Constitution and statutes of the United States"

(R., 110), the supposed Federal Questions being more specifically defined at page 126 and following of the record.

At the close of all of the evidence the trial court submitted to the jury for its determination a series of questions involving issues of fact raised by the evidence and in no wise involving any matter of Federal concern (R., 501), each of which questions the jury answered in favor of and found for the plaintiffs (R., 551), and judgment was given January 17, 1914, accordingly (R., 551, 559).

Upon appeal to the Court of Civil Appeals, State of Texas, all assignments of error made in appellant's brief were considered and overruled "and the decree of the trial court restraining appellant from changing the location of its general offices, shops and roundhouses from the City of Palestine, and from keeping and maintaining its general offices at any other place than Palestine, Texas, unless hereafter authorized by law so to do", was affirmed (R., 1022).

Examination of the opinion of the Court of Civil Appeals (R., 1001-1022) demonstrates that the affirmance by that court of the decree of the trial court was predicated solely upon the facts as found by the jury, and the application thereto of provisions of the local law. The assault by the Railway Company upon the validity of the State statutes as in contravention of the Federal Constitution was met and disposed of by that court as follows (R., 1018):

> Appellant assails the articles of the legislature being considered, originating as the act of 1889, as violative of the Constitution of the United States in the several articles mentioned in the ruling. It is believed that the act could not properly be construed as undertaking to add to preexisting contracts rights of a purely private character and to be enforcible as such. When a railway company bargains away for a valuable consideration the domicile of origin the effect is more than a mere personal contract. It is a modifica-

tion of the corporate franchise, and to that extent relinquishes and limits the charter obligation or privilege. The avowed purpose of the act was to be applicable to such situations and companies. Prior to the constitution of Texas of 1876 all railway companies were chartered by special legislative acts. Before the passage of the act of 1889 such railway companies having legislative charters were required by general acts of 1853 amended by general act of 1857, to keep their principal offices at the place named in the charter, but were further expressly authorized thereby to change same at pleasure to some other point on the line of the railway. Manifestly the language of the act of 1889 expresses the purposes and intention of the legislature to have only certainty of the location of the principal offices, shops and roundhouses, and to insist upon the domicile chosen by any railway company as suitable to it being final and unchangeable. In this view, as an amendment of the acts of 1853 and 1857, the legislation of 1889 is not an onerous amendment, nor does it either essentially alter the plan of corporation or fundamentally change any privilege in holding, as it does, the governing offices at the chosen domicile of the company when there has been permanent relinquishment and abandonment in point of fact of the domicile of origin. Such being the principle involved in the law, and as it operates and purports to operate no further than that principle, it is believed that under the facts clearly established by this record there does not arise nor is there presented any question of constitutional violation of appellant's rights in any respect, or impairment of obligation of charter contract (R., 1019). Under the findings of fact here the consolidated International & Great Northern Railroad Company, appellant's predecessor, changed the location of its governing offices, shops and roundhouses, to Palestine, under locative contracts, for a valuable consideration and aid by bonds. It is evident from the terms of the locative contract, and is adduced as a fact, that such company intended to permanently relinquish and abandon its domicile at Houston without intention of

return. It is a general rule of evidence that the acts of a party are admissible evidence of such party's intention to establish a domicile. And a domicile, once existing, is presumed to be retained until shown otherwise. So contracted locations, as here, abided with intention of permanency as here, would be acts evidencing the purpose to permanently relinquish and abandon the place designated in the charter, and have only the chosen domicile. It was proven that the International and Great Northern Railroad Company has had its domicile at Palestine, asserting that point as its place of principal office, for about forty years and to its dissolution by foreclosure proceedings. *And since the act of* 1889 *went into effect to the day of being sold out by judicial decree, being about twenty-three years, the International and Great Northern Railroad Company asserted and claimed its chosen domicile at Palestine as the place of its principal office and at which place its shops and roundhouses were located.* Having permanently relinquished and abandoned in point of fact the domicile of origin at Houston for a chosen domicile at Palestine, and without intention of return to Houston, neither the International and Great Northern Railroad Company nor appellant for it could consistently insist that a state of facts exists showing injury or destruction of any original contract term of having domicile at Houston. And in view of the fact of permanent abandonment, as was the effect of the locative contract, the repeal of the act of 1857 by the act of 1889 would not so far bear upon appellant's predecessor as to operate to impair any of its existing rights claimed or asserted to the time it was sold out. And even if the act of 1889 operated to amend the term of privilege to go "elsewhere on the line of road at pleasure," it would appear as a fact warranted by the evidence that the company as such sanctioned and agreed to the modification thereof by the general act of 1889. Knowing of the modification of the right to railway companies to go elsewhere at pleasure, as was the effect of the act of 1889, the stockholders of the International and Great Northern Railroad Company, after the passage of the act, met at Palestine annually for twenty-three years and to the judi-

cial sale, claiming and asserting *such chosen domicile as the "principal office."* Upon the idea that the act of 1889 operated to change or restrict the obligation to go freely elsewhere at pleasure, it would appear as a fact, deducible from the evidence, that such stockholders acquiesced in and consented to the change or restriction of the former privilege or term of contract (R., 1020). Knowing of the legislative provision and its application to the International and Great Northern Railroad Company, as it must be presumed that the stockholders did, it is apparent from their acts, claims and conduct in reference to the chosen domicile of Palestine that they as owners undertook to perform the requirement of the law and accept the chosen domicile of Palestine as final and unchangeable. It was thought in Com. *vs.* Cullen, 53 Am. Dec., 450, where a new grant is beneficial in its aspects very little is required to found the presumption of acceptance. It is not doubted that corporations can, like individuals, agree to and accept modification of terms of obligation. In Williams *vs.* Wingo, 177 U. S., 60; 44 L. Ed., 905, it was held, in effect, that a general statute may be repealed because it does not constitute a contract as such with any particular person or company. Therefore, in the facts of the case, it is believed a constitutional question does not arise having application to appellant or its predecessor. While adhering to the conclusion that the facts of the record afford no ground for holding that any existing rights of appellant or of its predecessor have been invaded or violated, it is nevertheless believed that the act of 1889 is in all respects valid and subject to no constitutional objections, as a police regulation within the power of the State to make. It is an established rule that a corporation is a resident citizen of the State in which it is created, and must dwell within the State of its creation. Bank *vs.* Earle, 13 Peters (U. S.), 519; 10 L. Ed., 274. And the State, having the power to create the corporation, has the right, it is not doubted, to fix by initial legislation the precise locality within the State for the location of the governing offices of the corporation. If the State has the power, as it has, to fix the location of the governing offices in the first instance, it rests upon the

ground of public interest in that respect. The location of governing offices of a corporation is a subject-matter of public interest and regulation for purposes of jurisdiction, litigation affecting the corporation as such, state visitation, and taxation of personal property. And in the absence of legislation conclusively fixing the principal office of the corporation, the place where it has such principal office would lie entirely in matter of proof. As well is the location of principal shops and roundhouses on the line of road a subject-matter of public interest, for they are but a part of the physical instrumentalities of necessary operation of the railway, and the public are affected in interest through proper operation of the road as a public carrier. Moreover, as the shops and roundhouses are a necessary part of the operation of the railway, the location of the same at the will of the company would not be an absolute right to it freed from legislative regulation in public interest and convenience. The company may not, as a right, establish its shops and roundhouses at a point either without the State or off of and distant from its line of railway, because, conferring, as the State does, the right to the company of operation of the road through a given territory, and only a given route within the State, the company in so doing would be acting beyond a territorial privilege of operation (R., 1021. The power of the State to restrict the privilege of operation of the road to the particular territory or route authorized to be covered would necessarily include the right, exercised in public interest and convenience of operation, of enforcing location at a particular point on the line of road of the given instrumentalities of operation. If the power exists in the State, as it does, to regulate and reasonably govern operation of the road in public interest and convenience, the necessity or expediency and economic reasons for so doing are purely questions for the legislature, and not for the courts. The location of the principal office, shops and roundhouses being a subject-matter of public interest, legislation in respect thereto would be within the police power of the State to promote public convenience or good. The police power of the State extends, reasonably exer-

cised, to promote the public convenience. Ry. Co. *vs.* Ill., 200 U. S., 561; 50 L. Ed., 596; Ry. Co. *vs.* Ohio 123 U. S., 292; 43 L. Ed., 704; Ins. Co. *vs.* Ohio, 153 U. S., 446; 38 L. Ed., 780. And location of the principal office being within the police power of the State, previous regulation would not prevent the operation of the police power further exercised to promote the public convenience or good. In application of that principle the State, in Ry. Co. *vs.* Kentucky, 161 U. S., 677; 40 L. Ed., 849, was held to have the power to forbid the consolidation of competing corporations, though the right to consolidate should be held to be given by the charter, and though the charter contained no reservation of power so to do. To the same effect is Pearsall *vs.* Ry. Co., 161 U. S., 646; 40 L. Ed., 838. It was held in State *vs.* Ry. Co., 24 Tex., 122, that it was within the constitutional power of the State to impose the duty upon executive officers of the company to reside within the State, though the law was passed after the grant of the charter. The principle of law of this latter case has direct application to the instant legislative provision. A difference in principle is not perceived to be between requiring the president and a majority of the directors to have residence within the State, and requiring the governing officers of the corporation to have residence in a particular locality within the State on the line of railway. A legislative provision requiring location of general offices at a fixed locality, in its last analysis means only that the executive and governing officers of the corporation as such shall have residence at a particular locality within the State on its line of railway. The same principle would have application to shops and roundhouses, which are but a part of the instrumentalities of operation of the railway. Holding, as we do, that the act is a regulatory one in public interest and within the operation of the police powers of the State, it is not therefore assailable as violative of the federal constitution upon the ground of impairing the obligation of charter contract.

Appellant, though, further claims that the statute denies equal protection of the law because of classification, in that it does not include individuals and

receivers operating a railroad as carriers. It applies to all railroad corporations alike. Ry. Co. *vs.* Mackey, 127 U. S., 205, 32 L. Ed., 107; Tullis *vs.* Ry. Co., 175 U. S., 348, 44 L. Ed., 192; Ry. Co. *vs.* Matthews, 165 U. S., 1, 41 L. Ed., 611. (R., 1022). And appellant further claims that the act is in denial of equal protection of the law because it imposes excessive penalties that preclude an appeal to the courts against its provisions. The penalty provision of this act being severable, and no penalties being here inflicted, that portion of the act is of immaterial consideration. Ry. Co. *vs.* Michigan R. R. Com., 231 U. S., 457, 58 L. Ed., 310; Ry. Co. *vs.* Garrett, 231 U. S., 298, 58 L. Ed., 229.

The act is not retroactive, as insisted by appellant, against it, for its charter bears date since the act was passed

It is further insisted that the act is void as direct regulation of interstate commerce. Undertaking, as the act does, only to make the subject of a local law the domicile of a corporation created by it, it could not reasonably be determined that the act attempts to regulate or is a *per se* regulation of interstate commerce. Consequently it is not an objection to the act that it may remotely affect, if it does, interstate commerce. Ry. Co. *vs.* Hughes, 193 U. S., 488, 48 L. Ed., 272; Ry. Co. *vs.* Mazursky, 216 U. S., 132, 54 L. Ed., 417; Smith *vs.* Alabama, 124 U. S., 465, 31 L. Ed., 511.

Upon application by the Railway Company to the Supreme Court of Texas for a writ of error to the Court of Civil Appeals to review its judgment, same was refused (R., 1288) and motion for a rehearing on such application was overruled (R., 1333). And so the case is here upon writ of error allowed by the chief justice of the Court of Civil Appeals (R., 1336).

ARGUMENT.

Plaintiff in error, the *Railway Company*, a Texas corporation organized in August, 1911, under the provisions of the Texas statute, approved September 1, 1910, for the express purpose of acquiring and operating the properties of the *Railroad Company* (likewise a Texas corporation but not a party to this cause and so far as appears without present corporate existence) which it had purchased at a judicial sale held June 13, 1911, invokes the jurisdiction of this *court*, to review on the ground of denial of some *Federal* right or *protection* five substantially concurring judgments of the courts of the State of Texas possessed of exclusive jurisdiction to consider and adjudge the issues in the cause. All parties to the proceedings are citizens of the State of Texas and those not natural persons are corporations or political entities existing and acting by virtue of the permission and powers conferred upon them by the laws of that State.

The concrete issue between the parties and the only issue of real moment adjudged in the course of the prolonged proceedings is whether in the circumstances alleged in the bill of complaint and found to exist as matter of fact by the seven distinct and separate answers in writing returned by the jury (R., 553-558), constituting its verdict in the case and approved by the trial (R., 558) and appellate courts (R., 1002; 1288), the Railway Company was justified in law in its attempt to remove its general offices from Palestine where they had long been maintained by virtue of an agreement between the Railroad Company (predecessor in interest of the Railway Company) and the defendants in error based on value, viz: the $150,000 bond issue of Anderson County and the erection for use of company's officers and employees of certain structures.

The right of the *Railroad Company* if any it had, to effect

such removal was primarily, if not as we think exclusively, to be sought for in the statutes of the State, under which both the Railroad and the Railway Companies were organized and had power to contract and otherwise transact the business for which created.

As found by the jury (R., 554 *et seq.*) Anderson County pursuant to previous agreement between the Houston & Great Northern Railroad Company, subsequently ratified and acted upon by the *Railroad Company* its successor in interest, issued and delivered its bonds to the first mentioned company previous to 1875.

By Texas statute of February 7, 1853, claimed to have been in force at the date of above agreements and bond issue, all such corporations were authorized to "establish a principal office at some point on the line of its road, and change the same at pleasure", and the Texas statute of March 29, 1889, authorized purchaser and associates of such sold-out railroad properties to incorporate for the purpose of acquiring and operating same. But the Texas statute of March 27, 1889 (office shops Act of 1889), required every railroad company chartered by the State for the operation of any railway company within the State, to "keep and maintain permanently its general offices within the State * * * at such place * * * where it shall have contracted or agreed, * * * to locate its general offices for a valuable consideration;" * * * "and if said general offices and shops and roundhouses, or either, are located on the line of a railroad *in a county which has aided said railroad by an issue of bonds in consideration of such location being made,* then said location shall not be changed; and this shall apply as well to a railroad that may have been consolidated with another as to those which have maintained their original organization", had been enacted and was in full force before the date of sale made of the properties of the *Railroad Company,* and likewise was in full force and effect at the

date of enactment of the Texas statute of September 1, 1910 (known as the International and Great Northern Railway Act), amending the above act March 29, 1889, under which the plaintiff in error here was incorporated. As before stated this law, after providing that purchaser and associates might incorporate for the purpose of acquiring and operating the road purchased "as if such road were the road intended to be constructed by the corporation," expressly declared

> "that by such purchase and organization, no right shall be acquired in conflict with the present Constitution and laws, in any respect,"

Such in terms was the State law in August, 1911, when the corporators of plaintiff in error, availing themselves of the permission accorded by such law, filed the articles of incorporation under which plaintiff in error first came into being and acquired touch with the matters touching the issue here in controversy.

In such circumstances, and without doubt animated by the elemental proposition that having availed itself of the authority and benefits of the statute of September 1, 1910, the *Railway Company* could not successfully avoid the restrictions and impositions of that law, the District court, without opinion, decreed that the *Railway Company* should keep and maintain its general offices, machine shops and roundhouses in the City of Palestine in the county of Anderson "where the Houston and Great Northern Railroad Company have contracted and agreed to forever keep same, for valuable consideration received" (R., 559).

On appeal to the Court of Civil Appeals of Texas, that court, after stating the issue and facts at length and quoting the second and third paragraphs of the Articles of Incorporation of the RAILWAY COMPANY (R., 1001-1004), said (R., 1005):

"Offering this charter as a defense, as appellant does, and the rightfulness to be a corporation for the purposes and objects declared in the second section thereof being an admitted legal right by statute of this State, there is at once present, and should be decided, the question, as one purely of law, as to whether or not there is any legal restraint or disability by law or operation of law upon the present incorporation in respect to designating, as the third section certainly does, the 'City of Houston' as the precise and exact locality within the State in which to establish and maintain its general offices. Plainly stated in another way, is article 6423 R. S. applicatory to appellant, a new corporation? The question is important of decision, in that if the proposed incorporation was legally at liberty to freely choose the locality in which to establish its offices, then the absolute right to do so would be a complete defense to the controversy; otherwise not so. The controversy here, it may be remarked, is in that very particular. The present corporation comes into existence by authority of article 6625 R. S., which expressly confers the personal right upon the purchaser of the property and franchises of a railway company, in virtue of sale in mortgage foreclosure proceedings, as here, of forming a corporation 'under Chapter 1 of this Title, for the purpose of acquiring, owning, maintaining and operating the road so purchased, as if such road were the road intended to be constructed by the corporation.' The act further provides that 'when such charter has been filed the new corporation shall have the power and privileges then conferred by the laws of this State upon chartered railroads, including the power to construct and extend,' but, as further set out, 'provided, that by such purchase and organization no right shall be acquired in conflict with the present constitution and laws in any respect, nor shall the main track of any railroad once constructed and operated be abandoned or moved.' The 'Chapter 1 of this Title,' under which the corporation is required to be formed, provides, among other articles, that the incorporators shall adopt and sign articles of incorporation which shall contain, among other things, '3. The place at

which shall be established and maintained the principal business office of the proposed corporation.' Requiring, as does the section just quoted, that the precise and exact locality of the principal business or governing office of the proposed corporation shall be given in the articles of incorporation, it was incumbent on the incorporators so to do, in order to have legal compliance with the terms of the section in that respect. And if the general language of the section is alone to be regarded as controlling in defining the right of the incorporators with respect to the choice of locality, then plainly the incorporators had warrant of law and were at liberty to freely make the selection of locality for the governing offices of the railroad. But to regard the general language of the section mentioned as controlling and conclusively defining the right of the incorporators to freely make choice of any locality, would be to ignore the effect of the conditions and limitations provided in art. 6625 that the 'organization,' or proposed incorporation, should come into existence as a corporation and acquire the franchise of operating the 'road so purchased' with 'no right' that would be in conflict with applicatory 'laws in any respect.' Such conditions and limitations would be legal compulsion, having the force of a charter requirement, upon the proposed incorporation, that it come into existence only upon applicatory legislative provisions. And it is believed that art. 6625 means, and it should properly be so construed, that in giving the proposed corporation the authority to be a corporation 'for the purpose of acquiring, owning, maintaining and operating the road so purchased' it was so done upon the same applicatory legislative provisions to its predecessor. The corporation owning previously 'the road so purchased' being under charter obligation to the State to operate the railway as a public carrier for a specified term of years, the State by the statute was in effect insisting that the purchaser and his succeeding corporation should perform that charter obligation to the State, and should not cease by reason of the foreclosure sale to operate that railway as a public carrier during such contractual period of time and under same laws applicable to its operation. By taking over the prop-

erty burdened with such obligation to the State, the purchaser and his succeeding corporation assumed to perform it. We understand the effect of the ruling of the Supreme Court to be that in the former appeal. As the effect of the act is to withhold from and disable the 'organization,' or proposed corporation, from acquiring any right in conflict with applicatory legislative provisions of its predecessors, it would necessarily follow, as a consequence of such prohibition or restraint, that a provision in the present articles of incorporation which is not responsive to a specification in the law applicatory to the franchise of operating the 'road so purchased' would have no force or effect. So considered, art. 6423, which is applicatory to location of the offices of railway companies, should be read in conjunction with section 3 above quoted, as consistent with and defining section 3 in specification of the place. Referring to art. 6423, is is provided that any railway company chartered by the laws of Texas 'shall keep and maintain permanently its general offices within the State of Texas,' either (1) 'at the place named in its charter,' or, (2) 'if no place is named in its charter where the general offices shall be located and maintained. then said railroad company shall keep and maintain its general offices within this State where it shall have contracted or agreed or shall hereafter contract or agree to locate its general offices for a valuable consideration,' or, (3) 'if said railway company has not contracted or agreed for a valuable consideration to maintain its general offices at any certain place within this State, then such general offices shall be located and maintained at such place on its line in this State as said railway company may designate to be on its line of railway.' The act also provides that the shops and roundhouses shall be kept and maintained at the locality where the company may have contracted to keep and maintain them; and further provides that if the railway company makes location of offices, shops or round-houses at a place on the line of the road, in consideration of the issuance of county bonds, such locality shall thereafter be the place for its general offices, shops and roundhouses. By requiring, as the article does, that railway companies shall per-

manently keep and maintain their general offices 'at such place within this State,' there is intended by that language an express prohibition against changing the place for the general offices, as well as machine shops and roundhouses, that are once definitely so located by operation of the statute. City of Tyler *vs.* Ry. Co., 90 Tex. 491, 91 S. W. 1.

"A restraint or prohibition against changing the locality so fixed by the statute for the general offices carries as a necessary consequence prohibition or restraint against the exercise of any right to voluntarily amend or change the charter privilege in that respect, in the absence of further legislative authority to do so. Thus it would plainly appear, we think, that if the International and Great Northern Railroad Company, the predecessor of appellant, stood restrained by force of art. 6423, which had united with its charter as a part thereof, of the privilege of changing the locality for its general offices and machine shops and roundhouses, a voluntary change thereof on the part of the International and Great Northern Railroad Company would be in violation of law. Hence, that same statute applicatory to its predecessor would attach with all its force to appellant, and be the law governing the appellant in designating the location of its offices, upon the ground that the statute authorizing the new corporation to exist operates to withhold and restrict any right to the proposed incorporation to obtain a charter privilege which is denied by terms of law to its predecessor. I. & G. N. Ry. Co. *vs.* Anderson County, 156 S. W., 499. It follows, therefore, that if the appellant had the legal right to fix the 'City of Houston' in the articles of incorporation, it would rest entirely upon the ground that art. 6423 has not application under the facts in the record to its predecessor, or, if it has application to its predecessor under the facts, that art. 6423 is not a valid and binding statute upon constitutional grounds urged.

* * * * * * *

"But if that construction be erroneous, the further terms of the same statute would afford another ground and would govern and control, and, we think, be de-

cisive. As a distinct and separate part of the act it is provided in these words: 'And such railroads shall keep and maintain their machine shops and roundhouses, or either, at such place or places as they may have contracted to keep them for a valuable consideration received; and if said general offices and shops and roundhouses, or either, are located on the line of a railroad in a county which has aided said railroad by an issue of bonds in consideration of such location being made, then said location shall not be changed; and this shall apply as well to a railroad that may have been consolidated with another as to those which have maintained their original organization.' Intending, as the legislature did, to establish a fixed locality for the general offices, shops and roundhouses of a railway company, and prevent their being moveable at the will of the company, the language of the act should be given that reasonable construction which would accomplish the purposes and intentions of the law. By expressly declaring, in the second paragraph of the article, that the principal offices shall not be changed from the locality where they 'are located on the line of a railroad in a county which has aided said railroad by issuance of bonds in consideration of such location being made,' it was evident that at the time the act went into effect the then place in which the offices are 'located on the line' in consideration of a bond issue of such county, would be the only locality thereafter allowable to such railway company at which to fix and keep the same. This has the effect of qualifying and modifying the first paragraph of the article requiring the company to keep its offices at the place named in its charter. This construction makes consistent and gives force to all parts of the article in meaning to require railway companies to keep and maintain their offices at the place named in their charter; but if they 'are located on the line' in consideration of county aid by bond issues such companies shall not change them elsewhere, even to the original charter place."

* * * * * * *

"Therefore in giving the proper legal effect to the state of facts found by the jury, which we must take

as true, it would certainly appear that the terms of the article have application to appellant's predecessor. And it would further appear as a fact that at the time the act of 1889 took effect the offices, shops and roundhouses were located at Palestine as one of the considerations for a bond issue of Anderson County for $150,000.00."

* * * * * * *

On application to the Supreme Court of Texas, writ of error was refused.

It thus appears that, apart from consideration of any Federal questions supposedly involved, the judgment under review was rested by the State courts upon a non-Federal ground sufficiently broad to sustain it and upon authority of the disposition made by this Court of the writ of error prosecuted to review the judgment of the Supreme Court of Texas in *St. Louis Southwestern Railway Company vs. City of Tyler* (99 Texas, 491), cited and relied upon in the opinion of the Court of Civil Appeals, *supra*, the writ of error herein should be dismissed for want of jurisdiction.

St. Louis Southwestern Ry. Co. *vs.* City of Tyler, 212 U. S., 552.

Eustis *vs.* Bolles, 150 U. S., 361.

Railway Co. *vs.* Fitzgerald, 160 U. S., 556.

Waters-Pierce Oil Co. *vs.* Texas, 212 U. S., 26, 116.

Adams *vs.* Russell, 229 U. S., 353, 358.

Enterprise Irrig. Dist. *vs.* Canal Co., 243 U. S., 157, 164.

It is certain that the RAILWAY COMPANY, plaintiff in error here prior to its incorporation in August, 1911, neither had nor could have had any connection with or relation to any of various matters or things pertaining to the RAILROAD COMPANY or its properties which were purchased at the foreclosure sale. It is equally certain that where a State court

of last resort has decided against a right or immunity claimed under an alleged contract and there is no statute subsequent in date to that under which the claim is asserted, this Court is without jurisdiction to review such decision.

New Orleans Water Co. *vs.* Easton, 121 U. S., 388.

See, also—

Fisher *vs.* New Orleans, 218 U. S., 438, 440.

Before this Court can assume jurisdiction it must surely appear from the decision of the State court that a real question arising under the Constitution or laws of the United States was involved and that the State court could not have reached its decision without having adversely decided the Federal question so raised. No such showing either has been or can be made in this case.

If the statute of 1889 does impair the obligation of any previously existing contract, which we deny, it is certain that no party aggrieved thereby is now before this Court.

Bowe *vs.* Scott, 233 U. S., 658.

There are no disputed questions of fact open for review here, and if any such ever existed they have been effectually put at rest by the special findings of the jury approved by the three concurring courts below.

Waters-Pierce Oil Co. *vs.* Texas, 212 U. S., 86.
Rankin *vs.* Emigh, 218 U. S., 27.
Chicago Junction R. Co. *vs.* King, 222 U. S., 222.
Portland, &c., Co. *vs.* R. R. Com'n, 228 U. S., 397.
Texas & Pacific R. Co. *vs.* R. R. Com'n, 232 U. S., 338.
Southern R. Co. *vs.* Puckett, 244 U. S., 571.

Matters of local practice as well as the construction and effect to be given to State statutes of limitations are matters of local concern, not open for review here.

Harrison *vs.* Myer, 92 U. S., 111.
Washington *vs.* Miller, 235 U. S., 422.
Perryman *vs.* Woodward, 238 U. S., 148.

The constructions by State courts of State laws are likewise of purely local concern and the propriety of such constructions is not for review here.

Pierce *vs.* Illinois, 238 U. S., 446.
Bi-Metallic Invest. Co. *vs.* Board of Equalization, 239 U. S., 441.

The Federal Questions so laboriously formulated in the assignments of error and so extensively argued in the brief for the plaintiff in error, are formal, not substantial, and at best rest upon obviously false assumptions. Being frivolous and without merit they afford no basis for the exercise by this court of its appellate jurisdiction over the State courts.

Parker *vs.* McLain, 237 U. S., 469.
Stewart *vs.* Kansas City, 239 U. S., 14.

It is respectfully submitted that the writ of error should be dismissed for the want of jurisdiction to entertain it.

FREDERIC D. McKENNEY,
A. G. GREENWOOD,
W. C. CAMPBELL,
JNO. C. COX,
THOMAS B. GREENWOOD,
Attorneys for Defendants in Error.

FILED
MAR 25 1918
JAMES D. MAHER,
CLERK.

IN THE

SUPREME COURT

OF THE UNITED STATES

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY, *Plaintiff in Error,* vs. ANDERSON COUNTY ET AL., *Defendants in Error.*	No. 243 October Term, 1917 / No. 612 October Term, 1916

REPLY ARGUMENT TO THE BRIEF OF THE DEFENDANTS IN ERROR

— By —

F. A. WILLIAMS,
N. A. STEDMAN,
DABNEY & KING,
SAM'L B. DABNEY,
BAKER, BOTTS, PARKER & GARWOOD,
H. M. GARWOOD,
ANDREWS, STREETMAN, BURNS & LOGUE,
FRANK ANDREWS,
Attorneys for Plaintiffs in Error.

GRAY, DILLAYE & YOUNG, HOUSTON, TEXAS

INDEX

PAGES

I.

Reply to the argument of defendants in error upon jurisdiction 1-16

State Courts have no jurisdiction to investigate or deny the decrees, and to hold the same void, given in U. S. Court in 1879, and in 1910-11 3

State Courts have not jurisdiction when jurisdiction has been reserved in U. S. Court to determine burdens, liens or servitudes against sold-out properties 3

Position combated that U. S. Court could not reserve jurisdiction over a public duty secured *in rem* 4

Position combated that U. S. Court could not or did not reserve jurisdiction when burden, etc., was removable, as is contended, at the will of the legislature 4

Position combated that U. S. Court could not or did not reserve jurisdiction over litigation of the public right, basis of decision of Court of Civil Appeals 5

Claim that there was no security *in rem* made only for the purpose of the jurisdictional point, elsewhere claimed that there was security *in rem* 6-11

Release of possession and control of the property by the U. S. Court does not release jurisdiction reserved in regard to certain claims against the property, nor does it amount to an agreement that the decrees of the U. S. Courts may be voided and set aside in a different jurisdiction 11-16

II.

Reply to argument upon constitutional points 16-50

Explanation of opposing attempt to limit the constitutional argument to the mere problem of violation of contract of mortgage of 1881, and exposition of the extent of the constitutional argument 17-20

Not for the public benefit to compel all of the repair work of this continental railroad, extending over 1106 miles, to be done at Palestine forever, a small interior town, and to compel all of the employes mentioned in the Act of 1889 to reside at Palestine forever, and keep their families inside the limits of the town. This not within the police power 20

Office-Shops Act of 1889 applies only to rail corporate carriers existing at its date or thereafter created, and to then extant contracts, or thereafter to be created contracts, and in no respect to non-existing railroads predecessors in title, or to extinguished contracts.....21-26

If Act of 1889, relied on, applies to extinct corporations and extinct contracts no longer in force, then unconstitutional 26, 44

Statement of limitations on police power, and that property cannot be taken even for a public use without compensation 30

Statement of opponents' position that the Office-Shops Act of 1889 applies to the alleged contracts of 1872-75, so that these contracts are a mere incident to bring the statute into operation, whereupon the terms of the statute are to be enforced, through existence of such incident, though totally different from, and in larger terms than, the terms of the alleged contracts, and particulars wherein it expands, swells and secures such alleged contract 30-31

At the date of the alleged contracts the words "General Offices," undefined in the alleged contracts, meant, then, in 1872-75, only the domicile of the corporation, and where the primary books should be kept and the annual meetings held 32

Discussion of the police power and its extent and meaning, and various precedents 34

Whether or not a particular matter comes within the police power, depends upon judicial ascertainment of reasonableness, except as to those things which are within the police power upon the face of the statute. The legislature alone can provide for the incidence of the police power, and it cannot delegate this incidence to private individuals, or exclude the judicial ascertainment of its reasonableness in application, as declared in the statute under consideration 37-42

Various cases upon the scope of the police power.....42

Rights of all purchasers at mortgage foreclosure not governed by law of the date of foreclosure sale and limitation on doctrine.....45-50

III.

Reply to opposing brief in regard to the sales under the decrees of the U. S. Court made in 1879, and contentions that such sales were void or subject to trust to secure the obligations of the subsequent statute of 1889.....50-62

Contention of defendants in error that decrees of foreclosure of 1879 and judicial sales thereunder, made in the U. S. Court in that year, were not *bona fide* 51

Gist of N. P. Railway v. Boyd is that something had to come down unrealized on into the new company through foreclosure, and to which creditors were entitled 52

Contention of defendants in error now made that they are not collaterally attacking the court decrees and judicial sales of the U. S. Court made in 1879, but in effect attempting to show a trust thereon, and showing on this contention that they cannot have a trust or a constructive trust in 1879 for that which could not exist until the statute of 1889 was passed 53

No evidence whatever that decrees and judicial sales in U. S. Court in 1879 were fraudulent or that there was any fraud 55

Not fraudulent for stockholders in foreclosed company to buy the property at judicial foreclosure 57

Contention of defendants in error that the decrees of the U. S. Court of 1879 were void for fraud 58-59

Showing that if there was any fraud, such as will create a constructive trust committed through the U. S. Court in 1879, then that this could not create a constructive trust to secure the rights of the defendants in error as claimed to have been created by the Act of 1889, ten years thereafter 59

IV.

With regard to failure to answer arguments in our principal brief 62

V.

Answer to argument that the Office-Shops Statute as construed and applied does not invade the commerce clause of the Constitution, and showing that it does invade that clause, and acts of Congress thereunder 62-65

VI.

Office-Shops Act of 1889 void on account of excessive penalties, and as being an *ex post facto* statute 65-76

With regard to the statutes of limitations which had already accrued in favor of the plaintiff in error, and the unconstitutional enforcement of the statute in derogation thereof 68

Further discussion of the penal provisions of the statute whereby it is unconstitutional 71

Argument that the whole statute must fall on account of unconstitutional elements in regard to penalties 73

VII.

Statute is class legislation 76

VIII.

The Supreme Court of Texas, the ultimate court of Texas, had, in 1879, construed the statute of 1871, and that this statute authorized the County Court of Anderson County to adjudicate certain matters, under which statute decrees were entered by the County Court of Anderson County in 1872-73, holding that extraneous matters could not be shown, and that the railroad had complied with every undertaking it had undertaken, wherein were not included the offices, roundhouses or shops; and construction of the Office-Shops Statute by the Supreme Court of Texas that a contract under said statute for the location of shops and offices was personal, and would not run through a foreclosure, and was not secured on the property; and showing that the plaintiff in error and its predecessors in title bought, mortgaged and dealt with the property under these statutes so construed, and with the benefit of the constructions; and application of Muhlker v. Railroad, 197 U. S., 544, to the facts of this case, and showing that the plaintiff in error cannot, with due process of law and without violation of the contract clause of the Constitution of the United States, be deprived of the benefits of such constructions, and of the statutes as so construed 80-94

INDEX OF CASES

PAGES

Anderson County v. H. & G. N. R. R., Texas....83, 86, 87, 89, 92, 93
Allen v. Detroit 37
Allen v. Inhabitants, Me. 45
Andrews v. Atwood, Ill 36
Bailey v. Railway, Del. 39
Barnetz v. Beverly, U. S. 47
Blair v. Williams, Ky. 34
Bonner v. Franklin Co., Texas 77
Bourgett v. Williams, Mich. 36
Bywaters v. Railway, Texas 23, 26, 44
Cicero v. Lumber Co., Ill. 40
Cole v. LaGrange, U. S. 45
City v. Railway, Mich. 71
Commonwealth v. Bridge Co. 39
Cotting v. Godard, U. S. 79
Con. Mut. Life Ins. Co. v. Cushman, U. S. 47, 48
Central Land Company v. Laidley, U. S. 92
Crowther v. Company, Fed. 36
Davis v. Pullman, Texas 78
Dash v. Van Vleck, ... 43
Davidson v. Richardson, Ore. 35
Dodge v. Missouri, Fed. 45
Deal v. County, Mo. 46
Donoho v. Williams, Cushing, ... 36
Ex parte Young, U. S. 72
Eubank v. Richmond, U. S. 42
Eustis v. City, Texas 72
Ex parte Wood, Fed. 72
Field v. U. S. 78
Matter of Frazee, Mich. 40
Gladney v. Sydnor, Mo. 71
G. C. & S. F. R'y v. Morris, Texas 25, 26
G. C. & S. F. R'y v. Newell, Texas 25
Harp v. Railway, Fed. 46
Holden v. Hardy, U. S. 38
Heath v. Company, Fed. 36
Hooker v. Burr, U. S. 48, 49
Houston, etc., Railway v. City, Texas 77
I. C. C. v. Railway, U. S. 29

I. & G. N. Railway v. Anderson County, Texas 74
International, etc., Ass'n v. Hardy 46
Janin v. State 75
Janin v. State, Texas 41
Johnson v. Goodyear, Cal. 36
Keeley Inst. v. County 45
Kingman v. City, Mass. 45
Kansas City, M. & O. R'y v. Sweetwater 71, 72, 88, 89, 91, 92, 93
Kansas City So. R'y v. Albers Co., U. S. 52
Lapsley v. Brashear, Ky. 34
Leonard v. Bosworth, Conn. 78
Loan Ass'n v. Topeka 43
L. & N. Railroad v. Railroad Commission 78
Lowell v. Boston, Mass. 45
Mellinger v. City, Texas 26, 70
M. K. & T. R'y v. Stone, Texas 77
Meyer v. Berlandi, Minn. 36
Muhlker v. Railroad, U. S. 92, 93
Munn v. Illinois, U. S. 36
Mutual Ins. Co. v. Richardson, Ind. 36
Michigan Sugar Co. v. Dix, Mich. 46
M. P. Railway v. Nebraska, U. S. 43, 46
Noel v. People, Ill. 40
Norfolk & W. R'y v. Conley, U. S. 52
N. P. Railway v. Boyd, U. S. 51, 52, 53, 56, 58, 59, 60, 62
O'Neil v. School, Minn. 36
Parkersburg v. Brown, U. S. 45
People v. Plank Road Co., Mich. 34
Planters Bank v. Sharp, How. 34
Railway v. Ellis, Texas 46
Railway v. Mackey, U. S. 79
Railway v. Ellis, U. S. 79
Railway v. Rowland, Texas 46
Railway v. Todd, Ky. 40
Railway v. Campbell, Kas. 46
Railway v. Mahaffey, Texas 75
Robertson v. Varnell, Texas 69
Sawyer v. Railroad, N. H. 86
Schloss v. Railway, Texas 77
S. P. Railroad v. State, Texas 29
State v. Railway, Texas 72
State v. Switzler, Mo. 45

State v. Railroad, Texas 32
State v. Bancroft, Wis. 42
State v. Osawkee, Kas. 46
State v. Froelich, Wis. 45
T. & P. v. Marshall, U. S. 29, 63, 69, 79
Tyler Case, 99 Tex., 491 32
Toledo R'y v. Hamilton, U. S. 36
Texas Southern Railway v. Harle, Texas 24, 28
T. & P. Railway v. Hughes, Texas 77
U. P. Railway v. R. R., U. S. 14, 15
U. S. v. Weltberger 78
U. P. R. R. v. Mason City, U. S. 8
Woodward v. Railway, Mass. 35
Wadley Southern R'y v. Georgia, U. S. 66, 70
Welch v. Cross 48
Yeatman v. King, N. D. 35

IN THE

SUPREME COURT

OF THE UNITED STATES

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY, *Plaintiff in Error,* vs.	No. 243 October Term, 1917
ANDERSON COUNTY ET AL., *Defendants in Error.*	No. 612 October Term, 1916

REPLY ARGUMENT TO THE BRIEF OF THE DEFENDANTS IN ERROR

In this reply we unfold propositions of our opponents, supply some of their omissions, and enlarge considerations advanced by us as fundamental, and laid down as predicates without particular argument, but now challenged or evaded.

I.

We first reply to the arguments under the first head, commencing page 6, and extending to the bottom of page 36, of the reply brief, relating to jurisdiction. If there was the right in rem asserted by our

opponents, secured on the property, they seem to admit that the State Courts were without jurisdiction. But if they are in any respect in conflict with the decrees of the United States Courts, the State Courts have no jurisdiction of the matters involved in such conflict.

We do not contend for any particular definition of the security claimed to have been given by the Act of 1889, for the securing of the alleged contracts of 1872-1875. The Supreme Court of Texas has declared that that Act placed a "burden," "servitude" and "limitation" upon the franchises (to do), roundhouses, shops and general offices "inhering" in and on them, and passing down through foreclosures. The five mortgages foreclosed in 1879 and in 1910-11 were all prior to the Act of 1889, and authorized, under existing laws, of the charters and franchises to be, as well as of the physicals. We do not limit ourselves to a claim that the Supreme Court of Texas declared that the Act of 1889 created a lien. But it did in effect. It is a logomachy to argue whether or not this thing which they insist upon, and which is termed by the Supreme Court of Texas a "burden," "limitation" and "servitude" can best be called a "lien."

Our opponents insist that their claim is a public duty. Whether it is a public duty or private duty is aside from the immediate purpose. Did the Act of 1889 secure a right running with, or a burden upon, the properties and franchises to be or to do, or did it not? If it did, as insisted by our opponents, and as they must insist to maintain their decree, then it is plain that the jurisdiction of this litigation was reserved

to the United States Court, for it expressly and impliedly reserved jurisdiction of all claims against the property.

On two general grounds the jurisdictions of the United States Courts are involved.

(1) *Because the decrees and sales of 1879 and 1910-11 are denied and collaterally assailed. In a different court decrees may be construed, or shown to be in trust. No other court than the court which entered them has jurisdiction to impeach or deny them, where, and where only, there is jurisdiction by appendent or supplemental bill; to preserve this jurisdiction no reservation of jurisdiction need be expressed.*

(2) *Because all burdens or claims in rem against the sold-out properties, physical and intangible, were directly and impliedly reserved to the United States Court in the decree of foreclosure of 1910;* as well as all merely personal contracts disowned by the purchaser under authority of the foreclosing court. The matter of these denounced contracts will not be further noticed, having been fully covered in our brief on file.

(*a*) At the bottom of page 6 of the opening brief it is stated: "It is and ever has been conceded that the contract obligation of the sold-out company and of the Houston & Great Northern Railroad Company, considered apart from the obligation of the regulatory statute (Office-Shops Statute of 1889—our principal brief, p. 229), *was purely personal and without lien or other security.*"

In this statement we concur. Our opponents here admit in effect that by the Act of 1889 they acquired

a lien or security, if they had a contract. We consider this the wrong construction of the statute, but they are supported by the Supreme Court of Texas. Having made this admission, that the Act of 1889 gave them a lien or security *in rem* for their alleged contracts of 1872-75, and realizing that if they had a lien or other security, they are indisputably within the reservation of the decrees of the Federal Court, actual or implied, or in conflict therewith, they argue that they have no security. They cannot so squarely admit and prevail. They say that they have a statutory duty imposed on us. How can that fact avail, if it be a fact, when it is secured by a "burden," "servitude" or "limitation" adhering in and upon the property? It is secured *in rem. Their argument amounts to this: That the United States Court did not reserve and could not reserve jurisdiction over a public duty secured in rem.*

On page 8 it is stated that there are many statutory duties enforced against railroads, and at the bottom of the page: *"Defendants in error can have no lien to secure the performance of the duty enforced in their favor. The legislature may relieve from a duty just as it imposed a duty by statute." In other words, our opponents make the proposition that if the legislature imposes a "burden," "servitude" or "encumbrance upon property for an indefinite time, removable at its pleasure, then the correct legal proposition is that as to such removable burden or lien the United States Courts did not or could not reserve jurisdiction.* They propound the proposition that those courts can and did reserve jurisdiction of liens fixed for a definite time, but never intended to reserve jurisdiction or

burdens, liens, servitudes and encumbrances removable at the pleasure of the legislature. This is analogous to their proposition that the *Federal Courts can reserve jurisdiction over the litigation of a private right, but not over the litigation of a public right, on which, as a basis, the Court of Civil Appeals ruled that the United States Court had not or could not reserve jurisdiction.*

It is stated that the Court of Civil Appeals recognized the power of the legislature to take away that it gave, but they procured a decree denying such power. (R., Vol. 2, p. 559.) It is declared therein that the railway shall "forever keep and maintain" the shops and offices at Palestine, and is "perpetually enjoined" from keeping them at any other place. An evasion is attempted by stating that this security, if *in rem,* was not within the reserved jurisdiction, because the legislature might possibly withdraw it. It is in effect admitted that if the security were irremovable, then it would be within the reservation, but it is contended that because it may be removed, it is not within the reservation. This is a monstrous assumption. This assumption is in direct contradiction of the terms of the judgment which the court entered in this cause. Could the legislature invalidate a solemn decree of the court?

It is insisted (page 8) that the legislature may impose duties on a public carrier. Assuredly, within constitutional limits. Whether or not the Act of 1889 was within such limits is not the immediate question. *Our opponents assume that because the legislature can impose duties, then that because of that fact the*

jurisdiction of the Federal Court is ousted. This is a non sequitur.

Near the top of page 20 of the opposing brief it is stated: "The statutes (Office-Shops Act of 1889) are none the less binding because the *sold-out company (foreclosed in 1910-11) was similarly bound by contract wholly unsecured." If this were so, pray when did the Act of 1889 (our brief, p. 229) create a "burden," "servitude" and "inhere in" the properties?* How, then, can our opponents prevail? Here again an attempt is made to escape from their own constant position, and from the opinion of the Supreme Court of Texas, invoked by themselves. It is stated that in 1910-11 the defendants in error had no security by force of the Act of 1889, but were the beneficiaries of a duty which, however, the Supreme Court of Texas has declared was secured by "servitude" and "burden" created by the Act of 1889, invoked against the plaintiff in error. It is next stated that because the alleged contracts, on which they sue, were unsecured, then "such being the nature of defendants in error's rights, they are clearly beyond the scope of the reservation of the decree of foreclosure, and wholly unaffected by the sale under that decree." This is an admission that if our opponents did have security, or if they could not recover except as having security, then they are within the reservations of the decree of the United States Court, and that the State Court had no jurisdiction. Our opponents quote at great length from the opinion of the Supreme Court of Texas, and because the word "lien" is not used therein, contend that they had no security, and yet, throughout this litigation, they contended, as they

contend now in other relations, that they are secured by the Act of 1889, and that *in rem.*

The Supreme Court of Texas is the ultimate State Court; the Court of Civil Appeals the intermediate court. *Throughout this litigation (on all points except jurisdiction) our opponents have taken the position that they have security in rem by force of the Act of 1889,* and against the railroad, and have induced the Supreme Court of Texas to so construe the Act. They now, when confronted with the jurisdictional question, insist that they have no security. They dare not say that they are not insisting upon a "burden" and "servitude." Consequently, they avoid the use of those words. It is admitted that the alleged contracts of 1872-75 were personal and unsecured until in 1889, when our opponents claim that the statute gave them a security. In order to get by the Supreme Court of Texas our opponents insisted that this security was in the nature of a "burden," "servitude" and *"lien."* The Supreme Court of Texas held referring to the Office-Shops Act of 1889: "It was not only a limitation upon the continuance of its corporate powers, but a limitation that pertained to the use and *enjoyment of essential parts of the railroad properties.* It qualified their use and enjoyment by an abridgment of the important right of location, which otherwise the company would have possessed as an incident of ownership, *and impressed their use* with an obligation to maintain the location provided by the statute. *As it inhered in the corporate franchise* exercised by the former company, *it necessarily subsists with the franchise* in the hands of its present owner. The transfer to such owner

(purchaser at foreclosure) of the right to own and operate the railroad" (*i. e.*, franchises to do), "*also transferred the obligation attached to such* right; and the enjoyment of the right" (to be a carrier for hire) "must be in observance of the obligation." (106 Tex., pp. 71-72.) Again the court said: "The obligation to which that company was subject" (sold-out company), "according to the petition, in respect to the location of its general offices, machine shops and roundhouses, was clearly a *burden* upon the franchise" (to be a public carrier for hire, etc.—franchise to do), "with which it is likewise charged in the hands of the plaintiff in error." (106 Tex., p. 72.) At the end of the opinion the court said: "There is present in this case not only a plain statutory duty in respect to essential instrumentalities of the railroad acquired by the new company, but an obligation that *inhered in and attached to the franchise" (to do) "of the former company.* If it is argued that the statute in that case (U. P. R. R. v. Mason City, 199 U. S., 160) created *an easement in the bridge which ran with the property,* it cannot be denied, we think, that the effect of our statute" (the Office-Shops Act of 1889) "in the requirement that the location therein provided of the general offices, machine shops and roundhouses of a railway company, subject to its operation, should be maintained, *is to impress them as property or instrumentalities* necessary to the use of the property with *a character of servitude* for the benefit of the particular community" (Palestine, Texas) "from which they are not exempt in the hands of a purchasing company." (106 Tex., 73.) It thus appears that not only physicals, but also intangibles, were ruled to

be so burdened. Again, the court said, speaking of the Office-Shops Act of 1889: "It is a qualification of its (railroad's) franchise (to do), and inseparable from it; a *burden* which accompanies its enjoyment, to be borne as a privilege of its use, and *adheres in* it with even more virtue than that of an original charter obligation, because of the nature imparted to it by a general law." (106 Tex., 69.)

The Supreme Court of Texas declared that the Act of 1889 created a "burden," a "servitude" both upon tangibles and intangibles. The avoidance of the use of the words of the Supreme Court proves the inability of our opponents to meet us on this ground. The mind does not take hold of inponderables as thoroughly as it does of ponderables. We are objectively more impressed with the latter, but certain classes of imponderables may be mortgaged and involve the highest property rights. If mortgaged, they may be foreclosed, and the power to enforce all rights, "burdens," "servitudes," etc., against them may be reserved to the foreclosing court. The statutes of Texas providing that charters—that is, franchises to be, as well as those to do—could be mortgaged, foreclosed and sold out, clothe the Federal Court with power to so foreclose them when the mortgages included them, as here; and to reserve, as here, jurisdiction of further rights against them, or affecting them, as well as against ponderables. Both ponderables and imponderables were involved in this decree. Our opponents claim that public duties were to some extent involved, therefore that the reservation could not extend to these matters, and they induced the Court of Civil Appeals to so expressly declare, admitting that

the Federal Court had intended to reserve jurisdiction, *but laying it down that it could not have jurisdiction, because public rights were involved; as if the Federal Courts were not competent to litigate public rights.*

As the Supreme Court of Texas has declared, the statute of 1889 did create a servitude (if the plaintiffs have proved the facts alleged) on the shops and offices, and a burden on the franchises and physicals, whether to do or to be, adhering and inhering therein, then *some of these things have descended from the old to the new company; for a thing cannot continue to "inhere" unless something continue to exist and has come down in which the thing can "inhere." There cannot be a content without a container.* All claims against the property, whether physical or metaphysical, if originating under or connected with the acts of the foreclosed, sold-out corporation, or its predecessors in title and privity, are reserved (as well as certain unsecured contracts, as set out in our brief, especially those denounced by the purchasers); and *the decrees of the Federal Court in 1879 wiped out every personal obligation of these alleged contracts, if they existed, and they could not be re-created by the statute of 1889, except in conflict with or in derogation of those decrees; for that would involve the statute raising from their graves the old, dead, wiped-out contracts of 1872 and1875. The Court of Civil Appeals, under this unescapable pressure, declared the decrees of 1879 fraudulent and void,* as if, after the lapse of 36 years, or one day, in collateral proceedings in a diffreent court, the decrees of another court could be declared void. To do so is an invasion of

the jurisdiction of that court, and a nullity, and subject to restraint out of that court, if it be desired to proceed in that way. We never heard of such a thing before, as one court declaring the decrees of another court void as obtained by fraud. It has no jurisdiction to do so. If a decree is to be declared void for fraud, it must be done by supplemental bill, brought in the court where the decree was obtained. Whether or not the decrees were shown to be in trust for the plaintiffs, though not void, will be discussed below under a different head.

(*b*) *The second position, taken upon the question of jurisdiction, is that the United States Court had released its jurisdiction, because the Circuit Judge, in 1911, turned loose the property.* In this connection our opponents strayed widely from the record, and inform us of a newspaper article and extraneous matters, of which we never before heard, saying that they are part of the legislative history of Texas. The only thing before the court is the record.

On September 25th, 1911, after the plaintiff in error had acquired the property under the contracts and decrees of the United States Circuit Court of the Northern District of Texas, it released the property from its control and possession.

The question here of jurisdiction is not dependent upon possession. In some cases jurisdiction is dependent upon possession. We have pointed out, under the settled decisions of this court, *that jurisdiction, on the principles invoked, is not dependent upon possession, but upon the reservation of the decree, and upon the further and broader principle that no*

court has jurisdiction to impeach or modify the decrees of another court. That can only be done in the court where the decree is entered. The precedents adduced by our opponents (pages 26-36, opposing brief) are therefore not in point. All jurisdiction, solely dependent upon possession of the property, was released by the United States Court in releasing possession, but that court never did release its inherent and expressly reserved power, to enforce its decrees, and to limit certain litigations to itself, as the assertions of rights *in rem* or burdens or liens upon the physical or metaphysical properties foreclosed, if originating under or connected with the sold-out corporation or its predecessors in privity and title. Nor did the United States Court for the Western District of Texas ever release its right to enforce its decrees entered in 1879, or ever agree (for it could not) that those decrees could collaterally be set aside 35 years thereafter, in another court, as fraudulently obtained. Multitudes of decisions can be found holding that jurisdiction (meaning of a certain kind) over property is released when the property passes out of the possession of the court, but that is jurisdiction over litigation not involving the contradiction of the decrees of the court, or not involving the limited matters reserved. The I. & G. N. Railway Company and its property were subject to litigation, attachment, or any kind of seizure in any court having jurisdiction after September 25th, 1911 (the date when the Federal Court released possession and dismissed the Receiver), in relation to all matters growing out of the acts done, from that time forward. Our opponents here involve themselves in a web out of which their

minds seem unable to escape. They are constantly talking about things in their wrong relations. There are no greater causes to misconceptions than the misuse of terms. To use Lord Bacon, they are obsessed with their "idols" here "of the forum." They mean that, after a court has rendered a decree and released property from its control the decree is subject to attack and collateral impeachment in any other court, merely because the possession of the property is released. Do they mean that a court foreclosing on and selling property has no jurisdiction to enforce its decrees, and that another court can re-litigate those decrees, or that it cannot reserve jurisdiction over that property, to gather up the loose ends after it has turned the property over to the purchaser? That is, to determine all undetermined "burdens," "servitudes" or claims thereto, or thereon, existing by reason of the act or connected with the acts or operations of the foreclosed owner or predecessor in title? Undoubtedly they mean to say this. We submit that such a contention is in conflict with the primary principles of the law of Judgments and Jurisdiction.

Judge McCormick, United States Circuit Judge, discharged the Receiver and the property from the possession, custody and control of his court. This does not mean that he discharged the decree of foreclosure under which the plaintiff in error had bought and paid. To so suppose would involve the changing of a contract, and an accusation of judicial dishonesty. Possession, custody and control are one thing; jurisdiction to litigate, when rightly invoked, is another thing; and Judge McCormick never modified his decree retaining jurisdiction, or undertook to say

that it or the decrees of 1879 could be impeached, collaterally modified or declared void for fraud without invading the jurisdiction of the United States Courts.

Some insistence is made upon the proposition that the Act of September, 1910, known as the I. & G. N. Bill (our brief, Exhibit "E," page 232), obligated the I. & G. N. Railway, organized in 1911, to take the property subject to all existing laws. That is true, *but it did not obligate the railway to take the property subject to non-existing laws, such as unconstitutional statutes.*

The decree of confirmance of the sale was entered June 15, 1911, as follows: "Hereby ordered that the Master Commissioner's report of sale filed herein on the 14th of June, 1911, be and is hereby in all things ratified, approved and confirmed, and that the sale to Frank C. Nicodemus, Jr., *be and is hereby confirmed and made absolute,* and the said Frank C. Nicodemus, Jr., *is adjudicated the purchaser of said property, premises and franchises; subject, however, to all the terms and conditions of decree of foreclosure entered herein on May 10, 1910, and subject also to the due performance by said purchaser, his successor or assigns, of all the obligations therein described.*" (R., 667.)

The position now abandoned (but for the point of jurisdiction only) was also carried into previous briefs, and claimed to be presented in the precedents. In the printed argument for Defendant in Error before the Supreme Court of Texas they adopt the argument advanced in the case of U. P. R'y v. R. R. (199 U. S., 160), by Mr. Kellogg, that the property passed down through foreclosure *"burdened with the ease-*

ments imposed by the donators and by Congress." *In this case, "burdened" with the alleged contracts of 1872-75 and the Act of 1889.* (P. 44.) On page 60 of the same argument they presented to the Supreme Court of Texas, as their position, "that any *burden imposed by the State in the interest of the public on a franchise to operate a railroad (franchise to do), should not be discharged by judicial or voluntary sale;*" and (on page 61) they quote from a previous argument by ourselves as expressing accurately their claim: "if this so-called duty to maintain the offices and shops at Palestine was a public duty fixed by law *as an attachment to these properties, of course, any owner of the properties would have to obey the law so long as the properties were enjoyed. * * * Of course, no private corporation by the new process of corporating can strike down or avoid a duty fixed against its properties.*" Upon their briefs and arguments our opponents obtained the opinion of the Supreme Court of Texas, but now they attempt, on the question of jurisdiction, to deny the whole foundation of their case.

The defendants in error have chiefly relied upon U. P. R. R. v. R. R. (199 U. S., 160, and 50 L. Ed., 135). That decision was adopted by Judge Phillips of the Supreme Court of Texas as his principal guide in the opinion therein. While we do not concur with Judge Phillips as to the application of this case, that is a matter foreign to our present discussion. It was thought applicable by the appellees and Judge Phillips. In U. P. R. R. v. R. R., the facts were that after the railroad issued a mortgage it had obtained from Congress a grant of a right-of-way to cross a river,

which was conditioned by the reservation of a common right-of-way by the Government over the bridge to be built, as trustee, to be exercised for other roads. Therefore, upon foreclosure of a mortgage prior to the grant, but covering any right under the grant, a greater title could not pass than the grantor (the U. S.) had put into the railroad. In the investigation of this matter in the lower courts this is made plain by these words: "Suppose that subsequent to the giving of the mortgage the company acquired the right-of-way over the land of A, subject *to the easement of a private crossing by A or assigns,* it certainly would not be contended, I think, that the mortgage, when it attached to this right-of-way, was not subject to such easement." (124 Fed., bottom p. 114 and bottom of page 116.) Our immediate purpose is now to show that an "easement," "servitude," "incumbrance" or "burden" was held to have been passed down, and were insisted upon most pertinaciously by our opponents, as attached to the property.

We will below more particularly answer our opponents' contentions in relation to their arguments upon their attempt to impeach the decrees of 1879 of the U. S. Court, as fraudulent, and their effort to escape the jurisdictional difficulties involved in that attempt.

In our brief we have pointed out that the Federal Court reserved jurisdiction of certain personal contracts, particularly if denounced by the purchaser—as these alleged contracts were.

II.

The defendants in error commence the second branch of their discussion at the bottom of page 36

of their brief, their principal constitutional discussion. They state: "The entire argument on behalf of plaintiff in error on the impairment of the obligation of the contract created by the mortgage and bonds of June 15, 1881, may be fairly stated to be based on two propositions."

Our constitutional argument does deal with the impairment of the obligation of the contract of the mortgage of 1881, but our opponents pass over in silence a great part, and seek to fix the constitutional controversy upon this mortgage alone. The constitutional question, in its general applications, we here draw to one head. Our opponents have obtained a decree that the railway shall *"forever" keep and maintain its general offices, machine shops and roundhouses "for the operation of the railway" in Palestine, and that it is perpetually enjoined from changing the location of the machine shops and roundhouses, and "from keeping and maintaining the general offices of the vice-president, general manager, general superintendent, general passenger and ticket agent, chief engineer, master of transportation, fuel agnt, general claim agent, superintendent of motive power and machinery, and master mechanic, engaged in the operation of the International & Great Northern Railroad at any other place than the City of Palestine."* (R., Vol. 2, p. 559.) The statute of 1889, on which they rely, and which is therefore a part of their decree, provides that all the persons above named *"shall reside at the place"* (*i. c.,* Palestine). (Act, Exhibit "D," our brief, p. 230, Sec. 2.) By the Act terriffic penalties are denounced for its slightest violation. As has been completely set out above, and in our principal brief,

the defendants in error have induced the Supreme Court of Texas, followed by the Court of Civil Appeals, to declare that if they proved their case they had a secured right created by the Act of 1889, inhering in some of the property coming down from the sold-out railroad, and a burden and servitude, and encumbrance thereon. It has also been shown that in 1879 four mortgages were foreclosed in the United States Court, being mortgages upon the franchises to be, that is, the charters; and all other property and the charters were sold out. Therefore, the question which our opponents propound is only a part of their difficulty.

The whole matter can be summed up in this way:

Could the legislature, in 1889, pass an act beneficial, as plead, to the property interests of the defendants in error, enlarging the definition of general offices, and to require those persons, and thereby their families, to reside in the small, interior town of Palestine forever?

And could the legislature constitutionally so enlarging and changing the definition of general offices over anything which could have been in the minds of the persons alleged to have been contracted in 1872-75 (for the evidence gives no definition of what they meant), secure the general offices and shops and roundhouses and nail them down at Palestine forever, including all of the repair shops of a continental railroad, and prohibit forever any shops existing at any other place, and these people from residing outside of the narrow limits of this small town, and secure the performance of these obligations of the statute by

penalties, now running into many millions, and by a burden, servitude and encumbrance?

And could the legislature, constitutionally, do this so as to revive and make effective alleged contracts of 1872-75, unsecured in 1879, when the whole property was foreclosed and sold out and all passed into a new company at that time free therefrom?

And did the legislature so intend to make the personal obligation (unsecured, as admitted, if existing in 1879, before such foreclosure) to become, by the Act of 1889, the secured obligations of the new company organized in 1879?

And could the legislature constitutionally in 1889 so secure, extend and revive the alleged contracts herein sued on, as to make them binding upon the new company organized in 1879.

And if it could, did the legislature so do by the Act of 1889, which was passed after the old company, existing before 1879, had been wiped out and ceased to exist, and during the life of the new company organized in 1879?

In other words, did the legislature, in decreeing that a railroad should keep and maintain its general offices and shops at a place where it contracted to keep the same, thereby intend to provide that the contract of a non-extant company, predecessor in title, should apply and bind the new company, acquiring the properties at the foreclosure sales?

And if the legislature did so intend by the Act of 1889 (our brief, p. 229), could it so constitutionally decree?

And, furthermore, could the legislature, in 1889, enlarge, extend and secure for the benefit of property

owners in Palestine, the alleged contracts, so as to make them prior in right to the mortgages foreclosed in 1879, and the mortgage of 1881 foreclosed in 1910-11?

And, as lying back of all of these questions, this: Could the legislature, in 1889, under the police power, constitutionally do these things? We maintain that it could not.

We will below go over some of the cases cited by our opponents. They are to a large extent in support of the undeniable proposition that all persons deal with property subject to the exercise of those sovereign powers which go back of the Constitutions. It is useless for us to discuss that broad proposition. Our duty is to show that, on the extraordinary construction of the Act of 1889, it is not within what is commonly called the police power.

Neither the contract clause nor the due process clause override the powers of the State to establish all regulations reasonably necessary to secure the health, safety, good order, comfort or general welfare of the community; that is, of the general community. *But it is an astounding proposition to say that it is for the general benefit of the community, that is, of the State of Texas, and the Nation, that all of the repair work of the International & Great Northern Railway Company, extending over 1106 miles, shall be done at Palestine, except, perhaps, light repairs, and that forever; and that fuel agents and master mechanics and claim agents shall have their offices in Palestine forever, etc., as well as the various general offices, and that their families shall be forever penned within the narrow limits of this small town.*

At the bottom of page 49 our opponents say that the answer to the main position which they attribute to us "depends of course on whether the statute comes within the police power of the State." We shall therefore largely address ourselves to the consideration of whether or not this statute comes within the police power, so-called.

But there is one primary question which must first be considered: The Office-Shops Act of 1889 provides that if no charter location is given, railroads should keep and maintain general offices and shops and roundhouses at the place "as they may have contracted to keep them for a valuable consideration received." Obviously, reference is had to existing railroads, or those which might exist in the future, and their extant or to be created contracts—in this instance, as claimed, Judge Reagan's political efforts and stump speeches in securing a bond issue to be voted by the county.

It is admitted that until 1889 these alleged contracts of 1872-75 were unsecured. As we have pointed out, in our principal brief, the old, sold-out I. & G. N. Railroad, sold out in 1879, was constituted in 1873 under the powers of their respective charters out of the Houston & Great Northern Railroad (whose charter located its general offices at Houston) and the International Railroad, whose charter gave no location; the general statute at that time permitting the road, in the absence of a location, to fix its general offices anywhere along the line, and to move them. The Houston & Great Northern therefore had its general offices in Houston. The statute provides that it shall be applicable only when no place is named

in the charter. In this case Houston is named where the general offices of the property now are.

Passing by that point, however, our opponents are confronted with the fact that the I. & G. N. Railroad ceased to exist in 1879. It is plain that reference is had to the *company existing at the time when the alleged contracts were made, and to the contracts then the personal obligations of that company, in this case 1872-75; and that the legislature never intended to say that if a predecessor in title had made such contracts, then that the Act of 1889 should bind that company or secure those contracts.* It is plain that it was intended that the Act of 1889 should only effect a company existing in 1889 or thereafter, *and should not affect contracts judicially or otherwise eliminated.*

Our opponents, when confronted with this, took the position in the Court of Civil Appeals of Texas, that the decrees and sales made under the foreclosures of the Federal Court of 1879 were fraudulent, and induced the Court of Civil Appeals to so hold in a collateral, long subsequent proceeding. This difficulty is one which they cannot squarely meet, because it is impossible that one court can collaterally void the decrees of another court. Our opponents were compelled to procure such action in the Texas State Court, and this is a main cornerstone of their case. But if the legislature of Texas did intend to say, what our opponents insist upon, to wit, in effect: that whenever there is no charter location, then a company, *the successor in title to a previous company, or even the same company, as to whom the contracts have been judicially nullified,* shall be bound to locate

and forever maintain its shops, roundhouses and general offices at a place where the previous dead company agreed to maintain them, or where the nullified contracts placed them, then we say that such an act is plainly unconstitutional, and violates the plainest constitutional guaranetes. This needs no argument to support it. (Bywaters v. R'y, 73 Tex., 628.)

If the corporation making the alleged contracts continued to exist, its charter located its general offices at Houston, and the statute of 1889 could not apply.

We have pointed out, in our principal brief, that the old I. & G. N. R. R. ceased to exist in 1879; that its charters, as well as its franchises to do, and physicals, had all been mortgaged by four mortgages, then foreclosed in the Federal Court, and that they were sold out and passed to a new company. It is no answer to this position to say that the new company was not a new corporation, because it was acting under the old charters. It is true that the charters continued to exist, and in that modified sense the new company, as a corporation, was existing as a corporation through its acquisition of the old charters, as then authorized by the statute of Texas. But this in no respect prevented it from being a new company, and in the truest sense a new corporation. Instead of taking out a new charter, the purchasers of the property simply acquired the old charters, which had been subjected to their mortgages. If this were not so, then every unsecured right would become secured merely because those who had taken the security, as a mortgage, exercised their security and sold out the properties.

It is useless to go through many of the Texas cases upon this subject, but we think it worth while to make a brief further exposition of the case of Railway v. Harle, 101 Texas, 170. On foreclosure of a mortgage a small railway had been purchased by a trustee for Mrs. Harle, for whose benefit, without a new charter, it was operated for a time. Then, under the statute existing in 1897, a new charter was taken out. Under the statute also still existing when Mrs. Harle bought (then R. S. 4549) it was provided that the purchasers should become the owners of the old charter, and should be deemed to be the corporators under it, as was the case in 1879. (101 Tex., 180.) Mrs. Harle and her husband were indirectly and directly parties to the organization of a new railway and the taking out of a new charter, authorized by the Act of 1889 (our brief, p. 227; 101 Tex., p. 180), but Mrs. Harle never joined her husband in conveying the property by a conveyance complying with the requisites of the Texas statute relating to conveyance of realty by married women. Principally, on account of the absence of any such conveyance, and after the new railway had fallen into difficulties, Mrs. Harle sued to assert her claimed rights as owner under the foreclosure proceedings. (101 Tex., 178-180.) This situation led the Supreme Court of Texas into an interesting discussion of the effect of the statute authorizing the charter to be mortgaged and sold out, and constituting the purchasers the corporators and owners of the old charter, and constituting them into a new company under the act existing in 1889, and quoted by the court, then Section 4549 of R. S. (101 Tex., 180; our principal brief, Exhibit "B," p. 224, Sec.

5), and also of the Act of 1889 (not Office-Shops Act of the same year) set out in the opinion of the Supreme Court as then R. S. 4550 (101 Tex., p. 180; our principal brief, Exhibit "C," p. 227), and authorizing, for the first time, the taking out of a new charter by the purchasers of the sold-out railroad.

It was pointed out that the Supreme Court of Texas, through one of its ablest Chief Justices, had declared, before the passage of the act authorizing the taking out of a new charter by the purchaser of a sold-out railroad, that the effect of the act existing in 1879 was that the sold-out "corporation continues, and the purchasers became in effect new stockholders, the corporation property so purchased, however, *being relieved from liability for debts, not creating a prior encumbrance on the property sold.*" (G. C. & S. F. R'y v. Morris, 67 Tex., 700, and 101 Tex., 181.) Of course, as was subsequently said, the purchasers take subject to the statutory and common law obligations to the public; but this means such obligations as are constitutionally imposed, and there were none herein involved in 1879.

Again, in G. C. & S. F. Railway v. Newell, 73 Tex., 338-9, in a case which arose before the adoption of the statute permitting the taking out of a new charter by the purchasers of a sold-out railroad, and referring to the statute existing in 1879, Judge Stayton says: That by the sale there was a change made in the ownership of the railroad and its franchises—"but the corporate existence continues with the franchise, neither enlarged nor restricted, as before, and the railway company, in whomsoever may be its ownership, stands charged with every duty and obligation

to the public imposed upon it by its charter and the nature of its business, and from these it cannot escape without legislative permission so long as its corporate existence continues. *A person or corporation, however, who acquires the property and franchises of a railroad corporation through sale under execution (and we can say, through any other judicial sale) takes it freed from all liability for its former indebtedness not secured by prior lien, and from all personal obligations assumed by the former owner.*" (101 Tex., p. 181.) The alleged contracts of 1872-75 are admitted to have been personal obligations until the passage of the Office-Shops Statute of 1889 (our brief, p. 229) securing them, as claimed. The old charters were washed clean. How, then, can the Act *of 1889 be assumed to have been applied by the legislature to the security of alleged contracts eliminated in 1879? The legislature, in 1889, had reference to existing companies, bound by existing personal contracts, not to pre-existing companies, and not to non-existing and eliminated "personal obligations."* Otherwise the statute is unconstitutional. (Bywaters v. R'y, 73 Tex., 628; Mellinger v. City, 68 Tex., 37.)

It is plain that what Judge Stayton undertook to state was this: The charters continue to exist freed from every personal obligation, and a new company is brought into existence. Our opponents would not contend that they would have any standing, if a new charter could have been taken out in 1879. That was not then permitted by the laws of Texas, but first in 1889. (Our brief, p. 227.) Because of the inability of the purchasers of 1879 to take out a new charter they maintain that there has been a complete identity

of the corporations, and the companies, through the foreclosures in 1879 and through the mortgage of 1881, and its foreclosure in 1910-11, and that therefore the Act of 1889 applies through all these foreclosures and mortgages. But they take this position with little confidence, and they induced the Court of Civil Appeals to find that the foreclosures in 1879 were fraudulent and void. To this they are driven. If they were void, then the old corporation existed from 1872-75 straight down, and the obligations of 1872-75 were not wiped out by the foreclosures of 1879, and the Act of 1889 would apply.

It is as if a farmer had personal obligations and made a mortgage under which his farm was sold out and bought by Brown, and the legislature should thereafter declare that because Brown owned the farm he is responsible for the first farmer's personal obligations. Of course, no such thing can be done, but our opponents say that although their private finances are involved, it is within the police power of the legislature to decree that an arbitrary and much extended general offices shall be put at Palestine forever, and the persons composing them, together with the shops and roundhouses, for this large railroad, forever pinned down there with their families as residents of that town, although the statute, in its terms, would only be applicable in the event that the dates of the alleged livery stable, etc., contracts were transferred from 1872-75 to after 1879, and testified to as made after the foreclosures. Although there was an identity of charters, there was no identity of companies or corporations, in the important sense. Because the same charters exist and the same corpora-

tion has a charter, it does not follow that the same corporation as an identity, or as a company, acting and doing, exists. That a new doing entity was created in 1879 does not seem to us subject to discussion.

We submit that this is precisely what was intended by the court in Railway v. Harle and the cases therein cited, for if the contrary were intended, then we would have this absurdity, that after 1889, when it was first provided that a new charter might be taken out by the purchasers of a sold-out railroad, such persons so taking out a new charter would be absolutely free under the terms of the Office-Shops Act of the same year, while the persons not taking out a new charter would be absolutely bound by that statute, although they had identical mortgages which were foreclosed. So our opponents are forced to the position that they could be defeated by taking out a new charter, if a sale was made under the foreclosure of a mortgage existing before 1889, and if the contract they sued on was made anterior to the Act of 1889, unless they can collaterally establish in the State Courts that the decrees of the Federal Court of 1879 are void for fraud, whereas, in a case where the sale was made before the Act of 1889, authorizing a new charter, the purchasers are bound by the subsequent Office-Shops Act of 1889, because no new charter could have been taken out. Let us suppose that instead of being sold out in 1879 the I. & G. N. R. R. had been foreclosed and sold out in 1889, after the Act was passed authorizing the purchasers to take out a new charter, but before the Act was passed of the same year relating to shops, roundhouses and offices, upon which our opponents rely. Then, in such case, if a new charter

was taken out, on their theories, they would have no standing, unless they have shown that the decrees of 1879 were void for fraud.

Our opponents stray extensively outside of the record, quote essays by Governor Hogg, and state out of their own interiors various matters which they consider relevant, and, as drawn by them, from long past political controversies in Texas. To none of these should we reply, except to state that the Office-Shops Act of 1889 was passed—not with reference to Palestine, but with reference to the case of T. & P. Railway v. Marshall (136 U. S., 393), and before that case was decided by this court. The statute was ignored by this court, and rightly so. Gov. Hogg, as Attorney General, brought a suit to compel the bringing of the general offices of the I. & G. N. from St. Louis back into the State, and this was done, as appears by the case referred to, not upon the basis of the Office-Shops Statute, but before it was passed.

We have no quarrel with the result in S. P. Railroad v. the State, decided before the Civil War, 24 Tex., 122. That the State then and now had power to compel a railroad to keep its general offices inside of the State we do not doubt.

This court has said that the public is not the general manager of a railroad. (I. C. C. v. Railway, 209 U. S., 118.) Attempt is now made, under the guise of the police power, to so manage a great railroad as to determine where the fuel agent or master mechanic, etc., shall reside, and necessarily where their families shall reside. If this case is maintained, it will be illegal for the families of any general officer and of various employes of the railway to reside outside

of the narrow limits of Palestine, although the health of their families, and the salubrities and economies of country life may make them desire to a little overstep the limits of this town. The laws of Texas fix a man's residence at that of his wife. This is not regulation within the police power, but is sheer tyranny and confiscation, for the benefit of the shopkeepers and landlords of this small town.

The police power is that power residing in the sovereignty and impliedly reserved to it lying back of the constitutional limitations; but it is not a tyrant's power, and is limited not only by the provision of Magna Carta, prohibiting the taking of property without due process of law, but by our various National and State constitutional limitations. Even for a public use it is provided that property shall not be taken or damaged without compensation. (Const. of Texas, Bill of Rights, par. 17.) *It is fundamental that the existence of a public purpose solely does not warrant the taking or damaging of property without compensation.*

Liberty, like morality, is individual, not corporate, and it is a great part of our civilization that there are certain individual rights lying at the foundation of liberty which cannot be infringed even by the sovereignty.

Our opponents contend that the Office-Shops Act (our brief, p. 229) is constitutional, although it burdens the property and swells out the alleged contracts of 1872-75:

(*a*) By creating a burden, servitude and encumbrance upon property of the sold-out railroad, and thereby giving security;

(*b*) By the requirement that certain persons, in no respect a portion of the general offices, should keep their offices at Palestine, to wit, the local treasurer, the superintendent of motive power and machinery, the master mechanic, the master of transportation, the fuel agent, and general claim agent;

(*c*) By the requirement that all these persons, as well as all of the general offices, should reside in and have their homes in the town of Palestine, which means, of course, that their wives and children must reside in the town when they have any, for in Texas a man's residence is fixed at the residence of his wife;

(*d*) By the penalty of $5000 per day, and possible forfeiture of the charter, for violation of any of the provisions of the statutes;

(*e*) By the provision that the words "General Offices" meaning in 1872-75 only the general headquarters and domicile of the corporation and place where its primary books were kept and annual meetings held, should be enlarged and changed so as to include all of the general officers and the additional persons, and thereby all of their offices, forever; and by the construction that the alleged contracts, agreements of 1872-75, were swelled out by this statute to cover not only the shops, roundhouses and general offices of the Houston & Great Northern, extending from Houston to Palestine, about 160 miles, but all of those of the whole railroad; and by the requirement that all of the repair work of the whole railroad, except light repairs, should be done at Palestine; although the road is now 1106 miles in extent, through consolidation with the International and other properties, and through construction.

What did the words "General Offices" mean in 1872-75? Our opponents do not claim that the evidence defines what was meant by "General Offices" as used in the alleged contracts of 1872-75. They only claim that the evidence shows that in those alleged contracts the "General Offices" were stipulated to be located at Palestine, without definition. We therefore are bound by then existing conditions. The contract litigated in the Tyler case (99 Tex., 491) was made after the adoption of the Act of 1889 (our principal brief, p. 229), and therefore with reference to its definition of general offices, that is, the contract enforced in that case.

In State v. Railroad, 24 Tex., 122, it was held that the domicile of the corporation shall be within the sovereignty which created it. But in no respect was it ruled that the general offices, as now defined, could be tied down forever at one place.

The first statute was that of Feb. 7, 1853, construed in the last case. By Section 4 thereof it was provided that the principal office shall be on the line of the road, to be changed at pleasure, and this provision is still in our Revised Statutes. (R. S. of Texas, 6435-6434; Exhibit 1, at end of this argument.) The amendment of 1857 provides that at least a majority of the directors, president and vice-president, treasurer and secretary, of a Texas land grant road, should reside within the State (thus showing that they did not have to reside at the general offices), and that the stock books should be kept at the principal office on the line of the road, and the meeting of directors there held. (4 Gam., 897, Paschal's Dig. of Statutes of Texas, 4884, etc., R. S. of Texas 1879, Secs. 4115-4131; Ex-

hibit 2, at end of this argument.) The existing Constitution of Texas of 1876 took away from the legislature the power of creating corporations by special acts. The first legislature under that Constitution passed an act to provide for the incorporation of railroads by general law, and that a railroad corporation should maintain a public office at one of its termini in this State, where transfer of stock should be made, the stock books kept, *and the names and places of residence of all of its officers kept;* and by Section 3 it was required that the place of the principal business office should be inserted in the charter, and by Section 32 that all corporations organized under the laws of the State should establish their domicile in the State; and by Section 10 that the general business of the corporation should be transacted at the general office. (R. S. of Texas of 1879, Arts. 4115-6-7, and Art. 4116.) By Section 3, of Article X, of the Constitution of Texas of 1878, it is provided that every railroad or other corporation, chartered under the laws of the State, shall maintain a public office, for the transaction of its business, and where transfer of stock should be made and the directors should hold an annual meeting. But the statutes set out in the exhibits at the end of this argument are the important ones—as existing in and before 1872-75—when the alleged contracts are claimed to have been made.

By the Act of March, 1885 (Acts, p. 67, 9 Gam., 687), it was provided that every railroad or other corporation doing business in Texas should have a public office in Texas where its principal business should be carried on, and transfers of stock made, and where the auditor, treasurer, general traffic man-

ager and Superintendent of the railroad, or where an agent of said corporation authorized to settle claims, should have their respective offices.

It is therefore plain that in 1872-75, and for a long time afterwards, the concept of general offices in Texas in no respect included the extensive terms of the Act of 1889 (our brief, p. 229); and in 1872-75 it is absolutely definite that by that term was meant only the place where the annual meetings should be held, and where the primary books of the corporation should be kept, and where its domicile should be; the primary books being the charter and minutes of the stockholders and directors.

Does the Act of 1889 relied on come within the scope of the police power, so as to go behind the contract clause and the first section of the 14th Amendment of the National Constitution, and the similar provisions of the Constitution of Texas, and the prohibition of that Constitution of retroactive laws? (Const. of Tex., Bill of Rights, Sec. 16.)

The word "impair," in conection with the contract clause, means simply to diminish, to injure, to make worse, or to change. (Planters Bank v. Sharp, 6 How., 827; Blair v. Williams, 14 Ky., 34; Lapsley v. Brashear, 14 Ky., 47.)

The case of People v. Plank Road Company, 9 Mich., 286-307, is important for one reason, because the opinion was given by Judge Christiancy. A statute was passed, subsequent to the charter, which denounced forfeiture, *in toto*, for that which under the charter would work only a partial forfeiture of franchise rights, to wit, for the failure to keep closely together the planks constituting the roadbed. This was

a statute for the general public benefit, to prevent the maiming of horses and travelers. The Act was held void, as not within the police power, and as not coming within any rational and satisfactory conclusion that such an Act so extreme was necessary to the safety, comfort and well-being of society.

The opinion in Woodward v. Railway, 62 N. E., 151 (Mass.), was given by Justice Holmes, now of this court. Though litigated in Massachusetts, the question arose on a statute of Vermont requiring the purchaser of sold-out railroad property to pay certain judgments. It was ruled that the statute was violative of the Vermont Constitution, prohibiting the taking of property, even for public use, without compensation, and that it was not within the reservations of that Constitution of the power to amend the charter, which could not be construed to be power to confiscate property.

Davidson v. Richardson (Ore.), 91 Pac., 1080, 17 L. R. A. (N. S.), 319. Richardson lent Davidson, a married man, money, secured by lien. Afterwards the legislature extended the dower rights of all married women. Davidson died, and the question was whether or not the legislature had the power, as against the prior lien, to extend these dower rights. This was unconstitutional. The State had an interest in the well-being of all widows and orphans. It was decided that the Act was unconstitutional in this application.

Yeatman v. King, 2 N. D., 422, 33 Am. St. Rep., 797. The State furnished seed under a statute creating liens for that expense, on farm lands, and declaring these liens prior to other liens. It was adroitly drawn

to give the appearance of a tax lien, which would be prior. The Act was held violative of the 14th Amendment, etc., and Munn v. Illinois, 94 U. S., relied on. Assuredly, it is more nearly a matter of general public interest for a State to provide seed for farmers, in great emergencies, than for the State to look after the incomes of a part of the people of Palestine.

Meyer v. Berlandi, 39 Minn., 438, 12 Am. St. Rep., 663. The statute involved practically preferred labor liens to other prior existing liens, and denounced severe penalties. Assuredly, to provide for the payment of laborers and to give them the just results of their toil is more within the public interest than the situation we have here. The statute was held unconstitutional. There have been a great number of these mechanic lien and supply cases by this and other courts. They have but one voice, and declare all statutes unconstitutional which attempt a preference over liens existing when the statutes were passed. Some of these cases are:

Toledo, etc., R'y v. Hamilton, 134 U. S., 299.
Crowther v. Company, 85 Fed., 41.
Johnson v. Goodyear, 127 Cal., 4.
Andrews v. Atwood, 57 N. E., 387 (Ill.).
Bourgett v. Williams, 73 Mich., 48; 41 N. W., 229.
Donoho v. Clapp, 12 Cushing, 440.
Heath v. Company, 83 Fed., 776.
O'Neil v. School, 26 Minn., 329, and 4 N. W., 47.
Mutual Insurance Co. v. Richardson, 77 Ind., 395.

It is contended that, though it must be admitted that the people of Palestine or the legislature could not burden or take the property of the I. & G. N. R. R. or its mortgages for a public school, a public road,

a public park, or sites for public buildings, or a multitude of other public purposes, without compensation; yet that it has a right to do so for the promotion of real estate values, and in order to make business for merchants of Palestine. The Act of 1889, if constitutional, could only be constitutional in enforcing and securing after the event (which it could not do) the alleged contracts of 1872-75, as made.

Allen v. Detroit, 133 N. W., 317, 36 L. R. A. (N. S.), 890. Property owners had placed building restrictions on an addition platted and sold by them. The city bought a lot and proposed to place a building for fire apparatus upon it, in violation of these restrictions, and without compensating the property owners. This was a public use, but it was held that it could not be done without paying the damages consequent upon the infringement of the building restrictions.

We now state, with the utmost emphasis, that whether or not a thing done or desired to be done is within the police power, if on any theory it can be therein, depends upon judicial ascertainment as to its reasonableness. The legislature cannot preclude judicial ascertainment of the reasonableness of the exercise of the police power. It cannot issue its own sweeping and final decree as to any class or any event or situation.

It follows that the Office-Shops statute of 1889 (our principal brief, p. 229) is an unconstitutional ukase as decreeing a finality. It shuts out all inquiry as to reasonableness.

The legislature can provide that, as to all of a class, or as to any one, possibly coming within the

police power, thus and so as to it shall be done, without compensation for the cost of doing, if found reasonable or that it may be required to be done. But the legislature cannot issue its final decree that it shall be done, i. e., precluding any investigation of its reasonableness, unless in that limited class of cases where the reasonableness of its being done appears on the face of the statute, e. g. The legislature can constitutionally declare that in the case of a great fire, when it is next to a house, that house may be blown up without compensation. In such a case all the court will have to ascertain is that the fire was a great and dangerous one, and right at the house. But, *contra,* the legislature cannot decree that whenever and wherever railroads are crossed by public streets or roads, they must divide the grades at their own expense. Railroads can be compelled to divide the grades at their own expense *when this is reasonable,* but whether or not it is reasonable is for the courts to determine, and the legislature has no power in such a case to issue its final decree precluding judicial investigation, thus exercising the power without regard to reasonableness. Such a statute would be unconstitutional.

> "The question in each case is whether the legislature acted in exercise of a reasonable discretion, or whether its action is a mere excuse for an unjust discrimination, or the oppression or violation of a particular class. * * * But the exercise of the police power is subject to judicial review, and property rights cannot wrongfully be destroyed by arbitrary enactment." (Holden v. Hardy, 169 U. S., 366.)

Therefore, it was ruled in Commonwealth v.

Bridge Co. (2nd Gray, 350) that when a charter or charters directed that a bridge draw or draws should be of a certain width, a statute could not finally decree that they should be of a certain greater width; what greater width they should reasonably be of was a judicial question. (cf. Bailey v. Railway, 4th Harrington (Del.), 389, and 44 Am. Dec., 594.)

Though the reasonableness of the exercise of the power in a particular case is for the courts, it is for the legislature alone to determine the policy, wisdom or expediency of invoking the police power, *i. e.,* of determining what matters may be brought within its scope. This is primary. *Consequently, the power* cannot be delegated, to be put into effect at the will *of private individuals.* The extent to which the invocation of the police power can be delegated by the legislature is to municipalities, or the regular governmental agencies of the State. But the legislature cannot delegate the invocation of the police power to even a governmental board, if to be exercised according to the uncontrolled discretion of such board, without regard to reasonableness. *A fortiori,* the legislature cannot delegate the invocation of the police power and the determination of its reasonable exercise, in particular instances, to private individuals, as here, because private individuals had made in the past certain contracts, or might make them in the future, precluding all judicial investigation of the reasonableness of the application of the police power to the particular instance. It is unconstitutional to vest a board or public official with power to exercise the police power at its or his discretion without regard to the reasonableness of its exercise

in the particular case. (Noel v. People, 187 Ill., 587, and 58 N. E., 616; Matter of Frazee, 63 Mich., 396, and 6 Am. St. Rep., 310; Cicero Lumber Co. v. Cicero, 176 Ill., 9, and 51 N. E., 758.)

As to individuals, the initiation of the police power or bringing it into operation can never be delegated to their direction, much less option. *The legislature cannot delegate its discretion to invoke the police power to individuals, or that its going into effect be determined on the volition to act or not to act of provate individuals.* (Corpus Juris, Vol. 12, p. 911, Sec. 421.) The legislature may lawfully, perhaps, require a railroad to build its right-of-way fence on a particular part of its way, but the statute cannot compel the railroad to build its right-of-way fence at the instance of a landowner. (R. Co. v. Todd, 91 Ky., 175, 179.)

Let us apply these principles to this case:

Here the statute leaves no room for judicial investigation of reasonableness, and decrees a finality without regard to reasonableness, to take effect upon the initiation and volition to do or not to do, in the past or future, of private individuals. It declares that if a contract has been made by the railroad corporation and anyone, then (as construed) the "General Offices," "Shops and Roundhouses" *"shall"* forever *be kept and maintained* at that place, etc. The legislature precluded all judicial investigation as to reasonableness, and issued its final decree.

Private individuals cannot initiate the application of the police power, even on a sound discretion. The legislature cannot abdicate this power to them. How, then, on these principles, can it be said that the Legis-

lature of Texas, in 1889, could finally decree that, because of the incident of a private contract entered into, however wisely or unwisely, then, without regard to a judicial investigation, the new, different and large thing called general offices (never contemplated by the parties making the contract) should be fixed, with the shops and roundhouses, at a small place, and tied down there forever; and applied to a continental railroad; merely because a little railroad corporation, afterwards consolidated into the larger and other thing, and others, of their own volition, saw fit to contract as to a different thing? This principle deposes the legislature, as entrusted to exercise its wisdom for the general benefit, and lends the police power to the schemes of land jobbers and railroad speculators in derogation of all public benefit.

It is notorious that before and after 1889 Texas was full of railroad speculative enterprises; and that the locations of shops or general offices, or both, were bartered away to land speculators, and in some cases, doubtless, by corrupt railroad promoters. They were located in little villages and at inconvenient points, on all sorts of considerations, other than the public interest. This is *reductio ad absurdum*. The legislature cannot finally decree and preclude judicial investigation of reasonableness, unless the reasonableness appears on the face of the Act, and cannot delegate this discretion to private individuals.

In Janin v. State (Texas), 51 S. W., 1126, a penal statute was held unconstitutional which depended for its incidence upon the volition of a railroad in connection with the formation of a contract.

So, we say in this case, it has always seemed to us

monstrous that the action of the people of Palestine and Anderson County in 1872, and a very few of the citizens of Palestine in 1875, in voluntarily entering into an arrangement with the railway (if they ever did so) for the location of the general offices as then defined, not as now defined, and of the shops and roundhouses, of this little road—the H. & G. N., could be the basis of the invocation of the police power against the continental road by force of the long subsequent Act of 1889, *when the application of the police power could not be determined judicially, nor by general wisdom, nor by any public policy, but by the mere option of individuals to enter into a contract? For the statute is of general application, and it is impossible to conceive that the legislature investigated and had in mind for all the past and all the future the benefits of the public, if any, in tying down great railroads forever in little villages and towns in the interior,* because some little afterwards consolidated fractions thereof made some sort of a contract. No, the thing is too absurd. The benefit of the public was not under consideration, but the benefits of individuals. It has always seemed to us that the proposition now made is one of the most certain in the whole case.

Eubank v. City of Richmond, 226 U. S., 137. It is not within the police power to establish a building line up and down the street by a two-thirds vote of property owners, although for the claimed benefit of all the people; when a property owner is thereby compelled to set back his house without compensation for the expense.

State v. Bancroft, 148 Wis., 124, 135 N. W., 330.

When dams have been built by corporations, under charter powers for the improvement of navigation or to develop power, then these rights are not subject to statutory modification without compensation, even where the State reserves the right to modify or recall charters, and it cannot do so under the claim that the power is exercised for a public use.

Loan Association v. Topeka, 20 Wall., 655. This is a great historical case. The power of municipalities to promote railroads by bond donations was upheld, largely on account of the analogy of railroads to wagon roads, and for reasons well known to this court. But, on the other hand, it was laid down that it was beyond the power of the Government to take property and bestow it in the aid of private enterprises, as here, in an attempt to build up the fortunes of the people of Palestine, "and, to build up private fortunes is none the less a robbery because it is done under the forms of law and without taxation. This is not legislation: it is a decree under legislative form."

M. P. Railway Company v. Nebraska, 217 U. S., 196. This is the elevator case. A statute requiring railroads, under severe penalties, to put in side-tracks to grain elevators adjacent to railway right-of-way, at its own expense, was held unconstitutional. Railroad property is protected by the Constitution.

Dash v. Van Vleeck, 5 Am. Dec., 291, and 7 Johnson, 477. The case is interesting and powerful, being participated in by Chief Justice Kent himself. It declares that the principles we defend are fundamental, not only in the English, but also in the Roman law, and are part of the law of civilization.

It is abhorrent to suppose that the legislature had in mind the upset of rights accrued, or was dealing with acts of a predecessor in title; we must construe statutes, if we can, to exclude such situations.

Bywaters v. Railway, 73 Tex., 628. A corporation had been dissolved by statute. It claimed to have been revived, by a subsequent statute, and sued to collect a subscription to the first corporation. The principle we stand on was here rightly invoked against the corporation. The court said: *"We cannot consent to the proposition that the legislature has power to make a contract for parties, or to revive and make binding an obligation which has lapsed or become barred, without the consent of the party to become bound"; i. e.,* without the consent of the subscriber to subscribe to the new corporation instead of the old. This is the situation here: The old I. & G. N. Railroad was sold out in 1879, and the new I. & G. N. Railroad then came into action. The Office-Shops Act was passed in 1889. Let us suppose that the bonds, in whole or in part, had not been paid to the old railroad, which ceased to exist in 1879; and let us suppose that the new railroad sued for these bonds, claiming that it had put its general offices and shops in Palestine. *Could the new railroad recover on the ground that a contract had been made with its predecessor? The question sounds foolish. It could not recover.* There had been a change of personality. If it could not recover, how can the other party to the contract recover? It is claimed that security was given to the alleged contracts in 1889. Contracts with whom? With the old then non-existing company, existing in 1872 in the shape of H. & G. N. and Inter-

national Railroads, consolidated into the I. & G. N. Railroad in 1873, and passing out of existence as entities in 1879. The principle established in the Bywaters case requires no authority to support it. The case merely illustrates a fundamental proposition in the law of contracts, and that it is beyond the power of the legislature, and violates constitutional limitations for the legislature to attempt to make the contract of an extinct predecessor the contract of its successor in title. *The following objects are not within the police power, even when aided by public general taxation, instead of as here, loading the burden upon a single person:*

Tax or bonds to promote manufacturers:

Parkersburg v. Brown, 106 U. S., 487.
Cole v. LaGrange, 113 U. S., 1.
Dodge v. Missouri, 107 Fed., 827; 54 L. R. A., 242.
Allen v. Inhabitants, 60 Me., 124; 11 Am. Rep., 185.

Bonds to aid fire sufferers to re-build:

Lowell v. Boston, 111 Mass., 454; 15 Am. Rep., 39.

Bounty to private inebriate hospital:

Keeley Institute v. County, 70 N. W., 68, and 60 Am. St. Rep., 105.
State v. Froelich, 118 Wis., 129; 99 Am. St. Rep., 985.

Bounty to students attending State University:

State v. Switzler, 143 Mo., 287; 65 Am. St. Rep., 653.

Aid to build a Grand Army Post:

Kingman v. City, 153 Mass., 255; 26 N. E., 998.

Furnishing seed to farmers:

State v. Osawkee, 14 Kas., 418; 19 Am. Rep., 99.

Bounties to tree growers:

Deal v. County, 18 S. W., 24; 107 Mo., 464.

Legislative attempt to infringe upon railway right-of-way for the benefit of elevators:

R'y v. Nebraska, 164 U. S., 403; 41 L. E., 489, *supra.*
R'y v. Nebraska, 217 U. S., 196; 54 L. E., 727.

Free tickets to stock shippers, attempt to compel:

R'y v. Campbell, 61 Kas., 439; 48 L. R. A., 25-1.

Statute to compel the building of a spur track to mines:

Harp v. R'y 118 Fed., 169.

Bounty for sugar growers:

Michigan Sugar Co. v. Dix, 124 Mich., 674; 83 N. W., 625; 83 Am. St. Rep., 354.

This list could be greatly extended.

To vary the contract by subsequent statute, though great public interests are involved:

International, etc., Ass'n v. Hardy, 86 Tex., 610.

To compel railroads to put in private crossings at their own expense:

Railway v. Rowland, 70 Tex., 298.
Railway v. Ellis, 70 Tex., 305.

Defendants in error announce the broad proposition *that the rights of a purchaser at a mortgage foreclos-*

ure sale are governed absolutely by the law in force at the time of the foreclosure sale, and cite Con. Mut. Life Ins. Co. v. Cushman, 108 U. S., 51, as authority for this proposition. *That this general statement is incorrect is fully demonstrated by the case of Barnetz v. Beverly, 163 U. S., 118, where the case first mentioned was discussed.* In the Cushman case the mortgagee bought in the property at foreclosure sale for an amount sufficient to pay the mortgage debt. Judgment creditors undertook to redeem, and it was held that notwithstanding the law at the time the mortgage was executed allowed judgment creditors to redeem by payment of the amount of the mortgage debt with ten per cent. interest, the right of redemption could be exercised upon payment of the amount for which the property sold with eight per cent., as authorized by statute enacted subsequent to the execution of the mortgage. Inasmuch as the mortgagee bid in the property for the amount of his debt, it was held that the subsequent law providing for redemption on the payment of eight per cent. did not impair the contract mortgage which was extinguished. In the Barnetz case the mortgagee became the purchaser at the foreclosure sale for an amount less than the mortgage debt. A statute passed subsequently to the execution of the mortgage and giving the mortgagor, or those holding under him, eighteen months after the sale within which to redeem and entitling him in the meantime to the possession of the property, when at the time the mortgage was executed the purchaser at foreclosure sale had the right under the law to actual possession as soon as the sale was confirmed and a deed was executed, was held to be an impairment of

the mortgage contract. The court discussed the Cushman case, and said:

> "The case of Conn. Mut. Life Ins. Co. v. Cushman, 108 U. S., 51, does not collide with the previous and subsequent cases. And the new statute did not lessen the duties of the mortgagor to pay what he had contracted to pay, nor affect the time of payment nor affect any remedy which the mortgagee had by existing law for the enforcement of the contract."

In Hooker v. Burr, 194 U. S., there was a further discussion of this subject. In that case the law in force, when the mortgage was given, permitted redemption by a judgment creditor of the mortgagor upon payment of the amount bid at the foreclosure sale with interest at the rate of two per cent. per month; whereas, by a statute, passed subsequent to the execution of the mortgage, redemption was allowed upon paying the amount bid with interest at the rate of one per cent. per month. This statute was sustained, the decision being based upon the Cushman case, which was distinguished from the Barnetz case by the consideration that in the former the mortgagee, by bidding the full amount of his debt, was converted from a mortgagee into a purchaser, whereas, in the latter, the mortgagee, in consequence of bidding less than his debt, retained his rights as a mortgagee, and was not converted into a purchaser.

The decision in Hooker v. Burr, 194 U. S., 415, was maturely considered by the Supreme Court of California in Welch v. Cross, 106 Am. St. Rep., 63-75. This case involved the constitutionality of a statute, passed after the execution of a promissory note, ex-

tending the time for redemption by the debtor against whom judgment on the notes was obtained, and whose property was sold under execution issued on the judgment within from six to twelve months. The last statute was held to violate the obligation of the contract evidenced by the note. It was held that the decision in Hooker v. Burr went no further than to sustain legislation reducing the rate of interest on redemption, and further showing that to interpret Hooker v. Burr as sanctioning the proposition that a statute, having the effect of diminishing the security of a mortgage, is valid, would be to strike at the very foundation of mortgage security. If an independent purchaser cannot hold the entire estate subject to the mortgage, the lien holder cannot sell the whole estate, and since no one will purchase and pay for what he cannot hold, all foreclosure sales will be weakened, and the value of the mortgage security be correspondingly lessened. The assertion of the principle that a purchaser at foreclosure sale takes subject to all laws enacted subsequently to the execution of the mortgage, and before the sale, even though the value of the security is seriously diminished, would evidently destroy the principle that the purchaser takes the title and estate as they existed when the mortgage was given.

It is the contention of defendants in error in this court that the alleged contracts of 1872-75 lend no force to the Act of 1889. In other words, they are merely the *descriptio loci* indicating the place of application of the Act of 1889, which, therefore, stands upon its own inherent force, unaided by these contracts. If this be true, there is but one question to

be determined with reference to the mortgage of 1881, and that is, does the Act of 1889, passed more than seven years subsequent to the mortgage, impair the value of the security thereby conveyed? The Supreme Court of Texas was evidently of that opinion, because it characterizes the Act as a servitude and burden. The value of a railway consists largely of its operating value. Its physical properties, considered as unrelated property, are but a small portion of its operating or business value. A burden, of the character imposed by this Act, which limits the road's activities for all time, manifestly decreases its value as an operating concern; and if the burden of the Act of 1889 is to be attached to the estate conveyed in 1881, the purchaser in 1911 acquired an estate much less valuable than that conveyed seven years prior to the passage of the Act. The property sold for less than the mortgage debt, and the purchaser cannot, consistent with the contract clause of the Constitution, be required to accept a property charged and burdened with encumbrances and servitudes injuriously affecting its value created by legislation years subsequent to the mortgage contract.

III.

Under their third head (opposing brief, p. 71) our opponents attempt to answer our proposition *that the I. & G. N. Railroad, existing in 1872-75, was sold out and ceased to exist in 1879, and that, as the Act of 1889 was not then in existence, and as their alleged contracts of 1872-75 were then admittedly unsecured and purely personal, their alleged contracts could not*

bind the new company coming into existence in 1879, or run through the three foreclosure sales made by the United States Court, and wherein four mortgages upon all of the property and all of the charters were foreclosed, and the charters and all property sold out, there then being no statute authorizing the taking out of a new charter on the judicial sale of railroads, but the statute authorizing the mortgaging of existing charters, as was done in the four mortgages, and their judicial sales to the purchasers.

Realizing that a new company and a new entity was created in 1879, on the face of these proceedings, *the defendants in error undertook to show that those foreclosure proceedings were not bona fide, and that the purchase through them was collusively made by agreement between the foreclosing mortgagees, the stockholders and the railroad. The effort was to bring the case within the purview of N. P. R'y v. Boyd, 228 U. S., 501, and to collaterally have the decrees of the U. S. Court held void for fraud, and then to maintain that the old company existed down as if those decrees had never been entered; or, failing to do this, to hold the new company, created by these judicial proceedings in 1879, as a trustee for all unsecured indebtedness and liabilities of the old company.*

As we shall show below, neither end was reached, *and there was no evidence whatever of fraud,* legal or actual. There was absolutely no case made, and consequently we present here purely a point of law; *for when there is no case and no evidence in the slightest degree supporting the case, it is a point of law that there is no case;* and this court will never permit the matter to be obviated by the mere declaration that

there was evidence, when there was none. If that were not so, *then there is no constitutional limitation, "or right, title, privilege and franchise" derived under a decree of a Federal Court, and guaranteed by the Federal statute, which could not be set to one side by the State Court by its merely finding things to exist which were not, or denying things which were.* This court will decide that question for itself, and is not bound by the declaration of the State Court. (Kansas City Southern R'y v. Albers Co., 223 U. S., 573, 591; Norfolk & W. R'y v. Conley, 236 U. S., 605.)

We never conceded, as stated on the top of p. 74 of the opposing brief, that the Boyd case had any application.

The gist of the Boyd case was that if by any agreement, between *the foreclosing mortgagees and stockholders of the foreclosing company, and those controlling both sides of the docket, property of the foreclosed company, to which unsecured creditors like Boyd could rightfully look, was passed into the new company organized on the foreclosure, then the new company would be liable.*

The old stockholders received preferences over the unsecured creditors of the old N. P. R. R., and became stockholders in the new railway. To state the matter briefly, the new company thereby became a constructive trustee, holding such property for the unsecured creditors of the old company; this property being passed down into the new company by a process which had deprived the unsecured creditors, like Boyd, thereof. Claiming the property, it could not refuse to pay those who were entitled to the value thereof.

It makes no difference whether the fraud were tech-

nical or willful. Here was created a constructive trust, and the constructive trustee became liable. It was said in the Boyd case that the sale therein could not bind non-assentive creditors when the old *stockholders were to receive a consideration on the basis of their old stock out of the assets of the old company,* they becoming stockholders in the new company; and that "any device, whether by private contract or judicial sale under consent decree, whereby stockholders were preferred before the creditor, was invalid." Equity creates a trust out of such situations, and the trustee, the new company (the measure of whose assets measured the value of the new stock) became, of course, trustee for these unsecured creditors, when the assets to which they had a right to look, by any arrangement, had been carried down into the new company, without the realization of these assets for the benefit of those creditors.

This is the heart of the Boyd case, and a succinct statement of the principles upon which it was ruled.

Our opponents state that they are not collaterally attacking the court decrees and the judicial sales thereunder of the United States Court of the Western District of Texas, made in 1879. (Their brief, p. 73.) Then they are making no attack at all.

They have procured an opinion from the Court of Civil Appeals that those sales and foreclosures were not bona fide; that they were fraudulent and void. Now they say that by this is not meant fraud at all. In other words, under the exigencies under which they are, of the jurisdictional question, they suddenly change their position. They do not bring this case within the limits of the Boyd case, and while they are

now unwilling to say so, yet this was an attempt to set aside collaterally the decrees of the United States Court made in 1879, as fraudulent. *No court can set aside as void decrees of another court. It has no jurisdiction to do so.* We understand our opponents, when confronted with our brief on that point, to now yield as hopeless their prior contention that the old company had come down through the decrees of 1879, because those decrees were void.

They now admit that they were neither void nor voidable, but contend that they are subject to a trust, because not taken in good faith. A trust for what? To secure the terms and extensions of the Act of 1889, not existing in 1879; in other words, that in 1879 they were cheated out of rights not then existing. This is monstrous.

We concur with our opponents that one court can ascertain that the decree of another court was taken by one person in trust, although it may not so appear on its face, for that does not contradict or void the decree; and it can be shown that the trust is a constructive trust, growing out of the violation of the right of some third person, as was done in the Boyd case. But that is not the situation of our opponents; they were attempting, though now they deny the fact, to set aside the decrees of 1879 in a collateral attack. They were not attempting to graft a trust upon it, but squarely stated: "There was no evidence of a real judicial sale." This was their proposition. (Brief, State Court, p. 221.) In our pleading (R., pp. 116-123, Sec. 33, Sub-secs. *a-o*), we set out the history of these foreclosures, all of which were completely proved, as has been shown in our brief.

Our opponents have answered (R., p. 376, etc.) that these foreclosures were made in order to consummate an agreement (of all parties) that the rights of the stockholders should not be extinguished or affected by the sales; and that Kennedy and Sloan had bought the property in as trustee, and conveyed the same to the International & Great Northern Railroad Company. (R., 377.)

There was no evidence that the interest of the stockholders was not extinguished, and no evidence of any fraud or any agreement whereby the stockholders of the new company were to get anything out of the old company. Kennedy and Sloan having purchased the properties, made a deed to the I. & G. N. Railroad Company, that is, to the new company, the charters of which, by result of the foreclosure, became the property of the purchasers. The charters, or franchises to be, of a corporation are the properties of the stockholders; the other corporate property is the property of the corporation. Kennedy and Sloan were trustees for the purchasers, and the only evidence our opponents had was that the old stockholders were to a large extent, though not completely, the stockholders of the new company. Kennedy and Sloan were trustees for the foreclosing mortgagees, and conveyed to the railroad, in consideration of its mortgage of $10,348,000 then created. (R., p. 848.) The foreclosed mortgages amounted to about $20,000,000.00. (R., 931-6.) Nowhere in the record is there the slightest evidence of any agreement or arrangement for this transaction, or any evidence that the new stockholders in the new company received anything out of the transaction; or of any injury to

persons holding unsecured liabilities; *nor was there evidence, or any attempt to show, that anything owned by the old company, to the realization of which its obligees were entitled, was passed down into the new company, as was the case in N. P. R'y v. Boyd.* Our opponents made no case. They plead and that was all. In their brief they make the violent assumption that because there was a considerable identity of stockholders in the old and new companies, that thereby it results there was fraud. We cannot point out what does not exist in the record. They now, in the teeth of all precedents and in the teeth of the Boyd case, undertake, in effect, to say that the new company became a constructive trustee for them, merely on account of the fact that mortgagees and stockholders or stockholders in the old company were the principles of Kennedy and Sloan, the purchasers at the three foreclosure sales. The mortgagees probably were. There is no evidence as to stockholders. This is merely an unwarranted assumption, without authority, and against all authority. It would be improper for us to extensively combat that position. It is sufficiently answered, commencing page 171 of our brief on file, and by the statements and propositions commencing on page 153.

The deed made by Kennedy and Sloan was proper; it was a memorandum of the transaction. It was not necessary under the law, because the law vested Kennedy and Sloan, as purchasing trustees, with the charters of the sold-out company, and all that was absolutely necessary for them to do was to take possession and distribute the stock; but they proceeded in a more methodical way. It is not in the slightest degree evi-

dence of any fraud or diversion of assets into the purchaser without realization thereon for the benefit of obligees, because the stockholders or mortgagees, or both, in and of the old company may have purchased. *The courts encourage such stockholders or the foreclosing mortgagees to bid; it is beneficial to the obligees that they should do so, and it is no evidence of fraud that they enter into a preliminary plan and organization for the purchase of the property, and no evidence that thereby any assets are diverted out of the old company, unrealized on, into the new company. On the contrary, the doing of all of this is favored.* (Cook on Corporations, Sec. 886; Thompson, Section 6008.)

Here our opponents are against an insuperable difficulty, which they meet with an unwarranted assumption. The Court of Civil Appeals has stated that the sale was made not in good faith, "and in consummation of an agreement between all parties at interest that such sale should not affect stock ownership in said company, *nor the company's title to said* property and franchises." There was no evidence of any agreement, or of anything in any degree tending to support such a statement. The only attempt made to support this theory was the introduction in evidence of a list of stockholders of April 7th, 1879, and November, 1879, from which it appeared that the stockholders in the old company had become stockholders in the new company, with the exception of 250 shares. (R., 849-850, Vol. 2, Sec. 28, and top of page 735.) There was no agreement shown, whereby they were to or did get anything in consideration of their stock in the old company, as was shown in the

Boyd case; that is, get something out of the assets of the old company. No agreement about anything was shown. What was shown was what naturally happens. People who have lost money in property and have been connected with it are encouraged by the courts to buy, and have a tendency to buy, or, as is said by Thompson: "A majority of stockholders may in good faith purchase at a sale and reorganize a corporation, but there must be no collusion or fraud." (Sec. 6008.) And by Cook (Sec. 886): "Stockholders are not debarred from purchasing at the sale. Fraud or collusion, whereby the property at the sale brings less than its real value will, of course, render the sale subject to attack; but the fraud must be clearly proved. The purchase of a corporate property by a majority of the stockholders at a foreclosure sale made in good faith is legal and valid." Our opponents, therefore, have shown no case whatever of any fraud in those transactions; whereby as a constructive or other trustee, the new company became a trustee for them and subject to their claims.

In their brief in the State Court they contended that there was "no evidence of a real judicial sale in 1879." (Page 221.) They induced the Court of Civil Appeals to collaterally find that the proceedings in the Federal Court in 1879 did not "affect the company's (old sold-out company) *title to said property and franchises.*" In other words, that the whole judicial sales were void. They also plead, as that court states, and that court so held. (174 S. W., p. 316, 1st col., top.) Now realizing that it is impossible that the State Court can void the decrees of the U. S. Court, they attempt this change. They have made no

approach to show the trust. Therefore, our conclusion was and is that they were attempting to void those decrees as fraudulent rather than to engraft a trust upon them.

In this view we are strengthened by the predicament in which our opponents are placed unless they void the decrees of 1879, instead of showing that they are subject to a trust. They cannot void the decrees in a collateral attack in the State Court, and yet that was the thing on which they induced the Court of Civil Appeals to base its judgment. Yet, if they are not trying to void the decrees, and even if they had shown something unrealized on, available to them, passed down into the new company, and even if they had shown that in 1879 the transactions were identical with those involved in the Boyd case, without voiding the decrees they would get no whither, because they are not suing to realize on assets or securities due them and diverted from them in 1879, as Boyd was. They are doing a very different thing. If the decrees of 1879 are not void and not established to be nullities, in this collateral proceeding, then our opponents cannot prevail. It is not sufficient for them to do what Boyd did—recover a sum of money on account of a constructive trustee having walked off with assets, to which Boyd was entitled; they seek nothing of that sort. If the decrees of 1879 are not void, then although there had been done precisely what had been done in the Boyd case, there would still be a new company in 1879, precisely as there was a new N. P. Railway Company as a result of proceedings investigated in the Boyd case. The fact that the new N. P. Railway Company was a re-

sulting trustee did not prevent it being a new company.

The Statute of 1889—Office-Shops Statute (our principal brief, p. 229)—by its plain terms dealt with then existing in 1889, or which might exist in the future, railroad corporations, which then existing had made a contract for the location of shops and offices, or might in the future so do. It is plain from its terms.

Our opponents, if they rely upon the Boyd case, and if they had any facts, would be in the situation of admitting that there was a new company brought into existence in 1879, as there undoubtedly was a new railroad entity, impressed (on such a supposition) with a constructive trust to perform the alleged office-shops contracts of 1872-75 of the old company. That would be absurd, for the Act of 1889, going into effect in 1889, could not attach any obligation at that time to a company which had ceased to exist in 1879; and did not so purport to do. Therefore, our opponents, if they come within the Boyd case, and if the new company and the new and old stockholders had derived assets out of the old company (which is not the case), *would not be helped a particle, for the Act of 1889, on their construction, does not give them any right to any assets diverted away from it, but only a security or burden or lien or servitude or saddle, so to speak, uncreated in 1879. Our opponents seek to enforce the Act of 1889 as creating a general offices, etc., as therein defined. They claim that the alleged contracts of 1872-75 are an incident, by reason of which the Act of 1889 becomes operative, and secures its own terms, not the terms of the alleged contracts,*

under which the "General Offices" would mean a very different thing. Now realizing that the State Court has no jurisdiction to set aside the decrees of 1879 of the U. S. Court, they elusively state that they do not seek to do that; but to show that those proceedings created a trust for them, by reason of fraud committed. Fraud on them for what? They reply in effect that in 1879 they were defrauded out of their rights not then existing, but which were created in 1889; that the defrauders were, so to speak, then gifted with prophetic powers, then defrauding them out of what the legislature was going to do ten years thereafter; that in 1879 they were defrauded out of what was then not.

To this shift our opponents have been reduced when they at last realize that the State Court is without jurisdiction to set aside the decrees of the Federal Court. They have no jurisdiction in the State Courts to show that the decrees of the Federal Court were void; and their attempt is null and void for lack of jurisdiction, and an invasion of the rights and title guaranteed to us by the Federal statute as derived under the decrees of a Federal Court, and by the law of judgments and jurisdiction.

Let us suppose that the Act of 1889 had been passed before the foreclosure of 1879, then our opponents, upon the construction of the Supreme Court of Texas, having their burden fixed before the foreclosures and the saddle placed upon the property, could ride in that saddle through the foreclosures; but how can they, under the terms of the Act of 1889, put the saddle onto the properties before that Act was passed; and under the express terms of that Act, how can

they saddle the properties and new company on account of the contract or act of one merely prior in the title of a company not existing in 1889? The thing is impossible, hence their attempt under all of these disguises to set aside the decrees of 1879 as null and void, and to maintain that the old corporation continued to exist; as would be the fact if those decrees were null and void. They are making no money claim, and the situation is in every respect unrelated to the Boyd case.

IV.

On page 88 of the opposing brief the broad statement is made that the facts of this case abundantly justify the decree entered. In our brief on file we have pointed out some of the remarkable conceptions of fact which have been involved, starting with the livery stable alleged contract of 1872. As our opponents attempt no answer, we will not go further ourselves.

V.

On page 80 of the opposing brief commences the answer to our contention that the statute as construed and applied invades the commerce clause of the Constitution.

Defendants in error, in reply to the contention of plaintiff in error that the Office-Shops Act of 1889, as construed and applied by the court below, acts as a restraint and burden upon interstate commerce, again appeal to the police power of the State, citing authorities to the effect that where Congress has not

legislated upon the subject-matter and the operation of the State regulation upon interstate commerce is indirect and remote, the State regulation may be sustained. It has been heretofore amply demonstrated that an act passed to give added security to a private contract and invoked for private gain can scarcely be dignified as an application of the great defensive power of the State known as its police power. Defendants in error have sought to give some slight color of public interest to this Act by extended quotation from stump speeches made in an excited political campaign. With equal propriety we might draw a parallel with the terms of this Act and the testimony in this case, and suggest that, in view of the case of T. & P. Railway Company v. Marshall, 136 U. S., 393, pending in this court at the time of the passage of the Act, its undoubted purpose was to make legal and enforceable private contracts essentially contrary to public policy and unenforceable in equity. Certain it is that it is, to say the least, unique and extraordinary that while no contemporaneous documents reflect such phraseology, it is found and proven forty years after the conversations relied upon by defendants in error exactly fit the decision of this court made in 1890. This legislative act can find no excuse in the police power of the State.

It is, of course, well established that where Congress has not legislated, where the effect on interstate commerce is indirect and remote, and where the legislation of the State promotes health or safety, the State legislation may be sustained. *It is equally well established, however, that where the subjects of the power to regulate commerce are in their nature na-*

tional, or admit of general and national legislation, the power of Congress is exclusive. But Congress has also acted.

We need not, however, rely upon this general principle. *Congress has taken control of the subject-matter.* The Hours of Service Act, the Ashpan Act, the Safety Appliance Act, and the Boiler Inspection Act, and the Car Service Act, all indicate the extent of the control which Congress has assumed of the instrumentalities of interstate commerce. Congress has fully exercised its power over carriers engaged in interstate commerce by the Act of 1916, whereunder the Director General of Railroads, appointed by the President of the United States, is now in the actual control and operation of the railway of the plaintiff in error, and of all other railways.

It is to the interest of interstate commerce that a great railway system which stretches for eleven hundred and six miles across the State of Texas, reaching the Mexican border, reaching two seaports, Houston and Galveston, and doing a great interstate business, should have its roundhouses and machine shops at those points where its engines and cars may be most conveniently and economically repaired, in order that the regulations of Congress may be complied with, and it requires no proof to establish the proposition that a law which through all time compels this plaintiff in error to haul its cars and locomotives from Laredo, Houston, Galveston and San Antonio, hundreds of miles, to a country village, for such repairs as may be necessary, to enable them to comply with the Acts of Congress, is a burden upon interstate commerce

and an invasion of a jurisdiction amply covered by Federal legislation.

Similar considerations apply to the general office provision of the Act. This Act and the decree of the court in this case require that the president or vice-president, secretary, treasurer, local treasurer, auditor, general freight agent, traffic manager, general manager, general superintendent, general passenger and ticket agent, chief engineer, superintendent of motive power and machinery, master mechanic and master of transportation, shall, not only perpetually keep and maintain their offices at Palestine (and, also, as a necessary consequence, all of their office forces), but that each of these individuals shall perpetually reside within this place. A more extraordinary stretch of the police power can hardly be imagined. Whatever may be the demands of commerce or business, or the requirements of service, this Act requires for all time each and every one of the persons mentioned not only to have an office at this particular place, but that he must personally reside there. which means that they must keep their wives and children within the penfold of this little town.

Were it not for the serious and important nature of this controversy, the length to which the Legislature of Texas has gone in order to conserve the private interests of particular localities and individuals at the expense of the public might well be characterized as ludicrous.

VI.

The Office-Shops Act of 1889 (our principal brief,

page 229) is void, in its application herein, on account of its excessive penalties, and thereby impeding access in the courts to contest their validity.

This is the ninth point presented in our principal brief, page 26. *It is involved in this question that by retroactive operation, closely allied to an ex post facto law, security by way of penalty is given, and attempts made to revive and secure expired rights, if they ever existed, and secure these retroactively and by way of penalty.*

Such retroactive attempts are closely allied to *ex post facto* statutes when the penalty may become operative for a past act and after the legality of the statute may have been adjudged. (Wadley Southern R'y v. Georgia, 235 U. S., p. 6626.) This statute attempts to revive matters of an "unascertained quality," as was said in the Wadley case; and denounces frightful penalties for the slightest breach.

The statute of 1889, as it is construed, denounces penalties which, in their incidence, affect the rights of third persons on transactions done before the Act was passed; whereby property rights, already acquired, and alleged contracts already entered into, are tremendously penalized by such subsequent Act if these contracts or rights be asserted, and if they be performed under the terms and conditions under which it was legal to perform them at the time of their alleged creation; or if performance thereof be refused, in the enormously extended terms of the subsequent statute. The whole statute, therefore, is void, not only for the terriffic penalties barring the way to the courts, but also on account of its analogy to *ex*

post facto laws, and its retroactive character, denounced by the Constitution of Texas.

Some of the elements herein involved, which we have completely shown above, are:

In 1872-75, at the date of the alleged contracts, "General Offices" only meant domicile, and the place of annual meetings, and where the stock books and minutes—that is, the primary books—should be kept. That was at the date of the making of the alleged contracts. The Act of 1889, under terrific penalties, to be pointed out, penalizes not the failure to comply with the alleged contracts, but the failure to comply with the enormously enlarged provisions of the Act of 1889.

In 1872-75, and until in 1889, the performance of the alleged contracts of 1872-75 was unsecured and personal. The Act of 1889, as construed, secures them, and in addition to various securities, denounced these terrific penalties for the failure to perform them.

It has been shown that if the alleged contracts existed, their performance on the terms and conditions as made is now directly penalized by the subsequent Act of 1889, and they are required to be performed on totally different terms and conditions.

It has also been shown that five mortgage contracts attach, and a title and right under the solemn decrees of the U. S. Court of 1879. Now, after the event, the performance of these decrees and the enjoyment of the contract rights and privileges are denounced and set aside, and the attempt to enjoy them is denounced under terriffic penalties.

It was completely shown on trial that the alleged

contracts sued on had been breached for more than two years, and more than four years as to the general offices, by reason of the fact that the general offices had been removed to St. Louis in 1881, and remained there until 1888, this suit being brought in 1912. As to this point we add the following, as to which there is no dispute:

The State sued the I. & G. N. Railroad to compel it to return its offices to Texas, not necessarily to Palestine, from St. Louis. This case was tried in June, 1888. The pleading set out that the railroad did not have any managing control or directing offices, or its public office, in Texas, but that all of these were in St. Louis. The trial judge found, without the aid of a jury, that the M. P. Railroad had possession of the I. & G. N. Railroad from 1881 to the second of May, 1888, and that only the assistant secretary had been at Palestine, and a general claim agent, road master, and superintendent, during that period, but that the annual meetings were held at Palestine. (R., Vol. 3, 950-951.)

Maury testified that all of these offices were in St. Louis from in 1818 up to in 1888, and the whole business done in St. Louis. (R., 945-946.) Howard testified to the same effect. (R., 759.) These persons were respectively auditor and treasurer, and of the old I. & G. N. Railroad. There was no dispute upon this point. After the trial court had refused to direct for the defendant peremptorily, subject to such refusal and exception thereto, special issue 9 was requested, submitting it to the jury to determine whether or not there was a breach of the alleged contract or contracts sued on by moving the offices from Pales-

tine to St. Louis in 1881, and keeping them there until in 1888. (R., 546-7.) The statutes of limitation were carefully plead (R., 95-97), both the two and four years statutes. The two year statute is set out in Appendix hereunder; the four years statute, which we consider applicable, in Appendix hereunder. Neither the Court of Civil Appeals nor the Supreme Court ever noticed these points fully presented to them.

The statute of limitation for two years we consider not applicable, though plead. The statute of limitations barring actions for debt where the indebtedness is not evidenced by a contract in writing we consider not applicable (R. S., 5688), although it covers actions for damages for breach of contracts of written obligations. (Robertson v. Varnell, 16 Tex., 382.) Therefore, the omnibus statute of limitations of Texas is applicable. (R. S., 5690.)

It cannot be denied that unless it be by force of the Office-Shops Statute of 1889 (our principal brief, p. 229), there could be no action for the specific performance of any such contracts as those alleged ones sued on. (T. & P. R'y v. Marshall, 136 U. S., 393.) Therefore, the only action which could have been brought before 1889 would have been an action for damages for breach under R. S., 5688, barred in four years by the terms of that Act. Now, our opponents, after the bar applies, bring an action for specific performance which is barred by the other Act of 1889 (the omnibus statute set out in the Appendix, page), and they insist that their action of specific performance to secure a performance of a barred right is secured by the terriffic penalties to be pointed out,

as if one could constitutionally punish a recalcitrant for his invoking an accrued statute of limitations, limitation having accrued before the right of punishment was given.

As pointed out, the relation between *ex post facto* statutes seeking by penalties to secure the performance of statutory edicts (putting in effect what has been set aside or is no longer effective) is very close to and for practical purposes amounts to the same thing as an *ex post facto statute.* The Constitution of the United States contains no provision denouncing retroactive acts, but does prohibit any State from passing an *ex post facto law.* (Section 10, Art. I, Sub-section 1.) The Constitution of Texas prohibits not only *ex post facto* laws, but also retroactive laws. (Sec. 16, Bill of Rights.) However, a retroactive attempt to secure non-existing laws or rights which have been set to one side is in the nature of an *ex post facto act,* when penalties are given for security. If the Legislature of Texas had merely decreed, without any penalty, security or revival of these extinguished claims, then the act would fall within the class of retroactive laws, but when it goes on, and after the extinguishment of these claims, attempts to secure them by terrific penalties, the statute is also in its nature (Wadley, etc., R. R. v. Georgia, 235 U. S., p. 262) *ex post facto.*

In the case of Mellinger v. City (68 Tex., 37), it was ruled that no statute removing the defense of limitation or the vested right to plead limitation already accrued could be constitutional, *and that the statute could not modify any vested right or impose a new duty or deprive a party of a vested defense.* This

case goes principally upon the prohibition of retroactive laws, but as we have pointed out, it is substantially all one, and also stands as an *ex post facto* law, and it has been ruled that if a husband acquired a homestead which the law permits him to mortgage, then that his right to mortgage being vested, his wife's rights, toward the already acquired homestead, cannot be extended in controversion thereof. (Gladney v. Sydnor, 172 Mo., 318, and 72 S. W., 554.) This principle is made even plainer, if possible, in City v. Railway, 97 Am. St. Rep. (Mich.), 238, and 89 N. W., 932, which in effect is this very case. Improvement assessments had been levied against a railroad property, and these assessments made under existing statutes for the improvement of a street. After the assessments had accrued, the legislature attempted to add security for the collection thereof by making the railways personally liable in addition to the previous sole liability of the railway realty abutting the street. It was held that this could not be done. In the Michigan case a security *in personam* was attempted. Neither can be done.

Coming now to the penalties of the statute (our principal brief, page 229) *they are monstrous, being $5000 a day, and no less, or $1,835,000 per annum,* and, counting six years only to have elapsed, *$11,010,000 for that period,* and this for only six years, when a greater period has elapsed since moving from Palestine. The statute directs that this penalty be levied *without any discretion in the courts,* even if a fuel agent should not be living in Palestine, or should have his wife outside. Besides, it provides that the charter may be confiscated. *The whole money pen-*

alty must be assessed, and not a cent less. It is insisted that the valid prior liens of the various mortgages entered into when this statute did not exist are subject to the statute, and all of this terriffic penalty. *These excessive and extraordinary penalties violate the first section of the Fourteenth Amendment to the Constitution of the United States,* the identical provision in the Constitution of Texas, and also that of the last Constitution, prohibiting "excessive fines and cruel and unusual punishments." (Art. I, Sec. 13, Constitution of Texas.)

Of course, Federal jurisdiction exists to prevent confiscatory penalties, as well as to litigate their constitutionality, *and penalties far less monstrous than these have been held to be unconstitutional.* It is useless to cite many cases:

Ex parte Young, 209 U. S., 123; 52 L. R. A., 714.
Ex parte Wood, 155 Fed., 155.
Eustis v. City, 90 Texas, 468.
State v. Railway, 100 Tex., 153.

This act goes beyond anything we have ever inspected. It first attempts to do that which may well ruin the properties forever, by chaining these so-called general offices and all of the repair work of a great continental railroad in Palestine *forever,* and then by drawing a circle around the persons declared to constitute the general offices, and thereby around their families, and to pen them and their families within the narrow circumference of that town, denying to this large railway the right to employ certain persons, unless those persons will resign the ordinary privileges of American citizens, and agree to confine

their wives and children within the corporate limits of this small town.

The statute is not only ruinous as an interference with a railway, and the performance of its public duties, but also as interfering with those unfortunates who may have to work for this railway in order to make a living.

But it may be said that the statute is not void in its entirety. To that we answer that it is void in its entirety, because on all of its provisions one conditions the other, and because the presumption is that the legislature enacted it as a whole. We have never been able to induce the courts to pass upon this great question, except the bare statement by the Court of Civil Appeals that the penalty provision is severable. (R., p. 1022.) *The penalty provisions are not severable.*

A statute may be void in one application, and valid in another, but there are two elements in this Act which in its applications to this case are unconstitutional, and which together, and also separately, drag down the whole statute; these are:

(*a*) *Those portions of the Act swelling out and adding to the alleged contracts of 1872-75 and securing the same;*

(*b*) Those portions of the Act which denounce penalties.

Our immediate question, therefore, is whether or not with these great portions of the statute exscinded, anything remains. It is hardly a necessary discussion, unless it be ruled that matters in Class A are not null; for if they be null, then it is immaterial to us whether the balance of the statute stands, because

there would be no burden or lien, and the whole would be personal to the sold-out railroad, and no duty resting against this defendant.

The Supreme Court of Texas has declared that the statute created a burden or servitude on the ground of the existence of the penalty, and that the public motive of the Act depends on the penalty. In effect, the Supreme Court of Texas has declared that the penalty cannot be untied from the Act, but that the whole must stand or fall together. If, therefore, the penalty is struck out, as it must be, the whole Act must fall. The Supreme Court of Texas puts the Act upon the ground that it expresses a public purpose, "and the penalty of the forfeiture of its charter against any railroad company that violates any article" (that is, any item) is taken as a clear intention of the public purpose and a clear ground to show that a burden was imposed. (I. & G. N. Railway v. Anderson County et al., 106 Tex., 60-67.)

Section 1 of the statute is bound up with Section 2, for Section 2 is largely a definition of Section 1; and Section 3 is bound up with Section 2, because Section 2 does not provide for the forfeiture of the charter, but only for the terms upon which the forfeiture may be suspended, while Section 3 provides for the forfeiture and the money penalties. The whole breathes one spirit, and has a single purpose, and is riveted together, so that the pulling out of one considerable portion wrecks the whole. If a "burden' or "servitude" is created, then they are created by the whole statute.

The Act of 1893 of the Legislature of Texas (page 97 of R. S. of Texas of 1911, 6637-9, and Penal Code

of Texas of 1911, Articles 1525-11) made it a penal offense for any person other than the agent of a railroad to sell its tickets, and provided for the redemption of tickets under certain conditions. The Court of Criminal Appeals having decided that the penal section of the statute was unconstitutional, the Supreme Court held that Section 5 of the Act also fell, it not being relevant for that court to go further. (Janin v. State, 51 S. W., 1126; Railway v. Mahaffey, 98 Texas, 392.) Section 3 of the Ticket Act was held unconstitutional, because in making the ticket contract the railroad could, at its option, put that part of the Act into force or suspend it, by printing the redemption privilege upon the ticket or not printing it.

Section 5 of that statute was not so closely related to the balance as Section 3 here. But both sections fell in the opinion of the Supreme Court under the familiar rule that they both must fall *"unless they are so clearly independent of each other that the court can say that the legislature would have passed it if the former had been omitted. On the other hand, if they be so connected, one upon the other, or so independent one upon the other, that it is apparent that the legislature would not have passed the Act except as a whole, then the entire statute must fall."*

Applying this test to Sections 2 and 3 of the Office-Shops Act of 1889 (Appendix, our principal brief, p. 229), they both must fall. The sections are closely interrelated. Section 2 conditions a forfeiture of the charter provided for in Section 3, which last provides flat-footed for the forfeiture. Section 2 contains no provision for forfeiture, but a condition to obviate forfeiture. Section 3, in addition to forfeiture, pro-

vides a fine of $5000 per day. It is, therefore, impossible that Section 2 can stand if Section 3 falls, as it must. As to Section 1, Section 2 hangs closely to it, and attempts to define what is meant by general offices therein, and to swell out and burden existing contracts. Besides, Section 2 makes Section 1 effective. Section 1 is nothing without it, for Section 2 defines what is meant by general offices, etc., in Section 1. By Section 1 it is decreed that general offices shall be kept at the places where they are contracted to be kept; that is, the thing which was defined in the contract or understood at the time to be general offices. Section 2 makes this a totally different thing.

Exscinding all of Section 3 and something over half of Section 2, practically nothing remains. It is impossible for the court to exscind any essential portion of Section 2 without making Section 1 utterly unimportant.

We therefore submit that the terriffic penalties must be struck out. That can hardly be a matter of dispute; when they are struck out the whole statute falls. The Supreme Court of Texas has pointed out that the penalties are an essential portion of the statute, and construes and enforces the statute in a certain way, because the penalties are there.

VII.

Our opponents attempt no answer to our fundamental position that the statute is unconstitutional, *because it is applicable only to chartered railroads, and not applicable to individuals, receivers or other persons operating as rail common carriers, or to other persons or corporations, as to whom no* ground exists for a difference in classification; *whereby the*

statute is class legislation against a species of class not rightly classified on any legal ground, and thereby violates Section 1 of the Fourteenth Amendment to the Constitution of the United States. (Our principal brief, Ground 10, p. 27.)

The Office-Shops Statute (our principal brief, p. 229) is limited to railroad corporations chartered by Texas or operating in Texas. It has no application to any receiver or to other public carriers or other public service, or other enterprises, which could reasonably have been included.

It would be useless to say that the words "every railroad company chartered by this State or owning or operating any line of railroad within this State" include a partnership, were that so, an individual operating a rail common carrier in Texas (as has happened and is legal) would not be included, but a partnership would be. But in the third section of the statute it is made plain that only corporations are included, because there is denounced the forfeiture of a charter.

Penal statutes must be strictly construed and can never cover any subject or person by implication.

Schloss v. Railway, 85 Texas, 601.
Houston, etc., Railway v. City, 91 Tex., 551.
T. & P. Railway v. Hughes, 99 Texas, 553.

Receivers are not included in the statute. It has been ruled in Texas that when penalties are denounced against railroads they cannot be recovered against receivers operating the railroad. (Bonner v. Franklin Co., 4 T. C. A., 166, and 23 S. W., 317, and also M. K. & T. R'y v. Stone, 5 T. C. A., 52, 23 S. W., 1020.) So, if a penalty be denounced against a cor-

poration, although a corporation con only act through its agents, the agents are not included. (Davis v. Pullman, 34 T. C. A., 624, 79 S. W., 637, and cf. Field v. U. S., 137 Fed., 6; Leonard v. Bosworth, 4 Conn., 421; U. S. v. Weltberger, 4 Wheaton, 95.)

Therefore, we confidently state that individuals buying a railroad or operating it, or receivers, are not within the statute, but only railroad corporations. Besides, various penalties against railroad carriers are made to apply expressly to receivers and persons as differentiated from corporations, showing the recognition of the fact that individuals have operated, do, and may in the future operate, rail public carriers. (R. S. of Texas, 6581, 6585 and 6586.)

This statute does not cover all rail carriers, but only those which are corporations, nor does it cover all enterprises engaged in lines of business other than rail carriers, which may have contracted, for valuable considerations, to keep their general offices and shops at the same place.

It does not, therefore, cover all of a class, nor cover all of those persons who should be classified together under the law, and therefore denies the equal protection of the law.

These principles are well known to this court.

In L. & N. Railroad v. Railroad Commission, 19 Fed., 679, the Railroad Commission Act of Tennessee was held unconstitutional, as denouncing penalties only against railroad corporations, and not as against other persons operating railroads.

The Constitution of Texas wisely prohibits such class legislation, and directs that the legislature shall not, except as specially permitted by the Constitu-

tion, pass any local or special law, and that where a general law can be made applicable no local law or special law can be enacted. (Const., Art. III, end of Sec. 56.) By Section 3 of the Bill of Rights of Texas all men are secured equal rights. The word "men," of course, includes the corporations. Equality before the law is therefore secured against the Legislature of Texas by the first section of the Fourteenth Amendment and by the State Constitution.

Plainly, under the opinion in T. & P. R'y v. Marshall, 136 U. S., 395, an individual operating a railroad in Texas could not be compelled to specifically perform these alleged contracts, and could be sued only for damages for breach. Although the Act of 1889 had been passed (Office-Shops Act, our brief, p. 229) before that opinion was given, and for the direct purpose of controlling that case, it was ignored by this court, and rightly so. It is not necessary for us to go into the well known cases by this court. (Cotting v. Godard, 183 U. S., 79; Railway v. Ellis, 165 U. S., 150; Railway v. Mackey, 127 U. S., 205.)

Nor can we see any basis in the limitation to the statute to relate to corporate carriers. Why should not public service corporations like interurbans, electric light, gas and water enterprises, be included? What right has the legislature to prescribe that the fuel agent or the general manager of a rail corporate carrier shall reside (*i. e.*, keep his family and himself) inside of certain towns, and not to provide that the fuel agent of a gas or electric light company, or its general manager, shall so reside? Why include one and omit the other? Indeed, we can understand why it might be more reasonable to have the fuel

agent or manager of a gas or electric light works of a city or town close at hand, where the town council could keep an eye upon him, than the fuel agent of a corporate railroad.

But why limit the classification to public service corporations? Why not require cotton mills, boiler manufacturers, etc., equally to perform their locative contracts, and to keep the families of large classes of their employes at certain places and within the limits of certain towns, so that the shopkeepers and landlords can make money out of them? We are utterly unable to see any basis for the classification attempted by the statute limited to corporate rail carriers.

VIII.

Some of the plainest positions taken by us and so fundamental as to support themselves are not answered by our opponents. We, as briefly as possible, go into the following, for fear that it may be considered they have been abandoned. In questions 11 and 13 (our brief, 28-30-31, and 33-34-35) these points are raised.

We refer to the statements there as part of their elucidation, and they are not repeated here.

A written contract was entered into between the H. & G. N. Railroad and the County of Palestine, whereby the county, in 1872, bound itself to deliver its bonds for $150,000 to the H. & G. N. Railroad if that railroad would build in its road through a portion of Anderson County into the town of Palestine, and place a depot within a half a mile of the courthouse, at the junction with the International Rail-

road; all to be completed within a year from the date of the contract. This contract was formed in the following way:

Under the Constitution of 1869 of Texas it was permissible for counties and towns to promote railroad construction. By the Act of April 12, 1871 (Acts, p. 29, and 6 Gam., p. 931) the legislature provided a method by which cities, counties and towns, if incorporated, could promote railroad enterprises. The statute was very plain, providing that the bond election could be initiated by not less than 50 freeholders, who could petition the County Court (then consisting of the Chief Justice and all of the magistrates) to submit the proposition of the proposed contract to the voters; whereupon it should be the duty of the County Court to call an election and submit this written proposed contract in clear and concise language, stating the particular road or work for which the bond issue was to be used in promotion. Then the court was to canvass the returns and provide a tax levy to take care of the bond issue, but the court was to decree whether or not the contract had been complied with—"provided that no bonds shall be issued or donation made under the provisions of the Act except for such portions of the work in aid of which it is proposed to issue bonds or make a donation, as shall have been completed at the time when the bonds are issued or donations made." (Sec. 6 of the statute.) In other words, the court was not to *decree the issue of the bonds except after it had judicially ascertained that the election was regular and that the railroad had performed its undertaking.* Palestine was then incorporated, and by Section 16 of the Act

of 1871, it could have given a bond issue, which it did not do, but claims to have come into this matter through a consideration of its ownership of Judge Reagan's political influence. The whole of the proceedings in the County Court are contained in the record. (R., 767-785, 823-826, and 304.) They contain the proposition signed by the freeholders, the order for the election, *the decree that the election had carried*, the petition of the railroad through Grow, its president, for the bonds, representing that the road had built in and constructed the depot; the protest of a member of the court that the railroad had undertaken certain things outside of the written contract, *among others, to put the shops and roundhouses* at Palestine (but no protest was made that the offices were ever promised), *and the decree of the County Court declaring and judicially ascertaining that the railroad had complied with all its undertakings, and was entitled to the bond issue*, thus directly setting to one side the protest that it had not complied with all of its undertakings, and declaring that the shops and roundhouses were not included in the contract. Although all of this was completed in 1873, and although the general offices were then located at Houston, no claim for them was made, but only for the shops and roundhouses. It had been submitted at the same election to determine whether or not any railroad, not necessarily the H. & G. N., should have the bond issue of $50,000 for building from Palestine north through the county, and which was never done. The H. & G. N. having built in from the south to Palestine, it was also claimed that the H. & G. N. had orally promised to build this northern extension as a part of the whole

undertaking. *The County Court repudiated this claim, and the claims that the railroad had contracted to put the shops and roundhouses at Palestine, and held that the railroad had done everything it undertook to do.* These claims and protests were all in writing, and introduced on this trial, as appears above.

Although the County Court authorized the issue of the bonds, and decreed that the railroad had done everything it undertook to do, and was entitled to the bonds, and although the bonds were issued, there was a change of mind the next year, and the county sued in the State District Court to repudiate the bonds, claiming that various oral representations had been made. The trial judge sustained demurrers, and refused to permit the case to come to trial, and the Supreme Court of Texas ruled *that the decrees of the County Court could not be collaterally attacked even the next year*, and that extraneous matters to the written contract could not be introduced. *The court construed the Act of 1871, and held that it authorized the County Court to make final decrees—which must be observed.* In this case the Court of Civil Appeals repudiates the decrees of the County Court made in 1872-3 with the slight remark that the Act of 1871 does not "preclude independent, specific stipulations, as the parties may deem proper to the extent of the work of construction that should be completed." (R., p. 1015.) This we shall show is in the teeth of the decision of the Supreme Court of Texas dealing with this very contract.

We procured from the files of the Supreme Court of Texas a complete copy of the record in that case (Anderson County v. H. & G. N. R. R., 52 Tex., 242),

and which record embodied the whole record made by the County Court of the submission of the proposed contract to the voters, the election, and the decree thereon, and the decree of the County Court that the railroad had complied with all its undertakings. (R., 827-832, 767-781.) The decrees of the County Court are as follows:

> "It is further ordered by the court that, upon the completion of the said H. & G. N. Railroad by said company to its intersection with the International Railroad at the said Town of Palestine, of the same style and class and character as of the part of said railroad now built, and upon the establishment of a depot of its said railroad within a half a mile of the courthouse of the said Town of Palestine, and upon the commencement of the said railroad company to run their cars regularly to their depot at said Town of Palestine, then the said County of Anderson will issue" to the H. & G. N. R. R. Co. the bonds. (R., 773-4.)

This was the decree of the County Court entered after the election. When the railroad petitioned the County Court to issue the bonds, it set out:

> "On certain conditions therein specified, said H. & G. N. R. R. Co. fully performed and complied with all of the conditions upon which said proposition was made, in the month of December, 1872, and prior to the 31st day of said month. By the terms of said proposition said bonds were to be issued to petitioner on its compliance with the conditions contained in said proposition, and, having fully complied therewith, your petitioner prays that the bonds be issued in accordance with said proposition, and the laws of the State." (R., 776.)

Overruling all of the protests, the County Court decreed, in January, 1873, as follows:

> "And that said road was so completed, and all of said conditions complied with by the said H. & G. N. R. R. Co., prior to the 31st day of December, 1872, and that said railroad company was then entitled to said donation, and to demand and have said bonds then issued to them."

The court then adjudges that the bonds should be issued, and levies a tax. (R., 777-8.)

Shattuck, a member of the court, filed a written protest, setting out exactly, as done here, that the written agreement was not complete, and that it had been agreed that the roundhouses and machine shops should be put up, and certain other agreements, all made on the side. (R., 780-781.) The opinion of the Supreme Court (52 Tex., 242, etc.) states that the exhibits, the written contracts, did not include these side matters, and that the statute had made "the County Court the tribunal to judicially deermine the result of the election," and that its decrees authorizing the issue of the bond and declaring the election could not be impeached; that more than two and one-half years had elapsed, and that no direct attack could be maintained, much less a collateral attack. (52 Tex., 242-245.)

The I. & G. N. Railway, and his predecessors in title, have rested upon this decree of the Supreme Court of Texas, approving the decree of the County Court repudiating the very contentions herein now made. *We submit that one State Court cannot collaterally set aside the decrees and judgments of another State Court, and that no court can impeach and*

set aside the decrees of another court; that has been fully discussed above.

On the trial of this case two witnesses were introduced who swore that when Shattuck made his protest they were present in the County Court, and that the president of the H. & G. N. Railway Company, Grow, told the court that everything Shattuck said was correct, and that he was going to do those things, but that he did not want them to be put into the decree as the sale of the county bonds might thereby be injured, and that in effect Grow and the County Court made a gentlemen's agreement on the side. This evidence was entertained, and we presume the Texas Courts have rested thereon, as we have been unable to induce them to mention this point. In this case not only are the decrees of the Federal Courts trampled down and disregarded, but all conflicting decrees of the State Courts, including the decree of the Supreme Court in Anderson County v. H. & G. N. Railroad. (52 Tex., 242.) We shall show below that we had a right to rest upon these property rights, and it is impossible to suppose that solemn decrees of a court can be set aside by parol testimony on collateral attacks.

We shall show below that when the Supreme Court of Texas decreed these titles and rights in Anderson County v. H. & G. N., and construed the Statute of 1871, and the contract herein involved, then that we had a right to rest upon such construction in all of the numerous proceedings and dealings of the railroad, including the taking out of the charter of 1911.

The precise point was litigated in Sawyer v. Railroad (62 N. H., 135, 13 Am. St. Rep., 541.) The only

difference was that the attempt to set aside the written record was made not after 40 years, but after about 3 years, and that there the effort involved an attempt to mutilate the record, and change it by parol testimony. Here our opponents do the same thing, except that they have not mutilated with ink and pen the decrees of the County Court or of the Supreme Court and District Court in the case of Anderson County v. H. & G. N. R. R. (52 Tex., 242). In the New Hampshire case a donation was made by the town or a township. The proposition or warrant was submitted to the people to determine how much the town could give to a railroad to build in with suitable depots, or within one-half mile of the town hall. The vote was carried on the written proposition, the railroad built in, and then having obtained the railroad, the town did precisely what the people of Anderson County tried unsuccessfully to do in 1874, and what they have successfully done up to this point, commencing in 1912. What is said by the Supreme Court of New Hampshire is so important that we would like here to print it. The length of the argument precludes us. We feel sure that the court will inspect that opinion with much interest.

(*b*) We now state:

That it is apparent on the undisputed facts of the record that the plaintiff in error is in privity of title with the sold-out I. & G. N. Railroad Company, and the companies going to constitute it, among which is the H. & G. N. R. R. Co., and that under the decision in Anderson County v. H. & G. N. R. R., above described (52 Tex., 228; 242-245) affirming and holding valid the decrees of the County Court of Anderson

County, Texas, and ruling that the judgment of that court, excluding extraneous matters in regard to shops and roundhouses, etc., could not be collaterally attacked; and construing the Act of 1871; and the property was sold out under the decrees of the United States Court of 1879, with the benefit of the County Court judgments and of the judgment of the Supreme Court of Texas;

And that, with the benefit of these judgments the property was bought in 1879 by the purchasers at judicial sales, and again mortgaged in 1881 with the benefit of those decrees of the County and Supreme Court and Federal Court;

And that the property was again, with the benefit of those decrees, under the foreclosures of 1910 and 1911, herein described, bought by the plaintiff in error;

And that the Act of 1889, being the Office-Shops Act herein relied on by the defendants in error (our principal brief, p. 229) was construed by the Supreme Court of Texas, in the case of Kansas City, Mexico & Orient Railway v. Sweetwater, 104 Tex., 329, wherein it was before the Supreme Court of Texas whether or not a contract upon a valuable consideration, in writing, to locate the shops and offices of the railway at Sweetwater was personal or secured against the property; and that the court held that there having been a mortgage foreclosure sale, the written contract was eliminated, the case being decided against the railway and it being directly involved in the case to decide whether or not this undoubted written contract bound the railway properties; and that this case was decided May 31, 1911,

and the properties of the I. & G. N. Railway Company bought in 1911 on the foreclosure sale under the decree of the United States Court, with the benefit of this decision, and paid for and delivered to the I. & G. N. Railway in September, 1911, with the benefit of this decision; and that in August, 1911, the plaintiff in error took out its charter with the benefit of this decision.

Wherefore it appears from all of the above—

That the plaintiff in error is entitled to the benefits of the decrees of the Supreme Court of Texas in Anderson County v. H. & G. N. Railway, and in K. C. M. & O. Railway v. Sweetwater;

The first construing the Statute of 1871, under which the County Court directed the bonds to be issued, and determining that, on its construction of that statute, the County Court had final jurisdiction to decree that the railroad had complied with all of its undertakings, and that these did not include the shops and roundhouses, or any other claims outside of the writings; and wherein the Supreme Court decided, in that case, that the written contract of 1872 therein involved was not subject to extraneous and parol additions;

And wherein, in the subsequent case of Railway v. Sweetwater, the Supreme Court of Texas decided that the Office-Shops Act of 1889 was personal and unsecured against the properties, and would not run with the properties through a decree of foreclosure.

Whereby it results that the decisions of the Supreme Court of Texas in this case, and of the Court of Civil Appeals, have changed the constructions of the Supreme Court of Texas in the Sweetwater case,

and Anderson County case, under which the plaintiff in error bought and procured its charter, bringing the statute into conflict with the prohibition of the Constitution of the United States against any State varying by statute the obligation of a contract, whereby the statute, as now construed, violates the obligations of its contract of purchase and its charter contract, and the various mortgage contracts and purchases of prior date, especially those under the foreclosures of 1879.

We have adequately described the construction of the Supreme Court of Texas of the Act of 1871 giving jurisdiction to the County Court to determine whether or not the bond contract and the written contract herein involved could be finally settled and adjudicated by the County Court, and whether or not under that statute such contract was subject to be varied by extraneous evidence. The plaintiff in error procured its charter and bought the property with full benefit of the decision of the Supreme Court of Texas, given in 1879, construing the Act of 1871, under which the written contract of 1872 was made, and wherein jurisdiction was conferred upon the County Court to decree whether or not the contract between the railway and the county had been complied with. All of the oral testimony in this case was introduced in conflict with that decision, and this was upheld by overruling our assignments of error without comment except as stated above.

The Sweetwater case and its application herein, and the way that question was raised, are fully set out in the introduction of our principal brief (pp. 28-30). The Colorado Valley Railway was a predecessor

in title to the Kansas City, Mexico & Orient Railway, and issued its bonds which were foreclosed, and the property sold out. After the passage of the Act of 1889, herein relied on, that now sold-out railway "contracted in writing with the citizens of Sweetwater to build its road from the latter place to San Angelo, and to maintain its general offices and machine shops at Sweetwater. The terms of the contract will not be given, as it is not necessary to the determination of any issue in this case." (104 Tex., 332-3.) Here we have the direct declaration of the ultimate court of Texas that the office-shops locative contract (if it was a contract, it must have been on a valuable consideration) did not run through a mortgage foreclosed, and that therefore it was purely personal. Having so decided as to a written contract, the court then ruled that the claims for a parol contract were not proved, and decided the case against Sweetwater. (104 Tex., 332-338.) The written contract is first dealt with in the beginning of the opinion. It was an undisputed matter, and necessarily settled the case, if it ran with the properties. The discussion of the oral alleged contract only became important in case that the written undoubted contract was held not to be important. The latter was not disputed; the first vigorously disputed, and finally held not to be proved. It results that the construction of the written contract and of the Statute of 1889 (the Office-Shops Statute) were immediately involved. The Office-Shops Act, herein involved, is set out in the opinion, and the decision was dependent upon and involved its construction. The K. C. M. & O. Railway bought the foreclosed Colorado Valley Railway properties.

It thus appears that the Supreme Court of Texas and the Court of Civil Appeals have undertaken to overrule Anderson County v. H. & G. N., 52 Tex., 228, construing the Act of April 12, 1871 (which made the County Court the judicial tribunal to determine the results of the election and adoption of the written contract, and also to determine whether or not it had been complied with), and also to overrule K. C. M. & O. Railway v. Sweetwater, 104 Tex., 329.

Under the facts of this case, are the obligations of a contract violated, and is the contract clause of the Constitution infringed upon? *It seems to us that there can be no dispute under Muhlker v. Railroad, 197 U. S., 544.* We do not mean to say that the ultimate court of a State cannot change the construction of a statute, but here we have a case of one privy in title acquiring rights under statutes, with the benefit of constructions, and making contracts with such benefits, and thereafter these contracts invaded by the same statutes under different constructions. This is not to be construed as the invasion by the courts, but invasions by the legislature. It is not necessary to extensively go into the matter. This court has too great a familiarity therewith. It has been a subject of much discussion. We do not go into some of the constructions of the Muhlker case, which is constantly affirmed and has never been overthrown by this court, because such constructions are inapplicable to this case. It has been thought by some that the Muhlker case was in contradiction to Central Land Company v. Laidley, 159 U. S., 103, wherein it is stated that the obligation of a contract must have been impaired by the legislative power of the State, and not

by the decision of a judicial department only. But a study of the opinions in the two cases must lead to the conclusion that they are not irreconcilable, but merely that this court, for the purpose of determining the obligation of a contract, will regard the position held by the State Court of last resort as binding when unimpeached at the time the contract in question was made, and that this court is not bound, for this purpose, to regard the position subsequently taken by the State Court overruling its earlier decision. On this theory there is no vital conflict between the two cases.

The decision in the Muhlker case seems to us rock-ribbed and founded on the fundamentals of justice and constitutional law. This court, with rare exceptions, follows the constructions of statutes given by the ultimate courts of the respective States. This exception now seems to us well established. If this court is to give effect to statutes of a State according to the constructions of a court of that State, it will so construe the decisions of that State as to keep the statute from being in conflict with the Constitution of the United States, if it can possibly do so. Here in Texas we have these conflicting decisions, those made in this case being in conflict with those made in Anderson County v. H. & G. N. R'y and in K. C. M. & O. v. Sweetwater. We have presented the decisions in those cases throughout this litigation. Great and extensive contracts of mortgage and purchase and a charter were made upon their faith. Why should they not be enforced? Can these express decisions construing the Statute of 1871 and that of 1889, and

entering into all of these contracts be set aside by decisions in the teeth thereof?

We respectfully present that this case must be reversed, and pray for all relief which is our due.

F. A. Williams,
N. A. Stedman,
Dabney & King,
Sam'l B. Dabney,
Baker, Botts, Parker & Garwood,
H. M. Garwood,
Andrews, Streetman, Burns & Logue,
Frank Andrews,
Attorneys for Plaintiffs in Error.

EXHIBIT

Statute of limitations of two years:

"ART. 5687 (3354). *Actions to be Commenced in Two Years.*—There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

"* * * * * * *

"4. Actions for debt where the indebtedness is not evidenced by a contract in writing." * * *

Statute of Limitations of four years:

"ART. 5688 (3356). *What Actions Barred in Four Years.*—There shall be commenced and prosecuted within four years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

"1. Actions for debt where the indebtedness is evidenced by or founded upon any contract in writing." * * *

General omnibus statute of limitation of four years:

"ART. 5690 (3358.) *All Other Actions Barred, When.*—Every action other than for the recovery of real estate, for which no limitation is otherwise prescribed, shall be brought within four years next after the right to bring the same shall have accrued, and not afterward."

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY ET AL. *v.* ANDERSON COUNTY ET AL.

ERROR TO THE COURT OF CIVIL APPEALS, SIXTH SUPREME JUDICIAL DISTRICT, OF THE STATE OF TEXAS.

No. 243. Argued March 25, 26, 1918.—Decided April 15, 1918.

With respect to a railroad within its territory, a state court has jurisdiction to decide whether the owner is under a public duty to maintain the offices and shops at a particular place, even though it were assumed, as a rule of decision, that a foreclosure and confirmed sale in a federal court conferred immunity from the obligation which that court alone could withdraw.

Foreclosure and sale of a railroad in a federal court will not relieve the purchaser from a contractual or statutory duty, which rested on its predecessors under the state law, to maintain offices and shops at a particular place, if the state law holds the obligation indelible by foreclosure.

The prohibition against removal of offices and shops located by contract within a county in consideration of county bond aid extends, under the Texas Office-Shops Act of 1889, to the successor by mortgage foreclosure of the contracting railroad.

In its provision that offices and shops shall be at the place named in the charter, and if no certain place is there named then at such place as the company shall have contracted to locate them, etc., this statute does not intend that a valid contract for location may be evaded by a purchasing company by naming another place in its charter filed under a general law.

Semble, that a contract to maintain the offices and shops of a railroad at a particular place survives mortgage foreclosure and sale of the railroad where the purchaser succeeds to the mortgagor's franchise to be a corporation.

Semble, that, generally speaking, a state legislature, dealing with a local railroad corporation, has power to fix the place of its domicile and principal offices.

A corporation, organized under general laws expressly declaring that charters thereunder should be subject to provisions and limitations imposed by law, while another act prohibited changing locations of railroad offices and shops in certain cases, purchased a railroad under

proceedings foreclosing a mortgage. *Held*, that whether or not the prohibition would have been constitutional as applied to the company's predecessors, it was a condition of its incorporation of which it could not complain.

In so far as it depends upon the testimony, the verdict of a jury, upon an issue requested by the complaining party, finding that a state regulation as to location of railway offices and shops does not burden interstate commerce, will be accepted.

Held, that the burden, if any, in this case, upon interstate commerce, due to a state law forbidding change of location of a railway's offices and shops, is indirect, and that the state power was not exceeded.

A decree of injunction which properly will be operative until the law is changed may properly be expressed as perpetual.

174 S. W. Rep. 305, affirmed.

THE case is stated in the opinion.

Mr. H. M. Garwood and *Mr. Samuel B. Dabney*, with whom *Mr. F. A. Williams*, *Mr. N. A. Stedman* and *Mr. Frank Andrews* were on the briefs, for plaintiffs in error:

The Circuit Court for the Northern District of Texas had exclusive jurisdiction, reserved in the foreclosure decree of May, 1910, under which the properties were sold out, and the state court had no jurisdiction.

This litigation is in conflict with the right, title, privileges and immunities protected by the decrees of the Circuit Court for the Western District of Texas entered on foreclosures of four mortgages in 1879, and by the decree of the Circuit Court for the Northern District of Texas, entered on foreclosure in May, 1910.

The state court had no power in this collateral proceeding to declare the three decrees of 1879 not to be *bona fide*, and to be fraudulent.

The mortgage of the International & Great Northern Railroad Company of 1881 was foreclosed in 1910, and included all charter rights, and on foreclosure sale all the properties were bought in and transferred to the International & Great Northern Railway Company, chartered

in 1911. Therefore, the Office-Shops Act of 1889, here relied on as giving security for the alleged contracts of 1872–1875, could not secure and enlarge those contracts without violating the obligation of the mortgage contract of 1881; which it is submitted has been violated by the decree here under review, contrary to that provision of the Constitution prohibiting any State from passing a law violating the obligation of a contract.

The Office-Shops Act of 1889, as construed and herein enforced, conflicts with the contract clause also because the purely personal alleged contracts of 1872–1875 sued on are extended and secured, and their obligations changed, by that statute.

The Office-Shops Act, as construed and enforced herein, cannot be justified as a legitimate exercise of the police power of the State.

Under the law existing in 1879, and anterior to that time, and at the time of the foreclosure of the mortgages in 1879 and the selling out of the property thereunder, not only tangibles were sold, but also there were mortgaged, foreclosed and sold all of the charters of the International & Great Northern Railroad Company, whereby the alleged contracts herein sued on alleged to have been created in 1872–1875 (then personal, and personal at the time of the foreclosure of 1879), were by the foreclosures and sales eliminated as against the new railroad, and could not by the Act of 1889 be extended and secured against the properties of the railroad without violation of the obligations of the foreclosed mortgage contracts, and without denial of the rights, titles, privileges and immunities secured by the decrees of the United States court, and after the lapse of 35 years those decrees could not, in the state court, be declared fraudulent, even if there had been evidence of fraud.

The Act of 1889, as herein construed, to extend and to secure as extended the alleged contracts of 1872–1875,

by a perpetual lien and servitude, deprives plaintiff in error of its property without due process of law, contrary to the Fourteenth Amendment; and in attempting to compel plaintiff in error (an interstate carrier) to forever maintain its machine shops, roundhouses and general offices at Palestine, places a burden upon interstate commerce, in violation of par. 4, § 8, Art. 1, of the Constitution.

Mr. F. D. McKenney and *Mr. Thomas B. Greenwood*, with whom *Mr. A. G. Greenwood*, *Mr. W. C. Campbell* and *Mr. Jno. C. Box* were on the briefs, for defendants in error:

This suit was not within any reservations of exclusive jurisdiction in the decree of foreclosure, because it involved merely the enforcement of a continuing statutory duty of plaintiff in error.

The Circuit Court for the Northern District of Texas completely discharged the railroad and franchises of the sold-out company from its possession, custody and control, actual and constructive, prior to the institution of this suit.

The Office-Shops Act came within the police power of the State as a valid regulation, for the promotion of the public interest, of franchises granted by the State for the operation of railroads, and it must be obeyed by plaintiff in error both as the purchaser of a railroad and its franchises, under foreclosure of a mortgage antedating the statute, and as a corporation organized under a law which expressly imposed upon it obedience to the statute.

The Court of Civil Appeals having determined as a pure question of fact, not open to review here, that the properties and franchises of the International & Great Northern Railroad Company were sold in 1879 to mere trustees for the debtor corporation, such sale could not discharge the personal obligation of the locative contracts, and in no event could such sale affect the statutory pro-

hibition against changing the general offices and shops from Palestine.

The statute is not void as a direct regulation of interstate commerce.

The record presents no substantial federal question for decision by this court, and the concurring judgments of the state courts are rested upon nonfederal grounds broad enough to sustain them. The entire matter is one of purely local concern, dependent for solution upon the construction and application of state laws.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit brought by the defendants in error to prevent the Railroad Company, plaintiff in error, from moving its machine shops, roundhouses, and general offices from the City of Palestine and from maintaining any of them elsewhere. An injunction was issued as prayed; the judgment was affirmed by the Court of Civil Appeals, 174 S. W. Rep. 305, in accordance with intimations of the Supreme Court of Texas at an earlier stage, 106 Texas, 60, and an application to the latter Court for a writ of error was refused. The case is brought here upon voluminous assignments of error which may be summed up in the propositions that the state court was without jurisdiction because of certain foreclosures in the Courts of the United States, that the judgment disregarded rights secured by the decrees of those Courts, and that it gave effect to a statute which as applied burdened interstate commerce, impaired the obligation of contracts, etc., and was contrary to Article I, §§ 8 and 10, and to the Fourteenth Amendment of the Constitution of the United States.

The facts begin with the predecessors of the plaintiffs in error. The Houston and Great Northern Railroad Company, a local road, was chartered by a special Act

on October 26, 1866. About March 15, 1872, it contracted with the citizens of Palestine in the County of Anderson in consideration of the issue of bonds by the county to maintain its general offices, machine shops and roundhouses at that place. The International Railroad Company was chartered in like manner on August 5, 1870. In 1872 the two companies agreed to consolidate and this agreement was ratified by the stockholders of each in 1873. A special Act of April 24, 1874, authorized the consolidated company, known as the International and Great Northern Railroad Company, to issue bonds secured by mortgage and provided that all acts theretofore done in the name of either of the companies should be of the same binding effect upon the new one that they were upon the old. In 1875 the new company in consideration of the erection of houses for its employees renewed the contract of the Houston & Great Northern and at about the same time it resolved that its general offices should be removed to Palestine. We see no reason for reopening the findings below that the alleged contracts were made. The offices were removed and there they remained, subject to some immaterial interruption, until 1911. The machine shops and roundhouses are still there. Each of the two constituent companies had executed mortgages before the date of the original agreement of the Houston & Great Northern and each executed another before the contract of the consolidated company in 1875. These mortgages were all foreclosed in 1879 and the property conveyed to a corporation, still called the International & Great Northern Railroad Company, by a deed that conveyed all the franchises and chartered powers of the original roads. The foreclosure is one fact relied upon for the defence.

The purchasing company in its turn executed mortgages, one of which, including, like the earlier ones that we have mentioned, the franchise to be a corporation,

dated in 1881, is the source of the plaintiff in error's title, by a foreclosure in 1910–1911. Before this last foreclosure took place two statutes were enacted in Texas that are important. The first, known as the Office-Shops Act, approved March 27, 1889, c. 106; Rev. Civil Stats. 1911, § 6423, provided that every railroad company chartered by the State or owning or operating a line within the State should permanently maintain its general offices at the place named in its charter, and if no certain place were named there, at such place as it should have contracted to locate them, otherwise at such place as it should designate; also that it should maintain its machine shops and roundhouses at the place where it had contracted to keep them, and that if the offices, shops or roundhouses were located on the line of a railroad in a county that had aided such railroad by an issue of bonds in consideration of the location being made, then such location should not be changed; "and this shall apply as well to a railroad that may have been consolidated with another as to those which have maintained their original organization." A violation of the act entails forfeiture of the charter, with a penalty of $5,000 a day for every day of violation. Rev. Stats., § 6425. An act approved two days later, March 29, 1889, with provisos that no rights should be acquired inconsistent with the present constitution, that the main track once constructed and operated should not be removed, &c., authorized purchasers of sold-out railroads to form a new corporation, whereas previously the purchaser had continued the franchises of the old under the original grant. A law of September 1, 1910, c. 4, further emphasized the change of policy by excluding a succession to the old charter unless coupled with an acceptance of certain liabilities, and providing that the charter should pass subject to the provisions and limitations imposed and to be imposed by law. Rev. Stats., § 6625.

The mortgage of 1881 last mentioned was foreclosed by proceedings in the Circuit Court of the United States. A decree of May 10, 1910, while reserving jurisdiction of the property, ordered a sale, which, after postponements, took place on June 13, 1911, and was confirmed the next day. On September 25, 1911, the railroad and franchises were finally discharged from the possession and control of the receiver and the Court. Before that date the plaintiff in error was incorporated under the Act of 1889 and general laws and took the conveyances under the foreclosure decree. Within the time allowed it had filed in Court a repudiation of any agreement on the part of any of its predecessors to maintain their offices and shops at Palestine, and later gave notice to that effect to officials of Anderson County and Palestine. The articles of incorporation fixed the place for the general offices as Houston.

The railway company denies the jurisdiction of the state court and sets up that the court of the last foreclosure is the only proper forum. But a decree of foreclosure does not render the purchaser and property foreclosed sacrosanct. The Circuit Court had finished the case and had given up possession and control before this suit was brought. *Shields* v. *Coleman*, 157 U. S. 168, 178, 179. *Wabash R. R. Co.* v. *Adelbert College*, 208 U. S. 38, 55. Even if it were true that the foreclosure sale and order carried an immunity from the present demand that the railway was entitled to set up, in the absence of action on the part of the Court of the United States, it would not take away the power of the state court to decide as to the existence of an alleged public duty on the part of a railroad within the territory where the court sat. *Ricaud* v. *American Metal Co., ante*, 304.

But the foreclosures did not have the supposed effect. They no more removed all human restrictions than they excluded the authority of ordinary courts. Suppose

that a special act incorporating the mortgagor had provided in terms evidently intended to reach beyond foreclosure that the general offices were to remain forever at Palestine, it hardly would be argued, and certainly would not be argued here or in Texas with success, that the requirement could be touched by a decree. But if the law made that requirement, it hardly matters whether the restriction was imposed by charter or otherwise or whether the remote reason for it was a contract or a general notion of public policy. The state courts hold that when the law on any ground fixes the place of the offices and shops the obligation is indelible by foreclosure. We see no reason why their decision should not prevail.

It is contended that the Office-Shops Act of 1889 does not touch the plaintiff in error by its terms and that if it be construed to do so it is unconstitutional. On the construction of the act it seems to us that there can be no doubt. It is true that the provision requiring the general offices to be maintained at the place where the railroad had contracted to keep them is conditioned on no place being named in the charter, but of course this does not mean that articles framed under a general law can get rid of contracts that otherwise would bind, and in our opinion it is equally plain that no distinction was intended between the contract by the present road and one by its predecessor, if the office and shops "are located on the line of a railroad in a county which has aided said railroad by an issue of bonds in consideration of such location being made." "Then," the statute says, "said location shall not be changed." The construction of the act by the state court is beyond criticism upon this point.

It is said that the act so construed would infringe the constitutional rights of the parties to the mortgage of 1881, which the plaintiff in error took by foreclosure.

But it will be remembered that the mortgagor under the law then in force merely had succeeded to the original contractors, freed from their unsecured debts, no doubt, but, it well might be held, not freed from the obligation in question. Also it was found by the Courts below that the sale under which the mortgagor took in 1879 was not a *bona fide* sale, and so was not a sale that put the purchaser in a position other than that of mortgagor. Apart from these considerations we should be slow to say that it was not within the power of a state legislature dealing with a corporation of the State to fix the place of its domicile and principal offices, in the absence of other facts than those appearing in this case. But furthermore when the Office-Shops Act was on the statute book the plaintiff in error took out a charter under general laws that expressly subjected it to the limitations imposed by law. It is said that this does not make the plaintiff in error adopt an otherwise unconstitutional statute. But even if, contrary to what we have intimated, the act could not otherwise have affected those particular corporations, it was a law upon the statute books and was far from a mere nullity, and if it was made a condition of incorporation that this restriction should be accepted, the plaintiff in error cannot complain. *Interstate Consolidated Street Ry. Co.* v. *Massachusetts*, 207 U. S. 79. We agree with the state courts that the condition was imposed.

The acceptance of the charter by the plaintiff in error disposed of every constitutional objection but one. It is said that the restriction imposes a burden upon commerce among the States, since the road concerned has expanded and now is largely engaged in such commerce. The jury found that it imposed no such burden, upon an issue submitted to them in accordance with the desire of the plaintiff in error, although not in the form that it desired. So far as the question depended upon

the testimony adduced the verdict must be accepted, and although no doubt there might be cases in which this Court would pronounce for itself, irrespective of testimony, whether a burden was imposed, we are not prepared to say that in this instance the State has transcended its powers. The burden if any is indirect. Some complaint is made of the form of the judgment, as purporting to be perpetual. But the word perpetual adds nothing to a requirement that the office and shops should be maintained in Palestine. The requirement is perpetual until the law is changed. When and how it may be changed is not before us now. Other objections are urged and other details are adverted to in the very lengthy printed arguments, besides those with which we have dealt, but we deem it unnecessary to go farther. Upon the whole case we are of opinion that the judgment below should be affirmed.

Judgment affirmed.